

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers
(
(Atchison, Topeka & Santa Fe Railway
(Company

Dispute: Claim of Employees:

1. That the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the Carrier) improperly dismissed Frank Baker, Jr. (hereinafter referred to as the Claimant) from Carrier Service on March 7, 1983, as result of formal investigation conducted on February 11, 1983.
2. That the Carrier be ordered to compensate Claimant for all loss of wages from March 7, 1983 to date of restoration to Carrier service with all rights and fringe benefits made whole.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On the night of December 13, 1983, a machinist at Carrier's San Bernardino Shops was injured. As a result of Claimant's involvement in the transportation and treatment of the injured employee, he was subsequently dismissed from Carrier's service on March 7, 1983. Claimant was reinstated by agreement of the parties effective July 5, 1983, retaining the right to progress his claim for "all wage loss and payment in lieu of all benefits" to this Board.

The Organization asserts that Claimant was not afforded a fair and impartial investigation as required by Rule 40 of the Agreement due to the Claimant's absence from the investigation. The formal investigation was initially scheduled for December 29, 1982. By letter to Claimant dated December 27, 1982, the Carrier noticed Claimant that the investigation was postponed at the request of the local chairman until January 11, 1983. On January

10, 1983, the Carrier duly notified Claimant by letter that the formal investigation was rescheduled at the request of the general chairman to February 11, 1983. Efforts by the Organization on February 10 to request another two (2) week postponement on the basis that Claimant had scheduled minor, walk-in surgery for February 11 was denied.

This Board is of the considered opinion that Claimant had sufficient notice of the date for formal investigation. There is no evidence that Claimant's alleged surgery was not elective, and the letter from his physician made a part of the record on appeal does not even mention that Claimant had surgery. Claimant's absence from the hearing on February 11, 1982, in light of the sufficient and timely notice of hearing did not deny him a fair and impartial investigation.

The Organization further urges a violation of Rule 40 when the conducting officer excused the general chairman from participation in the proceedings. Rule 40 provides in pertinent part:

"(a) No employee shall be disciplined without first being given a fair and impartial investigation which shall be promptly held....

... An employee involved in a formal investigation may be represented thereat, if he so desires, by a duly accredited representative of his craft and one member of the Shop Committee, only one of whom may interrogate witnesses."

The following exchange occurred as the formal investigation was opened:

Hearing Officer: "I note that Mr. Filipovic, General Chairman of the Machinists is present. Mr. Filipovic do you have written permission from Mr. Baker to represent him?"

General Chairman: "No sir I do not, but I am a duly accredited representative of this craft and I am here to represent the witness, excuse me, the defendant."

Hearing Officer: "Mr. Filipovic, because you do not have written permission to represent Mr. Baker we will proceed with this investigation as an Open Chair hearing and in the event Mr. Baker wishes we will reopen this hearing at a later date. At this time you may be excused."

The Carrier insists that its usual practice is to require a written statement from the Claimant authorizing a representative of the Organization to appear and act in Claimant's behalf. The Carrier argues that the General Chairman failed to properly object to his preclusion from participation in the hearing.

The Board finds that the General Chairman stated in clear terms his presence at the investigation was to represent the Claimant. The fact that after the above-quoted exchange the General Chairman then reiterated the Organization's request for a postponement, at which time the hearing officer again excused him from the investigation does not constitute waiver of this important right of representation. The Carrier's unsubstantiated claim that past practice imputes such a requirement is without merit, nor does it alter the clear meaning of Rule 40 to provide a claimant the right to representation at a formal investigation. The parties have not seen fit to include in their agreement the limitation Carrier would now have this Board impose upon them.

The clear implication from the exchange of correspondence relating to postponement of the investigation is Claimant's desire to have representation by a duly accredited representative of his craft. The Organization requested postponements of the formal investigation on the Claimant's behalf and with his knowledge. The Carrier approved two (2) requests for postponements. We do not find Public Law Board 1582, Award 39, controlling authority on this issue. The Carrier violated Rule 40 (a) of the Agreement when the Carrier's hearing officer excused the Organization's General Chairman from participation in the formal investigation.

Carrier posits that the failure to request a reopening of the investigation at a later date by Claimant or the Organization waived whatever procedural violation may have occurred by the denial of the General Chairman's representation of Claimant at the investigation. However, the Carrier maintained at the hearing before this Board that a "reopening" would not involve a complete new trial on the charges. Instead, the Carrier stated a reopening would entail only a review of the transcript by the Organization and Claimant after which the Carrier's witnesses may be recalled for further investigation. The clear implication was that Claimant would not be entitled to a trial de novo upon a request to reopen.

The right of confrontation and cross-examination are essential safeguards to maintain the accuracy of a fact finding proceeding. In the instant case, such safeguards essential to a fair and impartial investigation were absent. Claimant's duly accredited representative was unable to offer supporting evidence on the merits of the charge, or to test the weight and credibility of the witnesses' testimony. This Board is of the considered opinion that the procedural violation and the record created at the investigation on February 11, 1983 constitute an insufficient basis upon which discipline may be administered.

Claimant was charged with being quarrelsome, failing to obey instructions, and allegedly having personal interests which might conflict, or appear to conflict with the interests of the Santa Fe Railway in violation of Rule 14, Rule 16, para. 2, Rule 21, para. 1; and Rule 31, para. B. Even in the absence of the aforementioned procedural errors, the Carrier has failed to meet its burden of proof on the merits.

The case as presented to this Board at hearing centered solely on the activities of Claimant at St. Bernardine's Hospital to which this Board restricts its analysis of the record. The testimony of the Carrier's safety supervisor shows that Claimant was concerned that the co-employee who was injured should receive proper care and treatment at the hospital. The Claimant who was off duty at this time, did follow the instructions of the safety supervisor, although he firmly stated that he was the union representative and needed to be present. Claimant insisted on his right to take the injured employee home, and the safety supervisor testified he acquiesced in Claimant's actions due to the "rather embarrassing situation" which had developed.

Off duty activities of an employee may subject him to discipline, and even discharge from service. If an employee is convicted of a serious criminal offense, denigrates and thoroughly criticizes his employer, physically attacks a supervisor or fellow employee, or acts in a totally outrageous manner which endangers or seriously interferes with the Carrier's personnel, property or service that employee may be disciplined. The Board does not find sufficient credible evidence of record to prove the charged violations of Rule 14; Rule 16, para. 2; Rule 21, para. 1; and Rule 31, para. B.

Claimant shall be compensated for the difference between the amount he earned while held out of service, and the amount he would have earned on the basis of his assigned working hours during the same period. Claimant's personal record shall be so noted.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Devitt - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1985.