Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7034
Docket No. 6898
2-MP-CM-'76

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

Parties to Dispute: ( System Federation No. 2, Railway Employes' Department, A. F. of L. - C. I. O. Carmen
( Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated the Agreement of September 1, 1960, as amended, particularly Rule 32, when they unjustly withheld Carman J. A. Heffernan from service starting March 1, 1974, and following investigation dismissed him from service effective April 3, 1974.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Heffernan as follows:

(a) Eight hours (8') per day at straight time rate, five (5) days per week, beginning March 1, 1974 until returned to service on May 2, 1974;

(b) Retain his seniority rights unimpaired;

(c) Made whole for all vacation rights;

(d) Made whole for all health and welfare and insurance benefits;

(e) Made whole for pension benefits including Railroad Retirement and Unemployment Insurance;

(f) Made whole for any other benefits he would have earned during the time he was withheld from service;

(g) In addition to the money amounts claimed herein he be paid an additional amount of 6% per annum compounded annually on the anniversary date of the claim.

The record indicates that this Exhibit was not in fact "raised on the property". In these circumstances we have held repeatedly that such "new matter" is barred from consideration and is improperly before the Board. We so hold here and sustain Petitioner's objection on this issue. Prior Awards are legion on this established principle.

See, for example, 3rd Div. Awards 18122, 18247, 18545 and 19832, among a host of others.

We do not sustain Petitioner's objection as to the alleged impropriety of the Notice of Investigation. True, it is not based on a specific Rule, however the record does contain reference to a specific bulletined notice on the precise issue in the charge. In any event, the Notice of Investigation is clear and concise and fully apprised Claimant of the nature of the charge against him. Moreover, prior thereto he was put on notice, as to the alleged violation, by Carrier letter of February 15, 1974. We find, therefore, that Claimant was "apprized of the precise charge against him" as required by Rule 32(b).

See 2nd Div. Awards 5244 (Dolnick), 6346 (Williams); and 3rd Div. Awards 17163 (Jones), 18037 (Dolnick), 18903 (Ritter), and 20285 (Lieberman).

Careful review of the transcript of the Investigation and analysis of the record testimony shows that the hearing was conducted in a fair and impartial manner as required by Rule 32(a). Claimant was vigorously represented by Organization representatives, full opportunity for cross-examination was afforded, witnesses not testifying were excused from the hearing room (except for Claimant and his representatives who were present throughout), and Claimant was afforded full scope of expression to state his version of the facts. In certain instances, leading questions were asked by the Hearing Officer, but in the main these were pertinent to the charge and did not impair the fairness of the hearing; nor did they violate Claimant's rights of due process. Accordingly, we conclude that Petitioner's contention that the hearing was not "fair and impartial" is not sustained by the record.

Petitioner cites two prior Awards on the impropriety of conduct by a Hearing Officer, but we find these Awards to be inapplicable here. Thus, in Second Division Award 5223 (Weston), the Hearing Officer actually notified the Union by letter prior to the Investigation that he considered Claimant's "offense of such magnitude to remove him from service". This statement, plus other factors in the record, was tantamount to clear prejudgment of guilt and disqualified the writer from acting as Hearing Officer. Nevertheless, he conducted the hearing. Such situation is not present in the case at hand.

In Award 21046 (Daugherty-1st Div.) there was a specific finding that the Hearing Officer did not behave "in a truly objective and aloof manner, just as would an outside judge". However, the record before us does not support a similar finding. We recognize that during the course of a protracted hearing,

On the latter issue, Petitioner cites three Arbitration Awards, each of which is distinguishable from the issues before us. Thus, Award 8168 (Kheel) supports the proposition that, despite a Rule to the contrary, beards and hair styles are permissible "if neatly trimmed". No safety factors were there involved; nor is such finding contrary to the standards of Carrier in the case before us. In Award 8458 (Krimsly), the Arbitrator's basic finding was that grievant could maintain his "fashion of hair" "so long as it did not affect his work". And in Award 8509 (Krinsky) the Arbitrator held that grievant's beard was not of such "length which would constitute a safety hazard in the performance of his work".

The testimony here, as detailed hereafter, is to the contrary, the factor of work performance and safety standards in relation to Claimant's hair length and style being an important consideration and bearing directly on the specific charge. Additionally, in Award 8509, Supra, the Company had promulgated a "no-beard rule", which was held to be unreasonable. Such is not the case here.

On the merits, therefore, as summarized directly from the testimony, the following facts appear.

Car Foreman Dozier testified to delivery to Claimant of the letter of February 15, 1974 requiring him to comply by the 28th, but that Claimant had failed to comply and that as of March 1, 1974 "His hair was unkept and it was down on his collar, hanging below his collar". That his mustache and beard were not "neatly trimmed" and that the only respects in which his hair length or style had changed since March 1, 1974 was that "He has combed it and placed it behind his ears at the present time". Further, that on several prior occasions he and Mr. Wiggans discussed the matter with Claimant; that the latter understood the regulations and safety hazards, promised to comply, but never did.

Master Mechanic Wiggans corroborated the testimony of Dozier in all respects and further testified that the same standards applied to all other employees.

General Foreman Smith also corroborated both Dozier and Wiggans on all relevant facts dealing with the specific charge against Claimant, his promises to comply and his failure to do so. Mr. Smith further testified to the posting of the bulletined notice of November 15, 1973 and that Claimant conceded he was fully aware of its contents.

Claimant admitted his knowledge of the bulletined notice and the letter of February 15, 1974, but maintained steadfastly that "he had complied." His attitude during his testimony, however, does not indicate compliance. Instead, he raised objection to cutting his hair to the required length as violating his "rights as an individual". He admitted that he had been instructed to comply by Messrs. Wiggans and Smith.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of April, 1976.