

The Second Division consisted of the regular members and in addition Referee David H. Brown when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employee:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company unjustly dismissed Carman Kevin Walker from the service on January 31, 1979 as result of hearing held on December 19, 1978 and January 9, 1979.
2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to restore Carman Kevin Walker to the service of the Carrier and compensate him for all lost time from December 29, 1978 when he was removed from service prior to hearing held on January 9, 1979 until he is restored to service.
3. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to make Carman Kevin Walker whole for all rights and benefits that are a condition of employment such as, but not limited to, seniority, vacation, holidays, medical, dental, surgical, and all group life insurance benefits.
4. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to reimburse Carman Kevin Walker for all losses sustained account loss of coverage under all health, welfare and group life insurance benefits during such time as he is held out of service.
5. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to pay Carman Kevin Walker interest at the 6% rate per annum for any compensation he may receive as result of this 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.

On December 4, 1978, a letter was sent to Carman Walker advising him that a hearing would be held at 8:00 AM on December 12, 1978, to develop the facts and circumstances in connection with the following charges:

- "1. Your alleged failure to protect your assignment as a carman on the third shift in the Bensenville Train Yard on November 13, 25, 27, and 28, 1978.
2. For your alleged failure to follow Assistant Car Foreman T. Cunningham's instructions to remove the switch lock to the west end of Track 70A switch prior to going to work on Train No. 125 on November 28, 1978, at approximately 5:50 AM."

Such hearing was postponed by mutual agreement and held on December 19, 1978. Before a decision was reached in connection with the above case, Carrier found it necessary to again prefer charges against Claimant for an alleged act committed on December 29, 1978. Thus, on January 3, 1979, a letter was sent to Mr. Walker advising him that a hearing would be held on January 9, 1979 at 9:00 AM to develop the facts and circumstances in connection with his threatening the life of Assistant Car Foreman Tom Cunningham at approximately 11:15 PM on December 29, 1978.

The second hearing was held on January 9, 1979. On January 31, 1979, Claimant was notified by letter that his services with the company were terminated effective that date as a result of his being found guilty of the charges set forth in the letter of notice dated December 4, 1978, and the charge that he allegedly threatened the life of Assistant Car Foreman Cunningham as set forth in the letter of January 3, 1979.

Charges 1 and 2 above were fully developed at the hearing held on December 19, 1978. In connection with Charge No. 1 the record reflects that on the dates Claimant was charged with failing to protect his assignment on the third shift, he reported to work 30 minutes late on November 13, he did not work on November 25, nor did he receive proper authorization to be off that day. On November 27, he reported to work 15 minutes late, and on November 28, he was 20 minutes late.

The Claimant testified that on November 13, he was only 15 minutes late but did not refute the fact that he was paid 7 hours and 30 minutes for that day. His only answer was:

"Well, 15 minutes ain't going to make me or break me."

In connection with his unexcused absence on November 25, 1978, Claimant contends that he was sick but did not disclose the nature of the sickness or how same precluded him from working that date.

Relative to the charge that Claimant was late for work on November 27 and 28, Mr. Walker denied being late on those dates but could not explain why he did not take exception to the fact that he was paid only 7 hours and 40 minutes for November 28.

Carrier made proof of Claimant's culpability on the second charge through the following testimony of Assistant Car Foreman Thomas Cunningham:

- "Q. Mr. Cunningham, were you the foreman of the third shift train yard during the AM hours of November 28?
- A. Yes, I was.

Q. On November 28, 1978, was carman Kevin Walker working as a carman on the third shift train yard?

A. Yes, he was.

Q. At approximately 9:50 AM, on November 28, 1978, did you instruct carman K. Walker to take the blue light and the switch lock off 3-B and apply them to track 70?

A. Yes, I did.

Q. Did Mr. Walker do this?

A. No, he did not.

Q. Excuse me, the CM 125, what is that?

A. It is an outbound train. We previously worked a train on 3-B and still had the switch lock and blue light applied to that track. When we were notified to go to work on CM 125, I called the east end of B-yard told them to, excuse, told them to take the blue light and lock off 3-B and apply it to 70 track. After I was through telling them I gave Mr. Walker the same instructions, take the blue light and switch lock off of 3-B and apply it to 70 track. I told the east end to notify me by radio when they had the locks and light applied on 70 track and ready to work. After I gave Mr. Walker the instructions he left the office approximately 5 minutes passed the, the carman on the east end notified me that he was ready to go to work on 70 track. He had applied the blue light and switch lock. Mr. Walker had come back into the office. I turned and looked at him and I asked him, are we ready to go, he replied yes. So, I notified the east end of the yard by radio that we were ready to start working on 70 track CM 125. At this time Mr. Walker reached into a cabinet in the office and took a blue light out of the cabinet, walked outside and placed it on 70 track approximately opposite the west end of B yard shanty, and then he went to work on the 70 track.

Q. Excuse me, when you say went to work on 70 track?

A. To begin his inspection of the outbound train.

Q. Okay, go ahead.

A. While he was working the train, I happened to walk to the yard office and noticed there was still a blue light and switch lock on 3-B, so I looked at 70 switch and there was no lock applied. And those are the incidents that took place."

Upon being called to testify, Claimant denied that he had been given the noted instructions by Mr. Cunningham. Because of such unexpected denial, Conducting Officer Ed Borgh stepped down as conducting officer and testified as a witness. He did not resume his responsibility as conducting officer. In view of the Organization's challenge of Mr. Borgh's action, we set out the pertinent portions of the record:

MR. BORGH QUESTIONS MR. WALKER:

"Q. For the record did Mr. Cunningham tell you to take the lock and blue light off of 3-B and apply them to 70-A at approximately 5:50 AM on November 28, 1978?

A. No, he did not.

MR. BORGH: We will adjourn this hearing for a period of approximately 13 minutes. And we will reconvene at 10:00 AM.

MR. BORGH: It is now 10:00 AM and we will reconvene the hearing. I'm once again going to try to reach the business office of the telephone company for exchange 488. The number I dialed is 933-6100. Let the record show that the number is once again busy.

Being that information has been developed here that I'm privileged to, I find it is necessary for myself to step down as presiding officer and I will call Mr. Whalen to preside over the hearing.

MR. MACHIONE: Let the record show that the interrogating officer Mr. Borgh stepped aside and Mr. Don Whalen is the presiding officer in charge at this hearing held December 19, 1978, referring to Mr. Walker's charges if any.

MR. WHALEN: I would like to direct my questions to Mr. Borgh. You heard the testimony given by Mr. Cunningham of Mr. Walker's alleged refusal to remove switch locks off west end of track 3-B and apply the lock to the west end of track 70-A switch prior to going to work on train No. 125 on November 28, 1978, at approximately 5:50 AM, you also heard testimony given by Mr. Walker concerning his alleged failure to perform the instructions Mr. Cunningham gave him. Did you receive any communication from Mr. Cunningham on that morning concerning this alleged failure of Mr. Walker's to follow instruction --

MR. MACHIONE: I object in this line of questioning on the grounds that Mr. Borgh was the interrogating officer and the notification papers that I have received shows as Mr. Borgh being the interrogating officer. Now I come to find out he turns out to be a witness. So regardless of what Mr. Borgh says, I want it on the record that this case is rigged and biased and Mr. Walker will not be given a fair nor will be given an impartial hearing. This is all I have to say at this time.

MR. BORGH:

A. In response to Mr. Whalen's question and to clarify why I have stepped down as presiding officer, information has been developed in this hearing which I, not knowing the outcome

or what would happen in this hearing was privileged to certain information that with Mr. Walker's testimony I feel should be brought out in answer to Mr. Whalen's question. Mr. Cunningham did call me on the morning of November 28, 1978, to inform me of the incident that had happened with Mr. Walker that morning. I received a call at approximately 6:50 AM and Mr. Cunningham explained to me over the telephone that he had told Mr. Walker to take the locks and blue light off track 3-B and place them on track 70-A and that when Mr. Cunningham approximately 20 or 30 minutes later had walked to the yard office that he noticed that the lock had not been applied, but Mr. Walker had told him that he was ready to go on the train. Well, I was quite concerned first of all with Mr. Walker's safety and that of the carman on the other end, Mr. Froehlich. So, I came over to talk to Mr. Walker being I'm the General Car Foreman on why he did not comply with Mr. Cunningham's instructions. I went into the west end of B-yard shanty and approached the foreman, Mr. Cunningham, and Mr. Walker, and asked Mr. Walker to step outside and I asked him why he hadn't complied with Mr. Cunningham's instructions. And he couldn't give me any real reason other than that he was sorry that he didn't do it. When I asked him if Mr. Cunningham had told him to take the lock off 3-B and put it on 70-A, yes he had. When I asked him if he was aware of the dangers without a lock on the switch applied to the switch he applied, he was aware of them but he just didn't do it this time. I impressed upon him when his foreman tells him to something and that his was a very serious incident, like I say, Mr. Walker had told me and admitted to me that morning and to Mr. Cunningham that he had indeed not followed Mr. Cunningham's instructions, but in light of Mr. Walker's testimony where he now says that Mr. Cunningham did not give him those instructions, I felt it necessary to step down and to enter into the record the knowledge that only I was privileged to hear.

MR. WHALEN: Mr. Machione, your objections are noted and will stand on its merits as part of this transcript.

MR. MACHIONE: Good, Mr. Whalen."

We reject the Organization's contention that we should invalidate the proceedings insofar as they relate to the second charge because of Mr. Borgh's appearance as a witness. Mr. Borgh could not anticipate that Claimant would deny at the investigation a fact which he had admitted to him. Nothing in the Agreement precludes the action taken nor, under the circumstances, is there any basic unfairness to Claimant in what took place.

Relative to the third charge, we cite the following from the record of the second investigation:

ASSISTANT CAR FOREMAN TOM CUNNINGHAM TESTIFIED:

- "Q. Did Mr. Walker threaten your life at approximately 11:15 PM on December 29, 1978?
- A. Yes, he did.
- Q. Could you please state what happened at approximately 11:15 PM, on December 29, 1978?
- A. At 11:15, Kevin Walker came into work, and I asked him why he was late. And he gave no reason, and I told him to take 15 minutes off his timecard, change it to 7 hours and 45 minutes. And with that he began to change the card, and then he stopped, threw his pencil on the desk and started pointing his finger in my face and he said, 'Cunningham', and I'm not going to use the exact words --
- Q. Use the exact words, but if there is any profanity involved spell it out.
- A. All right. He said, 'Cunningham, if you're going to f-u-c-k with my job then I'm going to f-u-c-k with your life.' With that I turned and looked at him, and I said, 'Mr. Walker, are you threatening me?' He said, 'No, that is not a threat, that is a promise.' And with that I called on the telephone to the company police and asked Mr. Mapes to come over, that I was sending Mr. Walker home, and I would like him to come in case there was any trouble.
- Q. Who is this Mr. Mapes you speak of?
- A. Special Agent for the police department on the Milwaukee Road."

Carman Andrew Lacy was present on the occasion and corroborated Mr. Cunningham's testimony in detail.

We find that the record contains abundant, clear and convincing proof that Claimant Walker failed to protect his assignment as charged, failed to follow Mr. Cunningham's instructions as charged and indeed threatened Mr. Cunningham's life. We support Carrier's finding of an absence of mitigating circumstances to any degree.

Claimant was employed on May 11, 1978 and dismissed on January 31, 1979. He had been in Carrier's service for a little less than nine months. His attendance record from May 11, 1978 to the date of the first notice of charge indicates five days of absence and 21 days of tardiness and one early quit. On November 14, 1978, a letter was sent to Mr. Walker advising him of his failure to attend regularly and on time, in which letter he was put on notice that if he did not make himself available on a regular eight-hour-per-day, five-days-per-week basis, it would be necessary to take disciplinary action. Nine days later the claimant again failed to properly protect his assignment. Mr. Walker's record and conduct are nothing short of disgraceful. His Organization has defended him throughout these proceedings in a manner far above the call of duty; however, there is nothing in the record that would justify our modifying the discipline assessed.

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Award No. 9187
Docket No. 8816
2-CMS tP&P-CM-'82

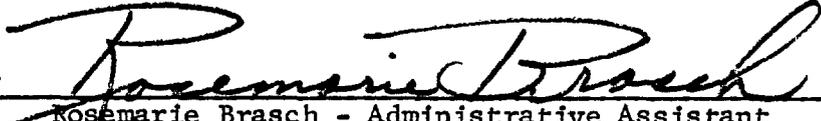
A W A R D

Claim denied.

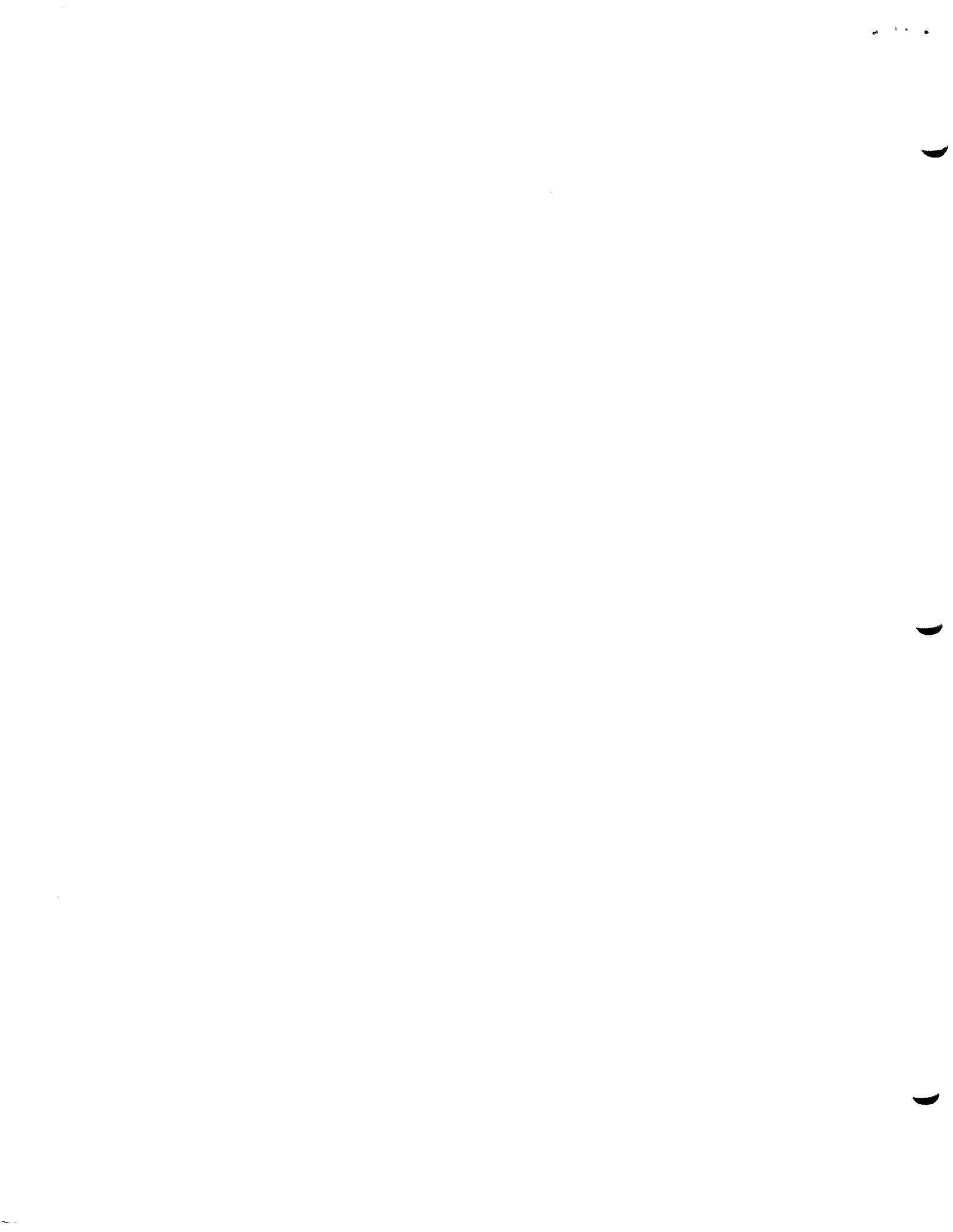
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.



LABOR MEMBER'S DISSENT TO
AWARD NO. 9187, DOCKET NO. 8816
Referee Brown

The Majority erred in reaching a conclusion inconsistent with the facts of record.

It is a well recognized fact of justice in the Railroad Industry that a hearing is conducted in order to develop the facts both pro and con relative to the Carrier's charges against the employe. There can be no doubt that the hearing as conducted in this particular case was not intended to develop the facts, but was intended to be a forum by which the Carrier would have the opportunity to prosecute the employe.

The proof of this purpose is clear and can be found by examining the actions of the Hearing Officer, Mr. Ed Borgh. He conducted the entire hearing almost to conclusion, however, close to the end he realized that the evidence was by far insufficient to sustain the charges leveled against the claimant, and at this point he called a recess. He then discussed the situation with the other Carrier Officer, (Mr. Whalen) and then stepped down as Conducting Officer.

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He then turned the hearing over to Mr. Whalen and proceeded to become a witness and testify in behalf of the Carrier. As soon as his testimony was recorded the hearing was adjourned.

As stated heretofore the purpose of a hearing is to develop the facts. On the basis of these facts the Hearing Officer makes a recommendation.

In this instant case Mr. Borgh was in no position to properly evaluate his own testimony because of the multiple roles he assumed ie; Hearing Officer and Company Witness. This entire procedure is contrary to the principle of fairness and impartiality. This Board has taken a very liberal attitude in adjudicating the conduct of Hearing Officers. In this instant case the Majority went overboard when they ignored the Organization's objection and arguments concerning Mr. Borgh's conduct. It is unbelievable that reasonable minded men could approve the procedure of a Hearing Officer to conduct a hearing almost to the very end then step down and become a Carrier witness.

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This conclusion by the Majority is contrary to all principles of a fair and impartial hearing and a gross miscarriage of justice.

This Division's Awards 4536, 6329, 6439, 6795, 7032, 8660 and Fourth Division Award No. 2158 have been accepted as fair and impartial procedures for the Hearing Officers to be guided by in order to conduct a fair and impartial hearing, these precedent Awards were thrown out the window by the Majority. It is quite clear that the Majority was not interested in the principles of a fair and impartial hearing, they chose instead to allow this Carrier to conduct an inquisition.

The evidence of record which the Majority ignored completely points out clearly that the claimant in this instant case was prejudged and had no chance of receiving a fair and impartial hearing.

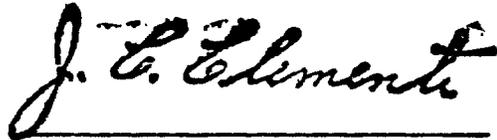
The Labor Members of this Board submit that in this case the hearing as conducted was a mockery of the established judicial system even as applied by this Carrier.

This was indeed a Kangaroo Court Hearing and a disgrace to the most elementary principles of a fair and impartial hearing.

Therefore, Award No. 9187 is palpably erroneous for the above stated reasons.

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Accordingly, the Labor Organization Members dissent:



J. C. Clementi



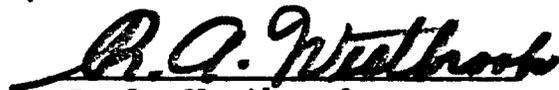
M. J. Cullen



D. A. Hampton



J. A. McAteer



R. A. Westbrook