

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(Northeast Illinois Regional Commuter Railroad Corporation

STATEMENT OF CLAIM:

1. That Coach Cleaner Patrick S. Walsh was unjustly dealt with when he was suspended from service from September 25, 1987 through October 1, 1987, a period of seven (7) days, subsequent to a hearing commencing on September 9, 1987 and continued on September 15, 1987.

2. That the Northeast Illinois Regional Commuter Railroad Corporation violated Rule 29(a) of the controlling agreement effective October 1, 1986, as amended, when Coach Cleaner Patrick S. Walsh was not given a fair and impartial hearing as was his right by Agreement.

3. That the Northeast Illinois Regional Commuter Railroad Corporation be ordered to compensate Coach Cleaner Patrick S. Walsh in the amount of eight (8) hours pay at the applicable rate of pay for each and every day he was withheld from service as result of his unjust suspension 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 employes 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 Organization denies that the Claimant was in violation of the Carrier's Employee Conduct Procedure, Paragraph 3 (6), which states: "Employees must not be: (6) quarrelsome or otherwise vicious." The Organization further alleges that the Claimant was unjustly dealt with in violation of Agreement Rule 29 (a) which reads impertinent part: "An employee shall not

be disciplined or dismissed from service, except as provided in Rule 30, without a fair and impartial hearing..." The charges against the Claimant hinged on an allegation that the Claimant pushed a bench on which a fellow employee was sitting and also picked up his lunch and threw it on the floor. The Organization charges that the Supervisor investigated the incident, conducted the hearing and also acted as a witness at this hearing. The Organization points to the record which shows that the alleged incident was first brought to the Supervisor's attention who was directed by the Superintendent to conduct an investigation, which he did. Pursuant thereto, the Supervisor interviewed three (3) witnesses who provided the Supervisor with signed statements. When the hearing initially commenced on September 9, 1987, the Supervisor was the hearing officer. When, it resumed on September 15, 1987, the Supervisor was replaced as hearing officer, but participated in the hearing as a witness. The Organization relies on the fact that the Supervisor was a witness and on the contradictory testimony of the witnesses interviewed by the Supervisor in concluding that the Claimant did not receive a fair hearing and that the Carrier did not meet its burden of proof in establishing that the Claimant was in violation of the Rule.

The Carrier relies on the fact that the complaints against the Claimant were first made by the complaining party himself; that an investigation was immediately conducted and that statements consistent with those representations made by the complaining party were consistent with his complaints. The Carrier, relying on the testimony of the Supervisor, charges that the difference in testimony by the witnesses from their statements given to the Supervisor was due to intimidation by representatives of the Organization. The Carrier also points out that the Supervisor acted at the direction of the Division Manager and that it was the Division Manager who issued the discipline in the instant case.

The Board notes that the hearing officer when the hearing commenced, was the first managerial person to be made aware of the alleged violation of the Rule. The same person, who acted as a witness when the hearing resumed but not as hearing officer, provided the Carrier with its most consistent and credible testimony. While the same witness at the hearing was not a witness to the violation of the Rule, he compiled and presented evidence, the preponderance of which, establishes that the Claimant did in fact engage in conduct that was "quarrelsome or otherwise vicious." He also provided uncontroverted evidence which convinced the Board that the witnesses who presented him signed statements were in fact reluctant to testify forthrightly at the hearing because of intimidation.

The question before the Board is whether or not the multiplicity of roles of the hearing officer violated the due process rights of the Claimant. This question is answered by a review of the record. We find that the Claimant was given every opportunity to present evidence and cross examine witnesses. We also view the conduct of the hearing officer as a witness upon resumption of the hearing with skepticism. Only the replacement of the hearing officer by another hearing officer provided the Claimant with the required due process. Furthermore, the signed statements by the witnesses which were properly received into evidence, established a prima facie case that the Claimant was in violation of the Rule.

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Award No. 11729
Docket No. 11559
89-2-88-2-69

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 14th day of June 1989.