Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9024
Docket No. 9139
2-ICG-SM-'82

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. The Illinois Central Gulf Railroad Company violated the controlling agreement, particularly Rule 39 when they unjustly suspended from the service of the Company Sheet Metal Worker H. H. Rademacher for a period of 15 days beginning July 7, 1979 through July 21, 1979.

2. That accordingly we request that the Illinois Central Gulf Railroad Company be ordered to:

   a. Restore Sheet Metal Worker H. H. Rademacher to service with all seniority rights unimpaired.
   b. Compensate him for all time lost until reinstatement.
   c. Make him whole for all vacation rights.
   d. Pay him for all holidays.
   e. Pay him for all jury duty.
   f. Clear his record of any mention of this improper investigation.

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, Mr. H. H. Rademacher is employed by the Illinois Central Gulf Railroad Company as a sheet metal worker at the Woodcrest Shop in Homewood, Illinois which is the heavy repair center for locomotives and suburban cars in the Chicago area. At the time of the incident in question he was assigned by bulletin to work the 11:00 P.M. to 7:00 A.M. shift. In a letter dated June 12, 1979 Mr. Rademacher was notified to attend a formal investigation for the alleged infraction of Carrier Safety Rule No. 1 on June 5, 1979 and to determine whether he had been habitually unsafe in his work habits while in the employ of Carrier. After a formal investigation on June 20 and 21, 1979 Claimant was notified on July 5, 1979 that he had been found in violation of Safety Rule No. 1 and that he was being assessed a fifteen (15) day suspension to run from July 7, 1979 to July 21, 1979 inclusive. The discipline assessed was not only because he

did not report an alleged injury to his supervisor, but also because of his past work record. After appealing the suspension through steps on Carrier property the case came before the Second Division of the National Railroad Adjustment Board.

Because of what the Board deems to be a serious and fatal defect in the total investigatory process of this case and its appeals as they relate to the application of Rule 39 of the controlling Agreement between the parties, no decision will be reached on the merits of this case. Rule 39 directs that no employees shall be disciplined without a fair hearing -- and by reasonable extension, without a fair appeal if the decision of the hearing officer is adverse to the employee. After the hearing held on June 20 and 21, 1979 which was conducted by Mr. T. W. Trussell, Assistant Shop Superintendent, Locomotive Department in lieu of Mr. R. T. Thetford, Shop Superintendent (*), Mr. Trussell stated explicitly that the decision resultant from the formal investigation of Claimant would not be made by himself alone but it would be made in collaboration with the Shop Superintendent, Mr. Thetford, and the General Shop Superintendent, Mr. E. M. Muehlenbein. In making first appeal of the decision Claimant was, therefore, obliged to seek fair recourse from the General Shop Superintendent, Mr. Muehlenbein, who was party to the original decision. The Board finds no cause for surprise that Claimant found no relief at this step of the appeal process. In making second appeal to the Manager of Labor Relations, Mr. M. J. Hagan, the assessment of Claimant's guilt by Carrier was reaffirmed. When Claimant, through his Organization, then made the last and final appeal to the Director of Personnel, Mr. R. G. Richter, the Board notes with both surprise and interest the presence of Mr. E. M. Muehlenbein, the General Shop Superintendent surfacing once again in the decision-making process. The final appeal, in effect, was a joint decision (**) made between the General Shop Superintendent and the Director of Personnel. This is not an arrangement, in the mind of the Board, which provides conditions for fair and impartial due process.

On the other hand, the Board does not have in the instant case, nor has it had in the past, difficulties with Carrier tradition whereby one officer brings forth charges, holds an investigation, and issues discipline. But this is not the issue in the instant case. Here it is question of: (1) one officer potentially influencing a subordinate's decision after the investigation was conducted by

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(*) Woodcrest Shop - Locomotive location rules state that the Shop Superintendent should conduct hearings.

(**) Letter of Mr. R. G. Richter, Director of Personnel, to Mr. D. C. Buchanan, General Chairman, Sheet Metal Workers' International Association, dated July 30, 1980.

> "This will confirm our conference on June 4, 1980, at which we discussed the claim on behalf of Sheet Metal Worker H. H. Rademacher.
>
> Since our conference I have discussed this matter with Mr. Muehlenbein and we find no reason to change our original position. Therefore, our previous declination is reaffirmed." (Employees' Exhibit M)

that subordinate; (2) having complete control over the first appeal, and (3) by admission of the Director of Personnel, having an integral role to play in the last and final appeal. Such pervasive influence of one officer on the total trial and appeal process reduces it, in the mind of the Board, to an academic exercise and contravenes both the letter and the spirit of the parties' Agreement Rule 39, whatever the merits of the case might be.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1982.

DISSENT OF CARRIER MEMBERS
TO AWARD 9024, DOCKET 9139
(Referee Suntrup)

The Majority's conclusion that it was improper for the General Shop Superintendent to have a collaborative role in the assessment of discipline and then to take part in the appeals' process is incorrect and without any sound bases in legal or administrative precedent. In arriving at this erroneous decision, the Majority failed to point to any evidence showing that the General Shop Superintendent acted unfairly or improperly, but simply stated that his involvement was wrong per se, and nothing more. The General Shop Superintendent is entitled to the same assumptions which arise in favor of Claimant under our system of jurisprudence. His actions are assumed to be proper unless specific evidence to the contrary is submitted. No such evidence was submitted herein.

It is well-recognized that a certain managerial relationship will generally exist in practically all discipline cases arising on the railroads. Cognizant of this fact, and aware that the individual contracts were made in contemplation of this procedure, the Board has taken a legalistic approach to the matter, and will not interfere with the disciplinary decision unless it can be shown - by evidence of record - that Claimant's rights were actually abused at some point in the disciplinary process. As hereinbefore noted, the Majority failed to address this issue inasmuch as there was no abridgement of Claimant's procedural or substantive rights.

Furthermore, the Majority did not appear to be overly con-

cerned with Claimant's guilt or innocence of the charge. Rather, they became engrossed in a morass of technicalities more befitting a court trial than a disciplinary action on a railroad. The distinction between the two was repeatedly brought home to the Majority without apparent success. However, it should be noted that the evidence adduced at the investigation clearly established that Claimant waited four days to report an on-the-job personal injury despite the mandate of the Carrier's Safety Rules that such injuries be reported promptly "prior to the end of the employee's tour of duty and before leaving company property." In addition, a review of Claimant's past record clearly demonstrated that he was an unsafe employee. In such circumstances, the fifteen day suspension assessed was neither arbitrary nor capricious but was rather lenient.

It can readily be seen why the Majority was not too interested in discussing the evidence in this case.

Hence, we dissent.

J. M. FAGNANI

D. M. LEFKOW

J. E. MASON

J. R. O'CONNELL

P. V. VARGA