Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28726
THIRD DIVISION Docket No. MS-28955
91-3-89-3-364

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (T. G. Smith
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(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"(1) The suspension from June 30 to August 18, 1988 of Railroader T. G. Smith for allegedly being absent without authority on June 30, 1988 was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.

(2) The Carrier violated the Agreement when it refused to afford the Claimant his right of appeal as set forth in Section VI. 'Discipline', following a hearing which was held on July 13, 1988.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Mr. T. G. Smith shall be paid for all wage loss suffered and his record cleared of the charge leveled against him."

FINDINGS:

The Third 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 were given due notice of hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute and filed a Submission with the Division.

This case involves an employee who was withheld from service by notice dated June 30, 1988, because of an alleged violation of General Rule C (GR-C). A Hearing was scheduled for and held on July 13, 1988, in connection with Claimant's alleged absenting himself from a rules class scheduled for June 30, 1988. Following the Hearing, Claimant was restored to service on or about August 19, 1988, with the time out of service from June 30, 1988, to and including August 18, 1988, counted as "suspension from service for violation of Rule GR-C ...".

The Carrier has argued that the Third Division of this Board lacked jurisdiction to hear this case inasmuch as the United Transportation Union is the only collective bargaining agent on the property. Carrier further argued that its employees are "railroad employees" rather than the traditional craft and class of employees as defined in Circular No. 1 of this Board. The Carrier argued that this case should be heard and decided by the Fourth Division of this Board.

We disagree. What was ably decided in First Division Award 24019 in connection with this same type of argument is equally applicable here. Regardless of what Carrier elects to call its employees, the fact remains, and the record here supports, that Claimant was working as a maintenance-of-way man and, therefore, this Claim is before the proper Division of the Board.

Carrier also argued that this case is defective because there was no proper appeal from the discipline initiated or progressed on the property prior to the case being presented to this Board. They point to General Rule I.C., Time Limit on Claims, Section 1. thereof which refers to the presentation of time claims and/or grievances by the "individual claimant or his/her duly authorized representative." This language, Carrier says, precludes the Maintenance of Way Organization representative from initiating or progressing an appeal from discipline on the Carrier's property because the United Transportation Union is the signator of the collective bargaining agreement and is therefore the "duly authorized representative" on this property.

On the other hand, Claimant argued that Rule VI., Discipline, of the rules agreement permits representation at disciplinary hearings "by counsel of his choosing" and since in this case the Maintenance of Way representative represented the Claimant at the Hearing, the appeal by this same Representative was proper.

A review of the record indicates that following the issuance of the notice of discipline on August 4, 1988, the Maintenance of Way Representative addressed an appeal letter on Claimant's behalf to its Director Labor Relations Dinsmore on August 19, 1988. This letter of appeal was hand delivered to Carrier and presented to the Director Labor Relations, Maintenance/Administration Fay who, rather than directing it to Director Labor Relations Dinsmore, acknowledged receipt of the letter and fashioned a reply on September 1, 1988, to the Maintenance of Way Representative asking him certain questions concerning "...handling steps within the Engineering Department ...." Subsequently, an appeal Hearing on this case was actually held on September 15, 1988, with Director Labor Relations Fay who ostensibly acted as a Representative for Director Labor Relations Dinsmore. Still later, when no reply concerning the appeal Hearing was forthcoming from Carrier, the Maintenance of Way Representative on December 21, 1988, addressed another letter to the Director Labor Relations Dinsmore asking him for his decision in this matter. Carrier's response to this communication of December 21, 1988, was a letter

dated January 3, 1989, over the signature of the Vice President Human Resources advising the Maintenance of Way Representative that Director Labor Relations Dinsmore was the designated highest appeals officer on the property. The Director of Labor Relations did not reply to either of the letters which were addressed to him on this matter.

It is apparent that some type of "gamesmanship" was employed in this case. We, therefore, reject Carrier's argument relative to the propriety of the appeals process in this instance. There is nothing in this record which defines the term "duly authorized representative." The reference to "duly authorized representative" is found only in the context of time claim and/or grievance filing in Rule I.C.I.. Rule VI deals specifically with discipline Hearings and appeals from discipline and it contains only a reference to "counsel of his choosing" when referring to Representation at Hearings. The rule makes no reference whatsoever to who shall initiate or progress appeals from discipline. We can not write "duly authorized representative" into Rule VI.

The Claimant has advanced several procedural arguments which we must address. He claims that suspension from service pending a Hearing violated the Agreement. He argues that the absence of a stenographer at the Hearing violated the Agreement. He contends that the Hearing transcript was not complete. He avers that the decision to discipline following the Hearing was not prompt. He alleges that the decision to discipline was improperly rendered by other than the Hearing Officer. He says that the charge was not precise. He also says that the Agreement was violated because no proper reply was made to the appeal.

Rule VI permits "...Suspension in proper cases pending a hearing ...." In light of the urgency of the moment which existed on this Carrier at the time of this event, it is a borderline call, but we believe it could be considered a "proper case." We will not overturn the discipline on this argument alone.

The "stenographer" argument is one which has been addressed on this property in Award 3 of PLB No. 4623. However, in this case unlike the fact situation which apparently existed in Award 3 of PLB No. 4623 there was no timely objection made to the absence of a stenographer. In fact, during the Hearing the Representative made references to, but did not object to, the use of a tape recorder in both this and the companion case referenced supra. The only complaint relative to the absence of a stenographer was made by the Representative during his closing statement, of the Hearing. The parties may not participate in the proceeding without objection and then complain for the first time at the end of the proceeding.

The allegation relative to the inaccuracy or incompleteness of the Hearing transcript is just that an allegation. We are not directed to any specific references of omissions or inaccuracies. Assertions are not proof.

The arguments relative to a prompt notice of discipline and a notice of discipline by other than the Hearing Officer are not persuasive and are rejected.

The contention concerning the absence of a precise charge is also rejected. While the Hearing notice in this case may not be a "text book" example of a precise charge, it does contain the necessary prerequisites. In addition, the Claimant answered affirmatively when asked if he was ready to proceed with the Hearing. Also, at the end of the Hearing, the Claimant stated "I believe the hearing has been conducted properly." It was not until the Representatives closing statement that he voiced any objection to the specificity of the charge. This is too late.

The allegation relative to the absence of a reply to the appeal is rejected for the reason that while it certainly is good labor relations to do so, and while Carrier was cavalier in not doing so there is no specific time limit requirement to do so found in the language of Rule VI of the Agreement.

On the merits, we are bothered by the absence on the part of the Carrier officers involved in this case to issue direct orders to the Claimant to attend the rules instruction class. While the Engineer Track initially testified that "I ordered him to go to the class" he followed by testifying that when on the next day he saw that the Claimant had not gone to the instruction class, he "waited awhile then when I saw them come in I went outside and asked if they were going to rules class. I yelled actually because they were quite aways away. They said no and I just waived my hand, said okay and I walked back inside." The Engineer Track then took no action against the Claimant in this case until the following day, July 1, 1988, when he withheld Claimant from service and ordered the Investigation Hearing. The testimony of the other Carrier officers involved indicates that they gave no orders either initially when General Foreman Woods talked to Claimant, or subsequently when Claimant informed General Foreman Gillette that he (Claimant) was not going to the rules class.

General Rule GR-C reads as follows:

> "Employees must devote themselves exclusively to the Company's service while on duty. They must make a prompt report to the proper officer of any violations of the Rules or Special Instructions. To remain in the service, employees must refrain from conduct which adversely affects the performance of their duties, other employees or the public. They must refrain from conduct which brings discredit upon the Company. Any act of insubordination, hostility or willful disregard of the Company's interest will not be condoned and is sufficient cause for dismissal."

The record in this case does not contain substantial evidence to support a charge of violation of General Rule GR-C. While this Board is disinclined to interfere with a Carrier's right to administer discipline under proper circumstances, we must require that the Carrier substantiate by positive, probative evidence the charges upon which they base the discipline which they administer. We have carefully read and reviewed the Hearing record in this case and have not found substantial evidence to support the charges as made. We must, therefore, overturn the discipline which has been assessed.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.