NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23427
THIRD DIVISION Docket Number CL-23451

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9322) that:

(1) Carrier acted in an unreasonable manner when it dismissed Mr. David P. King from its service effective March 6, 1979, as a result of an investigation held on March 5, 1979.

(2) Carrier shall now be required to restore Mr. King to service with all rights and privileges unimpaired and compensate him for all time lost beginning February 27, 1979, and continuing until corrected.

OPINION OF BOARD: This discipline case contains serious procedural defects which will be the basis of the decision and for this reason we will not burden the record with a discussion of the merits.

Carrier officer, Mr. J. F. McCaffery, Material Manager, filed charges against the Claimant, Mr. David P. King, for being unfit for duty. An investigation was held on March 5, 1979, copy of the transcript was made a part of the record.

The charging officer, McCaffery, appeared as a witness in the investigation testifying against the Claimant. This same officer, McCaffery, made the decision dismissing the Claimant from his employment with the Carrier. This same officer, McCaffery, made the decision on the first level of appeal, reaffirming his earlier decision, dismissing the Claimant.

This is a flagrant abuse of "due process".

We are not dealing with a novice. This Carrier has a long history of conducting itself in the labor-management arena with maturity and considerable expertize in this field. For this reason it cannot be excused for failure to guard against any abridgement of any of the procedural rights written into the collective bargaining agreement. The Carrier has within its hands the basic machinery of the judicial process upon the property. Consequently, it must bend over backwards at every stage to give the accused every opportunity to defend himself against charges which can cost him his job and considerable money. See Third Division Award 17511.

While the discipline rule of the agreement, Rule 24, does not contain the words "fair and impartial", the term "investigation", which is in the rule, has long been recognized in the industry as meaning a "fair and impartial hearing" with the right to representation and full opportunity to defend. It is inconceivable that accuser-witness McCaffery could possibly be "impartial" when making his decision based on his own testimony! The same reasoning applies to the first level of appeal decision. McCaffery merely confirmed his earlier judgment which was based at least in part on his own testimony! Again, it is inconceivable that this Carrier, so well experienced in this sensitive labor-management arena, would permit an alleged due process procedure that would allow a single officer to be the "accuser", "witness", "judge" and, to top it off, the "appellate court"!

The right of appeal is neither technical nor mechanical. It is an important and meaningful right that is not to be regarded lightly or ignored. The obvious purpose of the appeals machinery is to provide Claimant with independent consideration of his appeal at each appellate level. See Fourth Division Award 2642. In this case the appeals officer, McCaffery, could not be considered impartial or independent.

This overwhelming evidence proves that Carrier violated the basic fundamental rights of Claimant to due process. This Board must sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: R. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of November 1981.

DISSENT OF CARRIER MEMBERS
TO
AWARD 23427, (DOCKET CL-23451)

Dissent to this decision is required not only because of the self-serving homile that is being passed off as reasoned judgment, but also because of the facts completely ignored by the Majority in reaching this myopic mishmash.

This was an "under the influence" case in which the Claimant himself admitted the rule violation, and this was substantiated by corroborating witnesses.

TESTIMONY OF AGENT CAPPS:

"Q. Did you ask him if he had been using intoxicants?
"A. Yes."

"Q. What was his response?
"A. He replied that he had had a couple of drinks at noon, I believe. He said he had a couple of VO's and Seven at a tavern where he had gone to cash his check."

"Q. When you were in the automobile in close quarters en route to the hospital, did you have further occasion to detect the smell of intoxicants?
"A. Yes."

TESTIMONY OF AGENT BURRIS:

"Q. During the interview with Mr. King, was it obvious to you that he was in an unfit condition to properly perform his duties?
"A. He was."

"Q. Could you detect the odor of intoxicants on his person?
"A. Yes sir."

"Q. Was Mr. King asked if he had been using intoxicants or drinking?
"A. Yes, he was."

"Q. And what was his response?
"A. He stated that he had two drinks during lunch when he went up to cash his paycheck."

"Q. Did it appear to you that he had had considerably more than two drinks?
"A. He appeared to me that he was intoxicated, yes."

TESTIMONY OF CLAIMANT:

"Q. Were you using intoxicants during your tour of duty?
"A. Yes, I was."

"Q. Do you feel that you were in compliance with this rule on February 26?

"A. No, I guess not since I did have a few drinks and did take the medication." (Emphasis added)

It has long been held by this Board that admissions of wrongdoing substantiates the violation.

Third Division Award 8423 - Lynch:

"Claimant, by his own admission at the investigation, as reflected by the above quotations from the transcript, concedes his own guilt in violating Rule 807, upon which Carrier predicated its disciplinary action...."

Third Division Award 9033 - Hornbeck:

"Suffice to say, that by Mr. Benton's plea of guilty he admitted all of the material elements of the charge against him. Even if the Carrier had failed in its proof, which is not the fact, the plea of guilty removed the necessity of proof of the charge that Mr. Benton had violated a safety rule of the Carrier in the particulars alleged." (Emphasis added)

Third Division Award 14700 - Rohman:

"In view of the Claimant's own admissions at the investigation, this Board would be usurping its powers were it to substitute its judgment for that of the Carrier. Innumerable awards of this Board have enunciated the controlling principles in discipline cases."

Third Division Award 18903 - Ritter:

"It is the further opinion of this Board that Carrier had no alternative than to assess punishment in this instance, if for no other reason, the admissions of the named Claimants."

Third Division Award 21962 - Scearce:

"It is apparent from the testimony of record, including Claimants' own admissions and the uncontroverted testimony of Carrier's witnesses, that there is substantial evidence to support the charges. The discipline administered by Carrier is commensurate with the gravity of the proven offenses and we will not substitute our judgment for that of the Carrier."

Third Division Award 22564 - Scearce:

"The testimony in the hearing record, including claimant's own testimony, clearly establishes that, by his actions and/or lack of action, he was primarily responsible for the machine 'run-away' and resultant collision."

Second Division Award 8069 - Cushman:

"At the investigation the Claimant testified and admitted that he had placed 20 rolls of masking tape which was the property of AMTRAK in his automobile with the intention of using it to tape a car that he was going to paint."

Clearly, Claimant's guilt was established on the record. However, such matters of record are not to be considered pertinent or even worthy of note when one has embarked on an evangelical mission.

The Majority contends that this case involved a "flagrant abuse of 'due process'". Yet the Majority concedes and does agree at Page 1 of the Award that "the procedural rights written into the collective bargaining agreement" is the source of Claimant's allowance of "due process"; not some feeling of equity or perceived judicial entitlement.

Third Division Award 5104 - Parker:

"One of the purposes responsible for the enactment of the Railway Labor Act was to provide a simple and inexpensive method for the disposition of disputes between Carriers and Employes, including those similar to the one here involved. For that reason it has come to be generally recognized that in the conduct of the hearings and investigations neither technical nor legalistic rules of evidence are binding and we have repeatedly held, that where - as here - the contract does not specify the type of evidence that can be submitted at such hearings or investigations, statements of witnesses with references to the facts pertinent to the dispute, even though unverified, are competent and therefore properly received as evidence. (See Awards Nos. 1989, 2746, 2770, 2772, 3985, 4142, 4154 and 4251)."

* * * * *

"The guarantee of due process found in the 5th Amendment, and in the 14th Amendment, to the Federal Constitution, is intended to protect the individual against arbitrary exercise of governmental power and does not apply to actions between individuals or add anything to the rights of one citizen as against another (see 16 C.J.S. 1149 Sec. 568; 12 Am. Jur. 259 Sec. 567; Davidwo v. Lachman Bros. Inv. Co., 76 Fed. 2d. 186)."

Third Division Award 22427 - Scearce:

"We are well aware that it is not within the province of the Board to consider questions of equity; we are equally aware that questions of 'due process' are not properly before us. We are obliged to look to the provisions of the Agreement and to the record of the case at hand and will not do otherwise here. While we may have some reservations over the events leading to this point, we find no basis under the Agreement to affirm the Claims herein." (Emphasis added)

Third Division Award 22224 - Lipson:

"The Union has strongly objected to the search of the automobile involved, to the taking of pictures of the Claimant without his consent, and to the seizure of the bottles described above, on the basis that constitutional and other

"basic rights were thereby violated. A similar argument was addressed in Award No. 5104, Docket Number PM-4929, by a Third Division Board, with Jay S. Parker as Referee. The Board in the above case observed that 'the guarantee of due process found in the 5th Amendment, and in the 14th Amendment to the Federal Constitution, is intended to protect the individual against arbitrary exercise of governmental power and does not apply to actions between individuals or add anything to the rights of one citizen against another (citations provided)."

Third Division Award 22128 - Wallace:

"Careful review of the entire record in this case convinces this Board that Claimant has received all the due process rights to which he is entitled under the Rules Agreement." (Emphasis added).

Fourth Division Award 3490 - McBrearty:

"Any rights which an employee has during a discipline investigation flow not from the Constitution, but solely from the collective bargaining agreement negotiated under the Railway Labor Act. This has been firmly established by both courts of law and this Board. [See Clark v. S.C.L., 332 F. Supp 380, 381 (N.D. Ga. 1970); Edwards v. St.L-S.F., 361 F 2d 946, 953 (7th Cir. 1966); Third Division Award 15676; Second Division Awards 6963, 6381, and 1821]."

The Majority asserts that the Carrier:

"....must bend over backwards at every stage to give the accused every opportunity to defend himself against charges..."

This dictum is in error on at least two counts. First, there is no contractual requirement that Carrier bend over backwards. The Carrier's responsibility is to apprise the individual of the asserted charges so that he can prepare a defense and to provide the individual an opportunity as prescribed in the contract to rebut and to submit evidence that the contentions and assertions made in the notice of charges are in error or that there are

other causes responsible. In this industry it is incumbent on all parties to submit all facts and evidence into the hearing record because it is that record on which the finding of guilt is made, and it is on that record that the appeal of the discipline assessed is progressed.

Second, "every stage" of appeals reviews the record that is made. It is not an opportunity to re-try the matter de novo, but a review of the facts established and whether the discipline assessed was commensurate with the established violation. That is the contractually established appeal process in disciplinary matters in this industry. The Majority's dictum lacks contractual support.

Third Division Award 16678 - Perelson:

> "We find nothing in the Agreement involved in this dispute that prescribes who shall prefer charges, conduct investigations and/or render decisions; there is no rule which specifically states that the officer conducting the hearing must render the decision or assess the discipline. See Awards 15714, 14021, 13383, among many others.
>
> "Further, the record in this dispute indicates that the procedure followed is the established practice for the handling of discipline cases on this Carrier.
>
> "The fact that the Superintendent rendered the decision did not preclude his acting as the appeals officer. See Award 15714.
>
> "With reference to point two, this Board has held on any number of occasions that our function in discipline cases is not to substitute our judgment for that of the Carrier or to decide the matter in accord with what we might or might not have done had it been ours in the first instance to determine. We do pass

"upon the question whether, without weighing it, there is some substantial evidence in the record to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier and we are not warranted in disturbing the penalty imposed unless we can say that it clearly appears from the record that the action of the Carrier with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of discretion.Whether or not the penalty imposed is justified depends upon many factors and the circumstances in each case. In order for this Board to overrule, reverse, set aside or reduce the penalty imposed, it is incumbent upon the Claimants to show that the Carrier in assessing the penalty was vindictive, arbitrary or malicious."

Finally, the Majority's reference to Third Division Award 17511 is totally misplaced. That case involved a claim filed, after an agreed-upon settlement, with this Board that the Carrier's action was improper. The claim was dismissed for failure to handle the matter in the usual manner on the property. There is no relevance of this Award to this case at all.

The one fact tenaciously relied upon by the Majority here is the participation of Mr. McCaffery in a number of steps in the contractual disciplinary process. No objection was made to the fact that Mr. McCaffery issued the charges, testified at the hearing and assessed the discipline. McCaffery's testimony consisted in simply relating what Agents Burris and Capps had found in their investigation and to which they testified at the hearing. McCaffery's testimony was simply corrobatory. Claimant's admission and the direct testimony of Agents Burris and Capps was the substantial evidence entered into the record concerning the charge of being "under the influence". It is a gross presumption, absent any evidence, to conclude that McCaffery improperly executed any duty. The Employees' whole argument has been that Carrier's action was a per se violation of due process. That argument was never substantiated with evidence.

Third Division Award 20194 - Bergman:

"We have examined the record and do not find any statement made in the handling on the property that the decision made and penalty imposed was improper because it was made by a supervisor who was a witness. It cannot now be raised for the first time, Award 17424, 19746, 19977 and Awards cited therein."

Further, there must be some evidence as opposed to suspicion or conjecture to support such an allegation.

Second Division Award 8367 - Wildman:

"This Board has read and considered at length the numerous (and sometimes conflicting) decisions discussing the problem of that point at which the multiplicity of roles played by a hearing officer in a discipline or discharge case becomes prejudicial to the interests of a claimant and precludes a fair, just and adequate hearing. Wisely, we think, a clear majority of these cases, in assessing whether minimally adequate due process was present or not, look for a tangible and specific relationship between the multiplicity of roles played by the hearing officer and any prejudicial impediment to Claimant's defense which did, in fact, or probably did in fact, occur. We find no such cause and effect relationship in this case between the multiplicity of roles played here by the Hearing Officer and any significant denial of due process to Claimant.

"In short, it is not at all apparent that the evidence on the record in this case with regard to any material issue would be any different than it is had the Hearing Officer played fewer and/or different roles in the handling and processing of this case.

"Potentially, the most serious role conflict occurs, of course, when a hearing officer gives testimony at the very hearing he conducts (and, possibly, ultimately judges on appeal). While the Hearing Officer in this instance did make some assertions which relate to the case and which do appear on the record, they are only occasional and relatively unimportant, and are not, in our judgment, significantly material in nature. We conclude that this 'testimony' by the Hearing Officer was not procedurally fatal to the cause of a fair hearing for Claimant and was not prejudicial to Claimant. In sum, we are of the opinion that Claimant did, in fact, receive an adequately fair and just hearing."

Second Division Award 8219 - Larney:

"We first turn our attention to the procedural point as to whether or not Claimant was afforded a fair and impartial investigation. In addressing such procedural objections as those raised in the instant case, we have in numerous cases over the years reached our decisions on the case by case basis by applying the following general formula:

> "'That where there exists an objection regarding the mix of roles performed by a Carrier officer in connection with the charge against Claimant, the resulting investigation, the imposition of discipline, and the appeal process, such mix of roles must be balanced against the tenets consistent with fair play and due process. These tenets include: that claimant be properly and timely notified of the charge against him and the date, time and place of the investigation; that claimant be well represented; that claimant be allowed any witnesses of his own choosing; that claim- and be given every opportunity to present any and all testimony believed to be relevant to the situation; that both the claimant and his representative be allowed to cross-examine all witnesses; and that at the conclusion of the investigation the claimant and his representative be afforded the opportunity to express any exceptions they might have to the manner in which the hearing had been conducted.'

"Upon a thorough review of the record and a careful weighing of the alleged procedural defects against Claimant's having been afforded due process at the investigation, we conclude Claimant did in fact receive a fair and impartial hearing." (Emphasis added)

Note: Second Division Awards 7196, 8103, 8537; First Division Award 17304; Third Division Award 21241, and Fourth Division Award 3770.

In Third Division Award 10547 - Daly - we stated:

"Although the Claimant's guilt is not an issue in this case - the fact that the Claimant is undeniably guilty is an important consideration in our deliberations.

"This latter fact brings up an usual and interesting point. If the Claimant was admittedly guilty - a second 'fair and impartial' hearing as prescribed by Rule 22(c) could have no different result from the investigation. Therefore, since a second such hearing could have resulted only in the same conclusions, one might ask what difference does it make whether the appeal hearing complied with the letter and the spirit of the law.

"There is, however, a far broader implication involved. A guilty party - no matter how often heard impartially - will remain guilty. The outcome of guilt is guilt, but, it is a big BUT - the innocent party who has possibly not been vindicated by the first investigation - has the opportunity provided by Rule 22(c) to prove that innocence in a 'fair and impartial hearing' and thus, receive his just deserts. (Emphasis ours)."

In this case the Majority not only threw out the baby with the bath water, but also the tub, soap and toys. The expectation was a reasoned and supposedly well informed review of the record. What was provided was evangelicism.

We dissent.

P. V. Varga

W. F. Euker

D. M. Lefkow

J. R. O'Connell

J. E. Mason

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 23427, DOCKET CL-23451
(REFEREE LOWRY)

The Dissenters complain that, "In this case the Majority not only threw out the baby with the bath water, but also the tub, soap and toys."

It is evident, however, that the Dissenters were not deprived of all of their "toys" for they have spent some ten pages "toying with words" in order to say that they disagree with the Award.

Dissenters cite some fifteen Referees as though all of them would oppose the findings and conclusions reached in Award 23427.

Nevertheless, Award 23427 speaks for itself and the only "error" therein was a typographical 17511 rather than 17311. However, the "teaching" of both Awards 17311 and 23427 is that Carriers must afford a fair, not an unfair, hearing.

If that lesson is lost because of the Dissenters' views then neither the Carrier nor this Board have been well served.

The Award is correct, the Carriers' case, presented again in it's best light by the Dissenters, could not, and did not, overcome the Employes' case.

The Award is correct, and the Dissent does not detract therefrom, but only offers to cause mischief. I am confident

that a majority of the fifteen Referees cited by the Dissenters would also have found the actions of Carrier in this case so repugnant that they, too, would have sustained the Claim.

I. C. Fletcher, Labor Member
Third Division - NRAB

12-17-81