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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6366
Docket No. 6200
2-UP-BM-'72

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: (System Federation No. 105, Railway Employes' Department, A. F. of L. - C. I. O. (Boilermakers)
(Union Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Union Pacific Railroad dealt unjustly, unfairly, and capriciously, with Boilermaker Norman H. Sales, Omaha, Nebraska Shops, when it removed Boilermaker Sales from the service of the Carrier at the close of business February 25, 1971.

2. That accordingly the Union Pacific Railroad restore Boilermaker Norman H. Sales, to his former and right position with all rights and benefits unimpaired, including fringe benefits, hospital and Travelers Insurance Benefits; and

3. The Union Pacific Railroad pay Norman H. Sales eight (8) hours at pro rata rate of his position for February 26, 1971, and for each work day thereafter until he is properly restored to service and violation corrected; and

4. In addition to the money amounts claimed herein, the Carrier shall pay Norman H. Sales an additional amount of 6% per annum compounded annually on the anniversary date of claim.

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 employe 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 waived right of appearance at hearing thereon.

Claimant, a boilermaker at Carrier's Omaha, Nebraska shops, failed to report for work at the scheduled starting time of his shift on February 12, 1971. He appeared four and one half hours later, checked in with his foreman and was assigned work and he worked the entire second half of his scheduled shift. He was subsequently charged with having violated Rule 702 of the Carrier's "Rules and Instructions of the Motive Power and Machinery Department", pertinent parts of which read:

> "702. Employees must attend to their duties during the hours prescribed...They must not absent themselves from duty... Without proper authority..."

Following a hearing on the property, Claimant was removed from service on February 25, 1971. He grieved and his claims were duly processed and appealed.

The basic thrust of Petitioner's contention in support of the claim is that Carrier failed to comply with Rule 37 of the Controlling Agreement in that the notice of hearing initiating Carrier's action did not meet the requirements of the Rule and that the hearing itself was not a fair and impartial one and therefore, the claim should be sustained in full.

The pertinent provisions of Rule 37 read:

> "No Employe shall be disciplined without a fair hearing by a designated officer of the Carrier...At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge..."

It is unnecessary to dwell at length on the complaint concerning the notice of hearing. It set forth a precise charge. The Claimant and his representatives were not misled by it and they addressed themselves to it. It is the very purpose of the hearing to ascertain the validity and propriety of the charge and whether there is substantial evidence that the allegations set forth in the notice are indeed factual and sufficient to warrant the penalties subsequently imposed.

Petitioner's assertion of procedural defect in that the Carrier official who conducted the hearing prepared the charges, acted as prosecutor, and meted out the punishment arouses our concern. We are not unmindful of the limitations which may exist in facilitating the obligations of Rule 37. It is not always possible for lower escelon supervision to draft the charges in a precise and expository manner so as to satisfy that facet of the Rule. A person more experienced and knowledgeable in these matters, at the facility, may have to draw up the necessary document based upon information supplied to him. The rule requires that the hearing be prompt and to accomplish this the Carrier usually designates an official on the property to conduct it. Having heard the evidence, observed the witnesses and studied the documents, it is most appropriate for the hearing officer to make the initial determination. In recognition of the practicalities in fulfilling the objectives of this aspect of the Rule, we have held that the complained of process is not in and of itself violative of the rights accorded by the Rule. See Awards of this Division 1795, 4001, 4211 and 5855.

However, as we stated in Award 4001 (Anrod), the basic test in determining whether "an investigation hearing was fair and impartial consonant with the requirements of due process, is not who conducted it, but how it was conducted." (Emphasis supplied). The transcript reveals that the presiding Carrier officer appears to lack an appreciation of the nature and purpose of the hearing. It is not held to prove the guilt of the charged employe, but to ascertain all of the facts, (See Award 2923). In cases involving disciplinary action, this Board relies upon the record of hearing to determine whether there was substantial evidence to sustain the charge and whether the punishment decreed was reasonable and free from arbitrariness and capriciousness. But of equal, if not greater importance is that the hearing is the one place where the disciplined worker can see that he is being given fair consideration and recognition of his problem by his employer. We should not, at this point in time, have to remind management of the nature of a well run grievance procedure to effectuate desired responses by employees to their work obligations and responsibilities. The time and effort spent in evolving the collective bargaining agreement can be vitiated when an aggrieved worker has reason to feel that it fails to, in fact, afford him protection against negative subjective reactions of supervision toward him with possible substantial impact upon his means of livelihood.

There is merit to the Petitioner's claim that the hearing officer appeared to have pre-judged the case. He moved quickly through testimony on matters documentarily already established, and ignored the citation of Rule 22 of the ntrolling Agreement by the employe's representative. He did not endeavor to ascertain from the Claimant whether he had an explanation for the infraction of the endance rules or whether there were any mitigating circumstances. Even if it could be argued that he was technically correct in that it is incumbent upon the Claimant and his representatives to put such matters before him, this failure was not in harmony with the spirit and underlying purpose of the hearing. As stated above, we recognized the limitations of members of supervision in certain aspects of the process. By like token it is expected that equal recognition will be given to the possible equal or greater inexpertise on the part of workers and their local representatives in treating with these matters. The entire tenor of the transcript gives the impression that the hearing officer was just going through the motions so as to satisfy the written words of Rule 37 and not its basic intent and meaning. See our Award 2923 (Kiernan) and First Division Award 21046.

We are compelled to find that Claimant was not afforded a fair and impartial hearing. This should have been recognized promptly by the higher officer to whom the Organization appealed and the Matter moved for speedy adjustment to reduce the economic impact and festering discontent stemming from it.

We are not disregarding the fact that there were many failings on Claimant's part which may have warranted penalty for failure to comply not only with Carrier Rule 702 but also Rule 22 of the Controlling Agreement. Nor are we holding that the Carrier may not consider an employe's work record in determining the extent of discipline to be imposed. We do find that with these in mind, dismissal was an unreasonable application of such discretion as is afforded the Carrier in these circumstances. It is regrettable that these deficiencies in Carrier's case result what might appear to be an exoneration of the Claimant, although we believe,

as stated above, his inattention to his obligation to give earliest possible notice of his being delayed in appearing for work would normally have warranted a reasonable penalty.

As to the remedy, we find that the claimant and Petitioner should have given far greater consideration to the Carrier's offer of settlement made on May 10, 1972.

In our recent Award 6350, we found:

> "There is nothing in the record to indicate that Petitioner offered any alternative propositions other than full satisfaction of the claim in an effort to resolve the dispute, mitigate the damages, and bring to a halt the loss of earnings by the Claimant.
>
> We are not unmindful of the fact that acceptance of the Carrier's proposal, as offered, would have constituted a full settlement of the claim and would have foreclosed any further action on the part of the Claimant and the Petitioner to recover all or part of the more than ten weeks' lost earnings suffered by the Claimant. However, this Board has in its Awards admonished and cautioned parties to exert their best efforts to adjust disputes at the property whenever opportunity to do so presents itself. Although we did not find that the evidence adduced at the hearing warranted a holding for dismissal, we did find that Claimant's testimony revealed an attitude and conduct which Petitioner should have considered... whether to persist in its original position and await further processing of the claim rather than find a mutually satisfactory compromise which would have brought the matter to a close. ...It would therefore be improper for this Board to penalize the Carrier beyond the point when it opened the door for discussion of a compromise. Any subsequent wage loss was of Claimant's own choice and not reimbursible by the Carrier."

This is equally applicable to the existant matter and we are awarding accordingly.

As to the claim for interest on back pay being awarded, we have held, in Awards too numerous to cite that this is not contractually provided and therefore we are not, within the authority under which we function, empowered to grant same.

A W A R D

1. Claim sustained.

2. A) Carrier is ordered to restore Boilermaker Norman H. Sales to his former and right position.

B) The Claimant shall be recalled to work by the Carrier and upon his return, shall be granted all of his seniority rights and benefits stemming therefrom unimpaired. His vacation rights shall be such as he would have been entitled to under the Rules for active employment up to and including May 10, 1971. The period May 11, 1971 to the date of his return to work shall be treated, for vacation and retirement purposes, as though the Claimant had been on furlough without pay.

3. Carrier shall pay to claimant a sum equal to what he would have earned had he been employed in his position with it during the period February 26, 1971 and May 10, 1971, less any earnings he may have had from employment elsewhere during that period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September, 1972.