Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7606
SECOND DIVISION Docket No. 7539
2-SCL-CM-'78

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute:
(System Federation No. 42, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employes:

1. That under the current agreement Carman T. R. Moody was unjustly suspended from the service of the Seaboard Coast Line Railroad Company, from October 14, 1975 through October 18, 1975, inclusive. This action was unjust, unfair, arbitrary, and capricious.

2. That accordingly the Seaboard Coast Line Railroad Company be ordered to compensate Carman T. R. Moody for five (5) days, eight (8) hours each day, at his Carmen's rate of pay. Also any overtime he may have made and other benefits accruing to his position that he may have lost.

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.

This is a disciplinary dispute in which Claimant received a five day suspension. Claimant was charged with and found guilty of engaging in other gainful employment while absent from his regular assignment on September 6, 1975. He was charged with violation of Rule 18(a), which provides as follows:

"(a) When the requirements of the service will permit, employees, on request, will be granted leave of absence for a limited time, with privilege of renewal. An employee absent on leave who engages in other employment will lose his seniority, unless special

"provisions shall have been made therefor by the proper official and General Chairman representing his craft."

The facts, not in dispute, indicated that Claimant requested and was granted permission to be absent from his assignment on September 6, 1975 for personal business reasons (unspecified). It was also undisputed that Claimant had engaged in a business of contracting for work on diesel engines for the IMC Company and other companies in the area.

Carrier based its conclusions in this case on two elements: a visit to the site of one of the private companies for which Claimant had been working on the morning of September 6th at which time two supervisors saw Claimant's pick-up truck, and a subsequent telephone conversation with a supervisor of the private company who verified that Claimant had been working there on the 6th of September. This was supplemented at the hearing by the introduction of a written (and slightly ambiguous) statement from the private company indicating that Claimant had worked there on September 6th. Petitioner argues that Claimant was not given a fair hearing and that Carrier did not sustain its burden of proof in this matter.

We are quite concerned with the manner in which this hearing was conducted. The transcript of the investigation reveals that Petitioner objected on at least two specific major aspects of testimony introduced by the hearing officer: the report of the telephone conversation and the introduction of the written statement originating with the private company. The record indicates that the hearing officer in both instances merely stated that the objections were noted for the record and proceeded to permit the testimony to be introduced. The objections went to the point that the testimony was hearsay on one issue and unacceptable and without the privilege of cross examination on both issues. The hearing officer is charged with the responsibility of conducting a fair and impartial investigation as required by Rule 32. While we recognize that investigatory hearings are not court trials in which formal rules of evidence are followed, it is incumbent on a hearing officer to do more than merely "note for the record" when serious objections are made to the questions and testimony offered. When the matter is merely recorded, the hearing officer is, in fact, denying the validity of the objections. In disputes such as this, some response to a fundamental question concerning the evidence was required; the hearing officer erred in ignoring the objections.

Implicit in this dispute was a question of credibility findings by the hearing officer. He found in behalf of the Carrier position, crediting hearsay testimony of a phone conversation and a written statement from the private company's supervisor rather than the direct testimony of three witnesses. Without questioning the right of the hearing officer to make credibility findings, it is clear that he relied heavily on the written statement objected to by Petitioner. The introduction of and the

weight accorded that document without the right of cross examination was per se highly prejudicial to Claimant (see Awards 6083 and 6463).

A careful review of the record of the investigation also reveals that Carrier did not present substantial evidence upon which to base its conclusion of guilt: Carrier has failed to sustain the burden of proof upon which the discipline was based (see Awards 4046, 6419 and 7172, among a host of others).

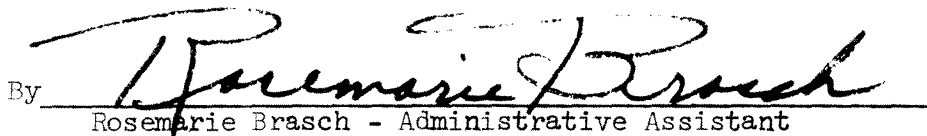
Our conclusion therefore is that the Claim must be sustained on three grounds: that the hearing officer erred in the conduct of the hearing; that Claimant was denied the right of cross examination on critical evidence, severely prejudicing his defense; and that the Carrier failed to sustain its burden of proof.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July, 1978.

CARRIER MEMBERS' DISSENT
TO
AWARD 7606, DOCKET 7539
(Referee Lieberman)

The decision in this case is in error, but even more seriously erroneous is the reasoning behind it.

The Carrier during the investigation introduced a written statement from a witness who saw the claimant at the New Wales mine. In evaluating this the referee stated:

> "The introduction of and the weight accorded that document without the right of cross examination was per se highly prejudicial to Claimant. (see Awards 6083 and 6463)." (Emphasis added).

This reasoning is totally fallacious. There can be no doubt that written statements are admissible. We only need to look as far as three awards by this same referee on this very point for support.

In Third Division Award 19558 this same referee stated:

> "In Award 16308 we said 'Numerous awards of this Board have held that written statements of witnesses not present at an investigation are admissable in the absence of contractual prohibition.' Although it would have been more appropriate had the Chief Engineer rather than the hearing officer first brought the documents forth, we do not view this as prejudicing the rights of Claimant."

In Third Division Award 19748 this same referee stated:

> "Though we feel that it is highly desirable for the 'accuser' to be present at an investigation such as this, we recognize that it is not always possible. However we have said (Award #13464):
>
> > 'There is no question that the Carrier may use written passenger's statements in considering the imposition of disciplinary penalties. However, in doing so it runs the risk of challenge if the passenger's statements are unsupported by other evidence, or if they fail in the light of testimony by witnesses at the disciplinary hearing.'"

In Third Division Award 21017 this same referee stated again:

"At the hearing, Claimant had the option of requesting a continuance so that he could secure a deposition or other statement from the complaining passenger; such option was not exercised (Award 4976). This Board has on numerous occasions sanctioned the use of passenger statements as evidence in disciplinary hearings. In Award 15981 we said:

'....In the investigation the Claimant's representative protested because the writers of the letters of complaint were not present at the investigation. No rule of the Agreement describes the type of evidence that may be adduced at investigations, and the Board has many times held that written statements are admissible in investigations without the writer being present. (Awards 14267, 12816, 11342, 11237, 10596, among others.) There is no evidence in the investigation that the Claimant was denied the right to present any witnesses that he desired.'"

The witnesses in the instant case were also in the same position as passenger witnesses for they were outsiders that could not be compelled to testify by the Carrier. Other decisions of various Divisions have held similarly:

Third Division Award 9311:

"This Board, in a long line of Awards covering many years of experience, has rather consistently held that written statements of witnesses not present at the investigation are admissible. We concur in the reasoning and findings in those Awards, too numerous to list herein."

Second Division Award 6232:

"A number of decisions of the Third Division, National Railroad Adjustment Board, have held that written statements are admissible in investigations without the writer being present. See Award Nos. 15981 and 16308. As was said in Award No. 16308:

> 'No prohibition is found against the use of written statements nor is there any requirement that a witness who submits a statement must be available for cross-examination. Numerous awards of this Board have held that written statements of witnesses not present at an investigation are admissible in the absence of contractual prohibition. Awards 10596, 9624, 9311, 8504 and others.'"(Emphasis added).

It is important to point out that the awards cited by the referee in support of his decision (Second Division Awards 6083 and 6463) are distinguishable because they involved the introduction of written statements from employees who were available and who could be compelled to appear and testify. For other statements on the admissibility of written statements as evidenced see: Third Division Awards 16308, 12252, 11342, 10596, 9455, 15981.

Further to illustrate the false reasoning of this decision, one need only put the shoe on the Organization's foot. It can be easily seen the shoe doesn't fit there either. If the tables were turned and the hearing officer refused to admit as evidence a written statement from an employee witness we highly suspect that this referee would not, in order to be consistent with this award, laud the hearing officer's decision not to admit the written statement as cavilierly as he condemned the instant decision not to. Award 15841 confirms that this Board is of the opinion that written statement should be admissible and that the rule cuts both ways:

> "Carrier's representative at the hearing refused to consider the letter on the grounds that the doctor was not available for cross-examination.
>
> "Had such evidence been considered, it is clear that it would have been a factor mitigating the severity of the sanctions imposed.
>
> "Hearings of this nature should not and cannot be conducted within the restrictive limitations of the rules of evidence found in courts of law. This is so because the parties are not represented by lawyers, and, more importantly, such hearings are not adversary proceedings in the strictest sense."

The Referee's error is compounded when he insinuates that the hearing officer was obligated to sustain the Local Chairman's objection to the introduction of written statements and that it is a fatal procedural error to "note objections for the record". The referee stated:

> "The hearing officer is charged with the responsibility of conducting a fair and impartial investigation as required by Rule 32. While we recognize that investigatory hearings are not court trials in which formal rules of evidence are followed, it is incumbent on a hearing officer to do more than merely 'note for the record' when serious objections are made to the questions and testimony offered. When the matter is merely recorded, the hearing officer is, in fact, denying the validity of the objections. In disputes such as this, some response to a fundamental question concerning the evidence was required; the hearing officer erred in ignoring the objections." (Emphasis added).

Nothing could be further from the truth. As already pointed out there is nothing per se prejudicial about the admission of written statements and therefore it was not wrong not to sustain the objection. And further there is certainly nothing prejudicial about a hearing officer only "noting an objection" for the record and by doing so he certainly is not automatically denying the validity of the objection. Quite to the contrary he is allowing the record to reflect the existence of the objection so that it may be considered in making his decision and more importantly, to the Organization, so they can reserve the right to appeal on that basis.

This very important consequence of noting objections for the record are themselves essential to a fair hearing. It seems this referee would have the hearing officer either sustain the objection or totally deny it without noting it for the record so it may be given due consideration in the decision making process and therefore subject himself to the potentially second guessing of a referee.

The issue of the use of written statements at hearings is not their admissibility but only their relevance and weight.

As stated in Award 1551 of the Second Division by Referee Wenke:

> "In regard to the evidence adduced at the hearing the contention is made that the statements of the members of the crew of train No. 3 should not have been received in evidence because the individuals making such statements were not present to be cross-examined. While it would have been desirable to have had these men present their absence does not prevent their statements from being received and considered. The form in which evidence is received only goes to the weight to be given thereto. Technical rules of evidence applying in courts of law are not applicable to evidence adduced at such hearings."

And in Third Division Award 7812:

> "Written statements, submitted in lieu of witnesses or oral testimony, have often been accepted as evidence by this Board. Such statements are taken for what they are worth and usually require some corroboration in the form of circumstantial or other supporting testimony."

Further, in Award 19558 supra a case involving use of written statements, this same referee in conclusion said "Truth and technicality should be the controlling factor in making decisions of this kind."

We hope that this referee, when faced with the question of written statements again, and others who may be asked to consider it as precedent, will recognize the error of this award. Referee Robert O'Brien in his discussion of Fourth Division Award 3131 cited supra, that held written statements as admissible, stated:

> "Finally, it should be observed that the findings herein appear to conflict with the statement of this Referee in Fourth Division Award No. 3033 relative to the introduction of written statements. We concede that our present findings do, in fact, conflict with our statement in Award No. 3033 and we hereby reject that statement. The issue was not adequately joined in Award No. 3033 and when it was thoroughly argued in the present claim we realized the fallacy of our position in Award No. 3033."

G. A. Vernon

John W. Johnson

[illegible]

J. E. Mason

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. W. GOHMANN

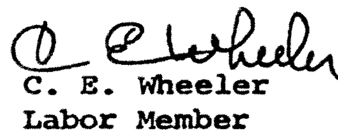
LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO
AWARD NO. 7606, DOCKET NO. 7539

We have reviewed Carrier Members' dissent to Award No. 7606 and submit it has no sound basis.

Certainly the author of the written statements was available for cross examination. The fact that a statement was given is indication the author was cooperative with the Carrier. And, as stated in the record, there were two employes involved with the same name as Claimant. The statement was unclear and everthing but precise. It could have been cleared up through cross examination. Second Division Awards 6083 and 6463 properly hold that cross examination of those bearing witness against you to be a fundamental right.

We agree with the Majority that a fair hearing requires more than a mere notation when an objection is raised. There should be at the lease sufficient discovery to determine the validity of the objection.

We believe the Findings in Award No. 7606, Docket No. 7539 to be sound and concur therewith.



C. E. Wheeler
Labor Member