

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(International Association of Machinists and Aerospace
(Workers

PARTIES TO DISPUTE: (

(The Kansas City Southern Railway Company

STATEMENT OF CLAIM:

1. That the KCS Railway improperly suspended Machinist E. G. Abner for alleged violation of Rule 29 of the current controlling Agreement.

2. That accordingly, KCS Railway be ordered to reimburse Machinist E. G. Abner for all loss of wages and benefits as a result of said suspension and all reference to the alleged charges be expunged from the Claimant's record.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

This discipline concerns an allegation that Claimant was insubordinate to the Diesel Foreman, when on June 4, 1986, he failed to comply with instructions that he record serial numbers and tag traction motors that were removed from Engine No. 4352. The investigation was held on these charges on July 1, 1986. At the hearing Claimant was represented by two officers of his Organization. Following the conclusion of the hearing Claimant was adjudged to be guilty of the charge and was disciplined with a fifteen day suspension.

Before considering the merits of the matter we must first deal with a contention of the Organization that the appeal process was flawed when a Carrier Officer, not designated in the claims handling procedure, rendered a decision on the discipline claim.

By bulletin, dated October 30, 1985, Carrier designated Mr. W. C. Hawkins as the initial claims recipient. Mr. F. Haywood, III, was designated as the intermediate appeal officer and Mr. J. L. Deveney was named the final

appeal officer. Mr. Hawkins was the conducting officer at Claimant's investigation. The discipline resulting from the investigation was assessed by Mr. Haywood. When the matter was appealed to Mr. Hawkins he timely responded that because he was the conducting officer at the investigation he felt that it was inappropriate for him to handle the claim and he forwarded the matter to Carrier's Chief Mechanical Officer for his action. This Officer made a timely response and denied the claim.

The Organization timely appealed the Chief Mechanical Officer's decision to Mr. Haywood. In that appeal it not only pursued the merits of the matter but also contended that its time limit on claims rule was violated when an officer, not within the designated appeal procedure, responded to the claim filed with Hawkins.

Mr. Haywood did not deal with either issue. Instead he stated that inasmuch as he was the officer that rendered the discipline decision it would be appropriate for the Organization to appeal the Chief Mechanical Officer's decision directly to Carrier's Vice President Labor Relations.

There are a number of Awards of this and other Divisions of this Board which conclude that claimants who are appealing discipline are entitled to an independent review and decision at each successive appellate level. In Third Division Award 24476 the Board held that such independent review "... is plainly lacking when the same person judges the discipline he initially assessed." Also, in Third Division Award 8431 the Board held that the intent of the Railway Labor Act contemplated that a "... first decision on a claim or grievance by a lower carrier representative may be appealed to one or more higher different officers." From this it is obvious that if Hawkins or Haywood had participated in the appeal process Claimant would have been denied the fair and independent consideration he was entitled to receive by law and contract.

Under the parties' Agreement Carrier exclusively controls the designation as to which of its officers are authorized to consider claims and appeals and we are unaware of any restrictions upon changing this designation from time to time. We do not consider it a breach of the Agreement, when due process considerations require that Carrier designate alternates to consider a particular claim or appeal, so long as the Claimant and/or Organization are not procedurally disadvantaged and the alternate designated gives timely independent consideration to the matter, which seem to be the facts in our case.

Accordingly, the procedural contentions of the Organization are rejected.

With regard to the merits of the matter we find that the clear and persuasive evidence in the investigation transcript indicates that a Relief Foreman asked Claimant to record serial numbers from traction motors he was changing. The Claimant responded that this task was not his job. The Claimant did not perform the task. At the investigation he stated that he told the Foreman that it was the Foreman's job to record traction motor serial numbers.

Regardless of who's job it was Claimant was given a direct order to perform a simple task and he refused. It is argued that the refusal in part may have resulted from a personality conflict between the two. This, however, does not change the fact that the Foreman was entitled to give the order and the Claimant was obligated to obey it. If the order was somehow improper, or if a personality conflict was present, complying, nonetheless, would not endanger Claimant's safety or that of others, it would not be injurious to his health and it certainly was not degrading or immoral, accepted exceptions to insubordination.

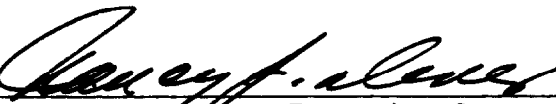
Obviously, under the circumstances of this case, Claimant was expected to "obey now and grieve later." Instead he refused. He cannot now complain about the suspension imposed. The Claim will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever - Executive Secretary


Dated at Chicago, Illinois, this 31st day of August 1988.


CARRIER MEMBERS'
CONCURRING AND DISSENTING OPINION
TO
AWARD 11578, DOCKET 11495
(Referee Fletcher)

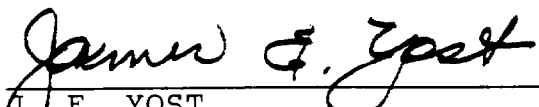
The Referee is clearly correct in holding that no procedural violation occurred when the Carrier had officers decline the claim who had not been designated previously to do so. We are concerned, however, that the Referee went too far in suggesting that, as a general rule, in the absence of such change, the Agreement would have been violated because of "lack of independent review and decision at each successive appellate level." There are simply too many Awards of this Board which have rejected such generalization. These Awards have recognized that the controlling issue is whether the Carrier's action resulted in prejudice to the Agreement due process rights of the employee. See, among a host of such decisions, Second Division Awards 9405, 9353, 8927, 8841, 8412.


M. W. FINGERHUT


R. L. HICKS


M. C. LESNIK


P. V. VARGA


J. E. YOST