

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12520
Docket No. 12482
93-2-92-2-18

The Second Division consisted of the regular members and in addition Referee Kay McMurray when award was rendered.

PARTIES TO DISPUTE: (International Association of
(Machinists and Aerospace Workers
(The Kansas City Southern
(Railway Company

STATEMENT OF CLAIM:

- "1. That the Kansas City Southern Railway Company violated Rule 29(L), in particular, but not limited thereto, of the Current Controlling Agreement between the International Association of Machinists and Aerospace Workers and the Kansas City Southern Railway Company when it harshly and unjustly dismissed Machinist E. A. Riley, III, from service after formal investigation for allegedly being in violation of Carrier Rule 85, effective June 13, 1991. He was reinstated to service on September 3, 1991, but without being made whole for lost time.
2. That the Kansas City Southern Railway Company compensate Machinist E. A. Riley, III, for all lost wages and benefits he would have received had he not been unjustly dismissed from service on June 13, 1991, and continuing until he was reinstated on September 3, 1991, and expunged from his personal record any and all reference to the charges, investigation, etc. pertaining to the instant dispute."

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 dispute here under consideration produced a voluminous file. There were sharp disagreements between the parties and numerous allegations by the Organization that it was being treated unfairly. A careful study of the entire record reveals no specific problems which would require comment by this Board in order to assist the parties in establishing a more cooperative relationship in furtherance of their joint interest in the enterprise. Further, it is not necessary to resolve all the problems in order to dispose of the claim before the Board. The Organization, among other charges, believes that the Carrier violated Rule 29(1) of the current working agreement by the manner in which the formal Investigation was conducted. Rule 29(1) in pertinent part reads:

"No employee shall be disciplined without a fair hearing by the Carrier."

The record reveals that the Superintendent of Locomotives, was the charging party in the disciplinary action. The transcript also lists him as assisting the Hearing Officer, at the hearing during the conduct of the formal Investigation. In addition, he also assessed the penalty. The discharge letter states in part:

"After a careful review of the transcript (he also participated in the hearing) of this investigation, it is my determination that you were in violation of Rule 85. ...Accordingly, you are being dismissed from the service of the Kansas City Southern Railway Company, effective June 13, 1991."

It was signed by the Superintendent of Locomotives.

The Organization takes strong exception to the multiplicity of roles played by the Superintendent of Locomotives and believes that a fair hearing cannot be obtained under such circumstances. We agree. A hearing in which one Carrier official prefers the charges and then serves as judge and jury does not, in our opinion, meet the standards of fairness required by the statute, the contract and the practices of this Board. Accordingly, we find that Rule 29(1) was violated by the Carrier and we have no alternative but to uphold the Organization's claim.

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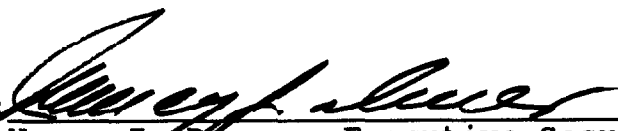
It should be noted that this Board is very reluctant to make decisions which effect the safety of operations of the enterprise. However, in this case, that decision has already been made by the Carrier in returning the Claimant to service on September 3, 1991.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

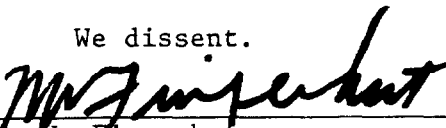
Dated at Chicago, Illinois, this 3rd day of March 1993.


CARRIER MEMBERS' DISSENT
TO
SECOND DIVISION AWARD 12520, DOCKET 12482
(Referee McMurray)

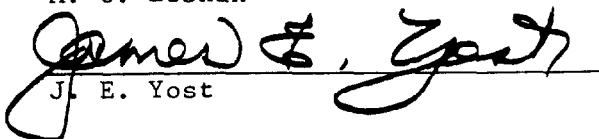
The Majority sustained the Claim solely on the basis that the same Carrier Officer prepared the notice of charge, assisted the Hearing Officer at the Investigation, and issued the discipline. The basis of the decision must be as surprising to the Organization as it is to the Carrier. A review of the Organization's Submission to the Board reveals that it did not believe the issue of "multiplicity of roles" was even worthy of mention, let alone argument. The subject is not to be found in its Submission.

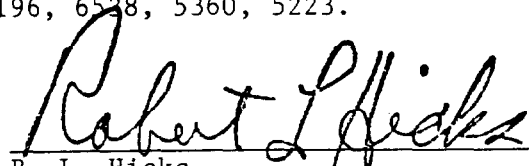
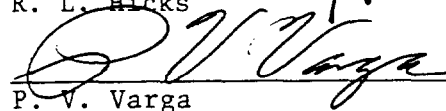
The Majority seeks to support its decision on the basis of "standards of fairness required by the statute, the Agreement, and the practices of the Board." It refers to no portion of the Railway Labor Act requiring its result - there is none. It refers to no "practices" of this Board requiring the result - there are none. The Majority does refer to the Agreement provision requiring a "fair hearing." On this point, there is a virtual plethora of Awards dealing with the issue of whether Agreement due process ("standards of fairness") rights are violated when the same Carrier Officer performs the functions which the Majority here held improper. The Majority does not cite a single Award to support its holding and we are not aware of any. On the other hand, a citation of Awards that have rejected such rationale could fill the rest of this page. In the interest of time, only eight will be cited. Second Division Awards: 8537, 8412, 8272, 8103, 7196, 6528, 5360, 5223.

We dissent.


M. W. Fingerhut


M. C. Lesnik


J. E. Yost


R. L. Hicks

P. V. Varga