NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29775
Docket No. MW-29636
93-3-90-3-629

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Union Pacific Railroad Company

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

(1) The dismissal of Track Inspector J. F. Montoya because he allegedly, '... falsified an accident in which you were allegedly injured on September 8, 1989 ... indicating a possible violation of General Rules A, B, D....' was arbitrary, capricious, without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File D-139/900091).

(2) The Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result of his unjustified dismissal."

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 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.

Claimant, an employee with 17 years of seniority, was assigned by Carrier as a Track Inspector. As such, he generally worked

alone covering his assigned territory in the performance of his inspection duties. Claimant's normal workweek extended from Monday through Friday with Saturday and Sunday as his assigned rest days. In the performance of this work, Claimant was assigned the use of a rail motor car.

On Friday, September 8, 1989, at approximately 6:45 P.M., Claimant was in the process of storing his rail motor car in its assigned tool house location when the rail car allegedly derailed. Claimant, on his own and without assistance from anyone else, allegedly lifted the rail car back on to the track. This rail car weighs 1,420 pounds. In the process of this alleged rerailing operation, Claimant allegedly "experienced a pain in his back, lost his balance and fell backwards." No report of this incident was made to any Carrier official until Sunday, September 10, 1989, when Claimant telephoned the Manager Track Maintenance at his home. At that time, Claimant was instructed to contact the Manager Engineering Maintenance at his home which he did at approximately 9:30 P.M. on Sunday, September 10.

In the meantime, on Saturday, September 9, 1989, Claimant alleged that he was "pretty stiff" but, because he was alone at home, he sat around "most of the day until the evening when my daughter-in-law and son came home, they insisted for me to go to a doctor - -". The examining physician's report, which was introduced into and made part of the hearing transcript, indicated that Claimant reported that he had "slipped while lifting to work on Thursday". The report further indicated that "pt. with only minimal pain yesterday, so went to work but pain much worse today." Eventually, on Monday, September 11, 1989, Claimant prepared a Carrier required report of personal injury on which he alleged that the injury occurred on "9-8-89".

By notice dated September 22, 1989, Claimant was instructed to report on September 27, 1989, for a formal Investigation on a charge of "allegedly falsified an accident in which you were allegedly injured on September 8, 1989 - -". By agreement of the parties, the hearing was postponed to October 17, 1989, at which time Claimant was present, represented and testified on his own behalf. Following the completion of the hearing, Claimant was notified by letter dated November 3, 1989, that he was dismissed from Carrier's service. Appeals on behalf of Claimant were progressed through the normal on-property grievance procedures and, failing to reach a satisfactory resolution of the dispute, it has come to this Board for final and binding adjudication.

The record indicates that Carrier by letter dated January 4, 1991, offered to restore Claimant to service subject to his ability to pass a physical examination. This offer to restore Claimant to

service was repeated on February 4, 1991. On February 8, 1991, Claimant indicated that he was unable to return to work because of his physical disability. The case record contains no further reference as to whether or not Claimant ever returned to service in an acceptance of this offer.

The Organization, in their progression of this dispute both on the property and before this Board, has advanced both procedural and merits arguments. It has argued that:

> "1. The hearing notice was not sufficiently precise and the rules cited at the hearing were not those cited in the notice of charge.
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> 2. Carrier erred when they refused to sequester the witnesses at the hearing.
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> 3. Carrier erred when they refused to permit Claimant's son to testify as a witness at the hearing.
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> 4. The hearing officer was not objective, impartial and fair.
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> 5. The notice of discipline was improperly issued by a Carrier officer other than the hearing officer. Also that the issuing officer was the first appeals officer."

The Carrier, on the other hand, argued that the hearing had been conducted in conformity with the Rules of the Agreement; that the notice of hearing was precise; that there is no Rule in the Agreement requiring sequestration of witnesses, therefore, the failure to sequester the witnesses in this instance did not violate Claimant's due process rights; and that the issuance of the discipline notice by the same officer who initiated the charges and served as the initial appeals officer was not a violation of any Agreement Rule or due process requirement.

From an examination of the record as developed on the property, this Board can find nothing inherently wrong with the charge notice as issued in this case. It contained all of the necessary requisites of a precise charge in a disciplinary proceeding. Claimant knew exactly what was being investigated. He was not surprised by any evidence or testimony of the Carrier witnesses. His representative had full opportunity to cross examine all witnesses and they (representatives) too were not taken

by surprise by any of the evidence presented by the Carrier. The Organization's arguments in this regard are not convincing and are rejected.

On the issue of sequestering witnesses, this Board is well aware of the divergence of opinion on this subject. While there may be a personal preference to sequester witnesses as an indication of giving the appearance of fairness in a Carrier hearing, we cannot ignore the logic or the precedential value of the many Awards of this Board which have held that in the absence of a specific Rule requiring sequestration, the decision to sequester is left to the discretion of the hearing officer. Second Division Award 11120 supports this conclusion. From an examination of the hearing record, we do not find that Claimant's rights were in any way impaired in this case by Carrier's failure to sequester the witnesses.

The Carrier's refusal to permit the Claimant's son to testify at the hearing was an error. The accused employee has the inherent right to present his case as he sees fit. The Carrier has the obligation to listen to ALL the evidence and testimony which might impact one way or the other on the determination of guilt. The Carrier, as the moving party in a discipline proceeding, has the right to weigh evidence and determine credibility. However, before evidence can be weighed and credibility determinations made, the evidence must first be heard. Having said that, this Board does not find, on the basis of the totality of evidence and testimony in this particular case, that the absence of the son's testimony was so egregious an error as to permit reversal of the disciplinary decision solely on that basis.

Neither does this Board find reversible error in the fact that the officer who signed the discipline notice also acted as the initial appeal officer. While this procedure may well be one to be avoided whenever possible because of giving the appearance of impropriety, there is nothing in this case file to indicate that there is any rule which sets forth who may or may not issue charge notices, conduct hearings, render decisions or act as appeal officers. We find the opinions expressed in Third Division Award 16347 and Fourth Division Award 3880 to be apropos to this case.

On the merits, and from our study of the case record, we find that the hearing transcript contains substantial evidence to support the conclusion that Claimant was guilty of the charges as made. The testimony of the witnesses relative to their findings and determinations at the scene as well as their interrogations of Claimant were straightforward and believable. Claimant's testimony, his lack of action to timely report the incident, his somewhat convenient memory, his physician's statements relative to

the alleged injury are collectively questionable and unconvincing. We do not find from this record sufficient reason to reverse the determination as made by the Carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin sh
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.