

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25907

Docket Number MW-23699

Paul C. Carter, Referee

ON REMAND FROM THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION CIVIL NO. C84-595

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Cook Ellis Johnson, Jr. was without just and sufficient cause and on the basis of unproven charges (System File 37-SCL-79-79/12-39 (79-26) J).

(2) Cook Ellis Johnson, Jr. shall be returned to service with seniority and all other rights unimpaired and be compensated for all wage loss suffered."

OPINION OF BOARD: The genesis of this dispute is found in Award No. 23821, Docket No. MW-23699, of the Third Division, National Railroad Adjustment Board, dated March 26, 1982. The parties to the dispute in that Award were the Brotherhood of Maintenance of Way Employees and the Seaboard Coast Line Railroad Company.

The issue involved in Award No. 23821 centered around the dismissal of Claimant as a result of a Disciplinary Hearing conducted on the property on March 16, 1979, following notice to the Claimant dated March 6, 1979. The Remand Order of the Court, issued April 1, 1985, cites allegations that Claimant was denied right of Hearing before this Board prior to the issuance of Award No. 23821. The Remand Order of the Court reads in part:

" . . . Pursuant to 45 U.S.C. §153(j), parties who have claims before the Board have the right to be heard in person or by counsel or other representative. See Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U. S. 711, 736 (1945); Jones v. St. Louis-San Francisco Railway Co., 728 F. 2d 257, 262 (6th Cir. 1984); Cole v. Erie Lackawanna Railway Company 396 F. Supp. 65, 68 (N. D. Ohio 1975), aff'd 541 F. 2d 528 (6th Cir. 1976), cert. denied, 433 U. S. 914 (1977). In this case, the Board failed to allow Plaintiff a reasonable opportunity to appear at the hearing and, if a hearing was in fact held, it was conducted without the presence of Plaintiff or his counsel or other authorized representative. There is nothing in the record to suggest that Plaintiff waived his right to appear

at the hearing. Therefore, the court holds that the Board violated SI53(j). Pursuant to SI53(q), the court will remand to the Board its decision on Plaintiff's claim due to the Board's failure to comply with the requirements of SI53.

". . . Plaintiff's original claims filed with the Board are hereby REMANDED to the Board for a hearing at which Plaintiff and/or his counsel or other representative are to be present and heard. Plaintiff and/or his counsel are hereby DIRECTED to inform the court of the status of his claims before the Board within ninety (90) days from entry of this order."

The records of the Board show that the claim in behalf of Claimant was submitted to this Division of the National Railroad Adjustment Board by the Brotherhood of Maintenance of Way Employees, the Collective Bargaining Unit representing the craft in which Claimant was formerly employed by the Carrier. A Hearing was conducted by the Board on January 15, 1982, with a representative of the petitioning Organization present and representing the Claimant. At the time of the January 15, 1982, hearing the Board was not aware of any request by Claimant that the Hearing scheduled for that date be postponed. There was no record before the Board of such request.

In view of the Remand Order of the Court, the Board scheduled further Hearing in the case for 1:00 P.M., September 30, 1985. At the request of Claimant's attorney, the Hearing scheduled for September 30, 1985, was postponed and rescheduled and conducted on October 25, 1985, at which time the Claimant was present and represented by Attorney W. D. Arnold, and a staff representative of the Brotherhood of Maintenance of Way Employees. Also present was Mr. Willard Oliver. The Carrier was represented at the October 25, 1985, hearing by Mr. Allred, Manager of Labor Relations.

Before discussing details of the claim and the handling thereof, we will set forth certain principles adhered to by this Board.

1. This Board being an appellate tribunal, may only properly consider the issues that were considered by the parties to the dispute in the handling on the property. New issues and new defenses may not properly be raised for the first time before this Board.
2. In disputes involving discipline the parties to such disputes and the Board are each and all restricted to the evidence introduced at the hearing or investigation, and the record may not properly be added to after the hearing or investigation closes.

3. That railroad disciplinary proceedings are not court proceedings. Strict rules of evidence do not apply, nor is the burden of proof the same as in court proceedings. The Board has followed the substantial evidence rule in upholding the disciplining (including dismissal) of employees. In Second Division Award No. 6419 it was held:

"The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' (Consol. Ed. Co. vs Labor Board 305 U. S. 197, 229)."

4. That in discipline cases the Board will not weigh the evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses. Conflicts in evidence do not warrant disturbing the Carrier's action.
5. If exceptions are to be taken as to the manner in which a hearing or investigation is conducted, such exceptions must be taken during the course thereof; otherwise they are deemed waived.

In the Hearing before the Board on October 25, 1985, the contention was made by the Claimant and his attorney that Claimant was deprived of a fair and impartial Hearing, or investigation on March 16, 1979, because Claimant was not permitted to present a witness that he desired; that the Hearing Officer was prejudiced, and the Claimant proclaimed his innocence of the charges. The Claimant's attorney requested that the dispute be remanded to the parties for de novo action.

The Board has again reviewed the transcript of the March 16, 1979, Hearing, or investigation. In the hearing the Claimant was represented by the General Chairman of the Organization. The record shows that Claimant requested that Mr. Willard Oliver, not an employe of the Carrier, be permitted to testify, which request was denied by the Hearing Officer. The record does not show any formal objection by the Claimant or the General Chairman to the

ruling of the Hearing Officer. The Claimant and his Representative indicated they were ready to proceed with the Hearing. Toward the close of the Hearing Claimant was asked by the Conducting Officer:

"Q. Mr. Johnson, do you feel that this hearing has been held in a fair and impartial manner satisfactory to you?

A. Yes, sir."

The same question was asked the General Chairman of the Organization:

"Q. Mr. Medders, do you feel that the hearing has been held in a fair and impartial manner satisfactory to you?

A. Well, I am going to have to state this, That when I've had an opportunity to review the transcript I will advise you at that time."

The record of the on-property handling of the dispute does not reveal that any objections were taken by the Claimant or his Representative as to the fairness and impartiality of the investigation. Such objection may not properly be raised for the first time before this Board.

Before the close of the Hearing before the Board on October 25, 1985, the Claimant, his attorney, and the Representative of the Organization were each asked specifically if any had anything further to say. Each responded in the negative. The Hearing was then closed.

After considering all presentations properly before the Board, and adhering to the principles previously set forth we consider that our previous decision reached in Award No. 23821 was proper and correct, and we hereby affirm it.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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

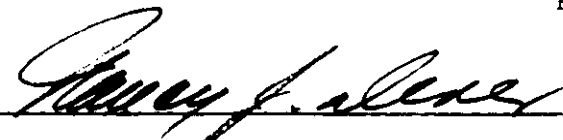
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", written over a horizontal line.

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.