Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8888
Docket No. 8857
2-D&RGW-EW-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Denver and Rio Grande Western Railroad Company

Dispute: Claim of Employes:

1. That the Denver & Rio Grande Western Railroad Company violated the current Agreement when Electrician T. W. Anderson was unjustly suspended from service on June 21, 1979 and subsequently dismissed from service on July 5, 1979.

2. That accordingly, the Denver & Rio Grande Western Railroad Company be ordered to compensate Electrician T. W. Anderson for all wages lost, be returned to service with seniority rights unimpaired, and compensated for all other benefits lost including hospitalization, vacation, sick benefits, holidays and any other rights, benefits or privileges account of being unjustly suspended and subsequently dismissed from service.

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.

The Claimant, an electrician, with seniority date of March 6,1979 was dismissed from service on July 5, 1979 for his alleged failure to properly perform his duties, and for allegedly making false reports respecting them on June 19, 1979. The discipline was based on an Investigation into this matter held on June 27, 1979.

The first question inviting consideration is whether the Organization appealed the discipline administered, in a timely manner. The disciplinary decision was rendered on July 5, 1979 and appealed by letter of July 11, 1979. This appeal was denied by letter of July 13, 1979. There followed an appeal of September 5, 1979. It was denied by a letter of September 11, 1979, which alleged that the Organization appeal of September 5, 1979 was not made within the 10 day appeal period specified in Rule 32 (c). The Organization, however, contends that Rule 32 (d) gives it 60 days to make such an appeal because it implicitly refers to the time limits of Rule 31 (b), viz; "If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance..." The Carrier also contends that even if the 60 day time period

is applicable it is exceeded by the actual number of days in the period July 5, 1979 to September 5, 1979.

It is unnecessary to definitively resolve the question of whether the appeal was timely taken in view of the Board's disposition, as stated below, of the other issues in this matter.

The Organization alleges that the Investigative Hearing was not fair and impartial. It points out that the same Carrier Officer notified Claimant to appeear for investigation, presided over and conducted the Investigation, interrogated the Claimant and witnesses, dismissed Claimant from service and, finally, denied Claimant's appeal. The Organization also contends that the Hearing Officer appointed a Co-Hearing Officer who was then allowed to act in the capacity of a witness. (The transcript of the Investigation, however, merely shows the Co-Hearing Officer asking questions.) The Organization also contends that the Hearing Officer and the Co-Hearing Officer conspired to have Claimant declared guilty, with the Hearing Officer having pre-judged such guilt.

The Carrier contends that these objections come too late because they were not made at the Investigative Hearing. For example, the Carrier cites Award No. 7955, Second Division: "The Board has held many times that objections as to the fairness of a hearing must be made at the hearing, else they are waived." Also Award No. 8145, Second Division: "... On numerous occasions this Board has ruled that objections to the way in which a hearing is conducted must be made at the hearing or else the right is waived," and Award No. 8563, Second Division: "It is well established that the Organization is precluded from making procedural objections before the Board that were not made during the course of the hearing on the property." Finally, there is Award No. 1402 containing the following language: "... employees having authorized representatives ... present ... will not ordinarily be permitted to participate in a hearing without objection as to the manner in which it is conducted and after an unfavorable result, complain of its fairness."

Awards presented by the Organization in this matter do not directly contravene the point that objections not raised at the hearing are waived. Nevertheless, it might be formalistic and mechanical to permit a seriously unfair and biased hearing to determine the economic fate of an employee simply because his representative, in a particular case, was not sufficiently sophisticated to raise valid and fundamental objections regarding fairness and due process at the hearing. Yet, here, even were we to consider the procedural objections on their merits the decision would go against the Organization.

Thereare cases which suggest that the type of procedural structure which was present in the instant case is infirm. For example see Award No. 4536: "... the same General Foreman preferred the charges, presided at the hearing, proferred and discussed the evidence, and finally made the determination of guilt and assessed the measure of discipline against the Claimant. ... The basic concept of fairness is nullified when the same official is complaining officer, judge, witness and jury. The defect ... is not cured even if the official personally was not arbitrary in his conduct at the investigation." There is also Award No. 7119 which states: "... (the hearing officer) activated the investigation, preferred the charges, held the hearing, reviewed the record, assessed the discipline and denied the appeal ... he fulfilled roles of investigator, prosecutor, trial judge and appellate judge. The disinterested

development of evidence, the unbiased review thereof and the objective assessment of appropriate penalty inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions." Award No. 8098, Second Division is also the same effect: "This is not an instance of minor overlap of roles. ... The foreman activated the investigation, preferred the charges, held the hearing, made statements at the hearing, he viewed the record and assessed the discipline, he fulfilled the roles of investigator, prosecutor and trial judge."

And on page fourteen of the Investigative Hearing transcript there are found quite leading questions from the Hearing Officer seeking to elicit a damaging admission from the Claimant. (Note, particularly, the last question on this page.) However, on the opposite side of the coin, we find that at the inception of the Investigation the Organization representative requested a postponement because he'd not yet conferred with Claimant because he'd not been able to reach the latter. The Hearing Officer asked whether Claimant had been advised, at the time he was removed from service, to contact his Organization representative. He responded that he was, but did not provide a satisfactory explanation as to why he had not. Nevertheless, the Hearing Officer, at that point, granted a forty five minute recess so that the two might confer regarding preparing a defense for Claimant. (After this recess the Organization representative said he was ready to proceed.)

For its part, the Carrier contends that two Hearing Officers are not unusual and reiterates that no protest respecting this arrangement was lodged at the hearing itself. It also contends that no harm was effected by having dual Hearing Officers, that nothing in Rule 32 prohibits two Hearing Officers from conducting an investigation and that the practice on this property, for many years, has been for one or two officers to sit at an Investigative Hearing. It also asserts that there is no prohibition against an officer who renders discipline, as the result of an investigation, from considering an appeal from such discipline, and that this is, likewise, a long standing practice.

In any event the key question where a Carrier Officer has occupied a multiplicity of roles in a discipline case, and where unfairness has been charged, would seem to be not the structure of the procedural arrangement of the hearing and subsequent appeals, per se, but whether unfairness has, in fact, occurred. Thus Award No. 8367 notes that there are conflicting decisions regarding whether a Hearing Officer occupying a multiplicity of roles prejudices the Claimant and precludes a fair hearing. It then stated: "... a clear majority of these cases, in assessing whether minimally adequate due process was present ... look for a tangible and specific relationship between the multiplicity of roles ... and any prejudicial impediment to Claimant's defense which did, in fact, or probably did in fact, occur." In the same vein is Award No. 8423: "As a general proposition ... the mere fact that a Carrier Officer serves multiple roles in a disciplinary proceeding does not, in and of itself, ... deprive an employee of a fair and impartial hearing... the real test is whether ... such multiple roles through the conduct of the hearing officer, is so ... prejudiced against the Claimant that it is apparent that the hearing officer had drawn a conclusion concerning the Claimant's guilt either prior to or during the conduct of the hearing." Also see Award No. 8412 involving a case in which the same officer cited violations by Claimant, conducted the hearing, dismissed Claimant from service and declined the initial appeal: "... even though the Carrier assumes the risk of denying a fair hearing when a Carrier officer engages in several different roles, the multiple roles must prejudice the Claimant's rights."

A review of the transcript in the instant case convinces us that the basic facts of the investigation situation were well elicited and, in substance, were elicited no differently, and with no other orientation, than they would have been if Mr. Speiss had not occupied a multiplicity of roles in this matter and if Mr. Wilson had not been a Co-Hearing Officer.

On the merits there is substantial and convincing evidence, from three witnesses of long experience, that Claimant did not perform the work he was assigned to do and which he signed off as, in fact, having done. The only evidence, contrary are the self-serving statement of Claimant to the effect that his signed avowal that he had performed such work is accurate and that he had been working for approximately two and one half hours, rather than forty five minutes, when first confronted by the Foreman regarding whether he had done the work in issue.

The evidence presented is certainly sufficiently substantial to prove the charge against the Claimant.

A W A R D

Claim denied.

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 27th day of January, 1982.

CONCURRING AND DISSENTING OPINION OF THE CARRIER MEMBERS
TO
AWARD 8888, DOCKET 8857
(REFEREE ABRAMSON)

The decision rendered in this matter was properly grounded upon:

> ".....substantial and convincing evidence, from three witnesses of long experience, that Claimant did not perform the work he was assigned to do...."

With that disposition we concur.

However, there is unwarranted dicta contained in this Award with which we must object. At Page 2 of the Award the following errant statements are found:

> "Awards presented by the Organization in this matter do not directly contravene the point that objections not raised at the hearing are waived. Nevertheless, it might be formalistic and mechanical to permit a seriously unfair and biased hearing to determine the economic fate of an employee simply because his representative, in a particular case, was not sufficiently sophisticated to raise valid and fundamental objections regarding fairness and due process at the hearing. Yet, here, even were we to consider the procedural objections on their merits the decision would go against the Organization."

The participants in disciplinary hearings are not expected to be legalistic tacticians. The sum and substance of the disciplinary hearing is to provide the opportunity for both sides to present the evidence supporting their respective positions so that an informed determination can be made on the facts so developed. It is also obvious that in conducting such hearings at the local level there is an expectation that the participants will be well aware of the facts, and it is on a factual record that the disposition of the matter must rest. To allow one party to subsequently plead lack of sophistication, and thereby overturn the record established and the disposition made thereon, is to court chaos.

It has been a mutually accepted operating procedure in this industry that it is only upon the record made in the hearing that discipline, if warranted, is assessed and that appeals therefrom are made. This requirement cuts both ways. If, as has been suggested in Award 8888, that one of the parties may, at a later time, plead ignorance, then the entire process of discipline handling in this industry can be brought to a standstill. It will always be to someone's advantage to hold back at the hearing so that an objection can be made later. Such does not foster rational decision making, and is clearly not good labor relations.

Fortunately, it does appear that the Majority has subsequently heeded our admonition. In Award 8935 we find the following:

> "In the first place, it may be pointed out that the procedural propriety of raising this argument, now, is dubious since such objection was not raised at the investigative trial itself."

P. V. Varga

J. R. O'Connell

D. M. Lefkow

J. E. Mason

J. M. Fagnani