Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28767
THIRD DIVISION Docket No. MS-28956
91-3-89-3-363

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

PARTIES TO DISPUTE: (James L. Fluellen
(
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"(1) The dismissal of Railroader J. L. Fluellen, Sr., for alleged '... violation of Rules GR-C, paragraph 3 and GR-H, paragraph 5 of the Guilford Transportation Industries - Rail Division Employees Safety Rules.' on Saturday, October 15, 1988 was without just and sufficient cause, arbitrary, capricious and on the basis of unproven charges.

(2) The Carrier violated the Agreement when it refused to afford the Claimant his right of appeal as set forth in Section VI. 'Discipline', which was requested within a letter dated November 22, 1988.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Mr. J. L. Fluellen, Sr., shall be returned to his position with all seniority and benefits unimpaired and he shall be paid for all wage loss suffered."

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.

Claimant, was assigned to a construction crew headquartered at Saugus, Massachusetts and lived in Lowell, Massachusetts. Claimant was permitted by the Carrier to utilize a Company hi-rail truck to travel from the Lowell area to his work site at Saugus. He was permitted by Carrier to retain possession of the hi-rail truck on his assigned rest days.

By letter dated October 18, 1988, Claimant was withheld from service and ordered to appear for a Hearing on October 27, 1988, on a charge of alleged violation of Company's Rules GR-C, Paragraph 3 and GR-H, Paragraph 5. The Hearing was held as scheduled. Claimant was present and testified at the Hearing. He was represented throughout the Hearing by a Representative of the Maintenance of Way Organization. Following the completion of the Hearing, Claimant was informed by letter dated November 11, 1988, that he was dismissed from Carrier's service because:

> " - - - on Saturday, October 15, 1988, without authorization, you used a company vehicle to move a refrigerator.
>
> This is clearly a 'misuse of Company property' and a violation of Rule GR-H."

Subsequently, by letter dated November 22, 1988, the same Maintenance of Way Representative who represented Claimant at the Hearing on October 27, 1988, wrote to Carrier's highest appeals officer requesting an appeal Hearing in connection with the discipline as assessed. By letter dated December 1, 1988, the Carrier's highest appeals officer refused to schedule an appeal Hearing stating that:

> "As neither you nor your Organization has any standing on Springfield Terminal Railway I cannot accept any appeals from you on matters involving collective bargaining. I am required to deal with these matters strictly in compliance with the Schedule agreement and the Railway Labor Act which both require that only duly authorized representatives of employees and Carrier adjust disputes."

On December 16, 1988, the Maintenance of Way Representative again wrote to Carrier's highest appeals officer taking exception to the December 1, 1988, communication. Carrier did not reply. On August 25, 1989, Claimant requested that the dispute as set forth in the Statement of Claim of this Docket be handled by the Third Division of this Board.

This background forms the basis for the dispute which we will address in this Award.

At the outset, Carrier challenged the jurisdiction of the Third Division to hear and decide this case on the basis that the employees of Springfield Terminal Company are classified by the Carrier as "Railroaders" and therefore are not the traditional craft and/or class of employees as defined by Circular No. 1 of this Board and, therefore, if this Board has any jurisdiction in this case it would be with the Fourth Division - not the Third Division. Carrier further contended that because the United Transportation Union was the Organization which is signatory to the only rules Agreement in effect on the Springfield Terminal Company, the Maintenance of Way Representative had no standing to represent this Claimant, but rather only United Transportation Union Representatives had such standing. Carrier continued by advancing the

procedural argument that inasmuch as no appeal was "properly" made on the property and no conference was held on the property, our Board should summarily dismiss this case because it was not handled "in the usual manner" prior to being listed with this Board.

In response to the jurisdictional argument, we note with favor the decision of First Division Award 24019. As was similarly decided in Award 24019, regardless of what Carrier elects to call its employees, the fact remains, and the record of this case supports, that Claimant was employed as a maintenance-of-way man at the time of the incident here involved. Therefore, this dispute is properly before the Third Division of this Board and we reject Carrier's contentions to the contrary.

On the matter of no proper appeal having been made and, therefore, a failure to handle the dispute "in the usual manner" on the property, Carrier directs our attention to Section I. Part C. of the Springfield Terminal/United Transportation Union Agreement which deals with "Time Limit on Claims" and provides in pertinent part as follows:

> "C.1. All time claims and/or grievances must be made in writing to the General Manager/Superintendent of the Company within thirty (30) days from the date of occurance by the individual claimant or his/her duly authorized representative."(sic)

The aforementioned quoted excerpt is the only reference in the rules Agreement to "duly authorized representative." The remainder of Paragraph C.1. and all of Paragraph C.2. of this rule deals with and sets forth time limits for appeal and progression of time claims and/or grievances through the various Carrier officers to and including the highest appeals officer.

Because of the fact that the United Transportation Union is signatory to the rules Agreement on this property, they were informed of the pendency of this dispute and were accorded the opportunity to present their opinions on this matter to the Board. They did so and their opinions are part of the considerations which are being made in this case. The United Transportation Union did not personally appear before the Board. The Claimant was represented before the Board by the Maintenance of Way Organization Representatives.

Claimant argued that under the provisions of Rule VI of the applicable rules Agreement he had the right to "counsel of his choosing" at disciplinary Hearings. Therefore, he continues, that inasmuch as he chose the Maintenance of Way Representative as the "counsel of his choosing" at the Investigatory Hearing, that same Representative was his choice to handle the on-property appeal from the discipline assessed. It was also argued that because Carrier refused to accord him an on-property appeal from the discipline, Carrier violated both the provisions of Rule VI as well as Claimant's basic rights to an appeal Hearing. Claimant also contended that he had been improperly withheld from service pending the Hearing and that too violated his due process rights.

Rule VI, Discipline reads as follows:

> "No employee shall be disciplined without a fair hearing by a designated officer of the Carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this principle. At a reasonable time prior to the hearing, the employee is entitled to be apprised of the precise charges against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If the judgment shall be in his favor, he shall be compensated for the actual wage loss, if any, suffered by him, less any amounts earned during the period of suspension. In case of discipline, the right of appeal will be granted if exercised, in writing, within thirty (30) days. In case of suspension or dismissal, a conference on appeal will be given within ten (10) days. If after an employee has been found guilty and dismissed, he is later restored to service, such restoration shall be subject to whatever conditions are agreed to at the time of restoration. A stenographic transcript of the hearing will be taken and a copy will be furnished to the accused, or his representative."

Rule VI is a special rule which deals specifically with discipline and appeals therefrom. There is no language found in either Rule I.C. or Rule VI which ties Rule VI to Rule I.C. or vice versa. Rule VI has its own specified time limits for making appeals and the scheduling of Hearings thereon. These time limits are different from those found in Rule I.C. The reference to "duly authorized representative" is found only in Rule I.C. The reference in Rule VI is to "counsel of his choosing." In spite of Carrier's contention that this reference to "counsel of his choosing" applies only to the Investigatory Hearing, we note with favor the opinion expressed in First Division Award 16973 which, in a remarkably similar situation, ruled as follows:

> "We hold, therefore, that in a discipline case involving an individual who selects a personal representative other than the organization holding the governing agreement, and where the selected representative appears and defends the individual while under investigation, such representative has the continuing sole right to settle, dismiss, appeal, or otherwise progress the case until his authority is shown to have been abrogated."

In this case, it has not been shown that the authority of the Representative who acted as Claimant's "counsel of his choosing" at the hearing has been abrogated.

As for Carrier's argument relative to handling this dispute "in the usual Manner" on the property, it is Carrier who neglected to act "in the usual manner" by refusing to accept the request for appeal from the "counsel of his choosing" Representative. Carrier cannot create a situation which frustrates the handling of a dispute "in the usual manner" and then ask this Board to dismiss the dispute on procedural grounds which they created.

With regard to the merits of this case, we find two (2) areas which must be addressed, namely, the withholding of Claimant from service pending a Hearing and the assessment of discipline by dismissal for a first offense of the nature here involved. While it is true that Rule VI permits "...Suspension in proper cases pending a hearing...", the nature of the admitted offense in this case falls considerably short of even a liberal definition of "proper cases." The Claimant was permitted by Carrier to use the hi-rail truck. He was permitted to retain possession of the truck on his assigned rest days. The record does not contain any citation of specific restrictions which were placed on the truck's use. Even though it can rightly be presumed that the truck's use is for Company business only - including the transporting of employees from the point of residence to the work site - this record does not contain any indication that there was any compelling reason or urgency to demand the immediate removal of Claimant from service pending a Hearing. From this record it cannot be concluded that Claimant was a risk to the Company, to the other employees or to himself. It is our conclusion that Claimant should not have been withheld from service pending the Hearing. He should, therefore, be compensated for time lost from the date of removal from service to the date of the Hearing.

As a general rule, this appellate Board will not interfere with a Carrier's right to discipline its employees. In this case, there is an admission of improper use of the Company truck by the Claimant. However, there is also in this case an employee with more than ten (10) years of service with no prior discipline. Discipline to be effective must be instructive rather than punitive. Based upon the record and circumstances in this case, we conclude that the period of time during which this Claimant has been out of service is sufficient to impress upon him that derelictions of this nature will not be condoned by the Carrier. Claimant should, therefore, be returned to service with seniority unimpaired but without any compensation for the time out of service following the Hearing and dismissal, however, he is to be compensated for time lost as a result of being withheld from service prior to the Hearing.

A W A R D

Claim sustained in accordance with the Findings.

Award No. 28767
Docket No. MS-28956
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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1991.