

Award No. 13978
Docket No. TE-12297

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

P. M. Williams, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)**

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Pennsylvania Railroad, that:

J. N. Zarra, Sr., regular assigned Block Operator 'Q' Tower, 6:00 a.m. to 2:00 p.m., was falsely accused of placing himself in a position to induce sleep and failing to perform his duties as Block Operator 'Q' Interlocking on June 24, 1959.

That the charge was not proven at two trials conducted on July 1, 1959 and July 20, 1959 and Appeal Hearing held on August 24, 1959 and despite the false charges, was disciplined by the imposition of suspension of seven days.

That J. N. Zarra, Sr. was not accorded a fair and impartial trial as provided by Regulation No. 6-C-1(b).

That the service record of J. N. Zarra, Sr. be cleared of the false charge and that he be compensated for the days he was suspended from working on his regular assignment and for time lost and consumed at the trials on July 1 and 20, 1959 and appeal hearing held on August 24, 1959.

OPINION OF BOARD: The essential facts are very much in dispute. Claimant was charged with "placing himself in a position to induce sleep and failing to perform his duties as a Block Operator."

The record discloses that the alleged incident giving rise to the charge occurred at 8:45 A.M., June 24, 1959, in the "Q" Interlocking tower. Three persons were in the tower at the time, i.e., Claimant, a leverman and the Carrier's Supervising Operator, the person who charged Claimant with the offenses.

Claimant's trial was conducted by the Assistant Supervising Operator whose immediate superior was the person filing the charges and who also appeared as Carrier's only witness at the trial.

The applicable agreement provides that employes will not be suspended without a fair and impartial trial. Petitioner asserts that this provision was violated. It requests that Claimant's record be cleared of the conviction and that he be compensated for the period of his suspension.

Because the disciplinary action taken against Claimant was based upon the uncorroborated testimony of the Supervising Operator at a hearing conducted by that person's assistant, we are of the opinion that the agreement's provision requiring a fair and impartial trial before suspension, was violated. Not only must the trial be fair and impartial but the record must contain facts which give the appearance of fairness and impartiality. The instant record does not give that requisite appearance.

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 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November, 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13978, DOCKET TE-12297

(Referee Williams)

The Majority's conclusions are unsupported and in error. When this dispute was handled on the property, there was no complaint or objection premised upon the Assistant Supervising Operator conducting the trial while the Supervising Operator was the witness. The matter was not in issue before the case reached this Board. If the Petitioner believed this managerial relationship prejudiced the Claimant's rights, they had ample opportunity to object during the course of the trial, or for that matter—while the case was on the property. Failing to do so, they waived whatever technical or procedural defects which may have existed. See Awards 8993, 9322, 12001 and 13040.

Moreover, as we interpret the Majority's findings, they appear to assume the decision of the Assistant Supervising Operator was wrong per se, without

pointing to any evidence showing that he acted unfairly or improperly. We are certain no facts were presented or discussed which would give substance to any such conclusion. The test applied by the Majority here is unrealistic and enjoys no sanction from precedent either legal or administrative. The Hearing Officer is entitled to the same assumptions which arise in favor of Claimant under our system of jurisprudence. His actions are assumed to be proper unless specific evidence of erroneous rulings or improper conduct are submitted. None were submitted.

It is to point out the obvious that a certain managerial relationship will generally exist in practically all discipline cases arising on the railroads. Cognizant of this fact, and aware that the individual contracts were made in contemplation of this procedure, the Board has taken a legalistic approach to the matter, and will not interfere with the conducting officer's determination, unless it can be shown—by evidence of record—that Claimant's rights were actually abused in the course of the trial.

Furthermore, the Majority did not appear to be overly concerned with Claimant's guilt or innocence of the charge. As usual, they became engrossed in a morass of technicalities more befitting a court trial than a disciplinary action on a railroad. The distinction between the two was repeatedly brought home to the Majority without apparent success. For someone who might be interested in that question however, a brief statement made by the Claimant at the trial relating how he happened to be found in a position to induce sleep, should suffice:

Claimant: "I just can't recall, there is many things you said that I didn't hear at all. Now I must illustrate to you the position I was in when you saw me; in that corner of the tower it being very dark, I am sure you are greatly mistaken. Now if I tell you that around a quarter to seven I called the office and nobody answered until the time you came in. I called this number 2426 and nobody answered, so the job got busy and I didn't have much time to call again, but later on it got a little slow, so with a terrific headache I decided to go in back of the machine and arrange my safety kit, the safety kit is under the locker on the floor, to get the kit I must get on my knees and in doing so I leaned on the bench that Mr. Stewart refers to. The leg of that bench is broken, naturally it tilted over on its side, so in trying to get up a coat fell on my head from the top of the glove compartment, and just at the time it tilted over in a position which prevented me from getting out from under the coat and then I heard somebody ask me, 'who are you?' That is the tilting position that he saw me in. Now this Safety Kit I explained to Mr. Stewart and he told me to keep it outside, which I later did; but insofar as lying down or sleeping that is a foolish statement, I resent that very much because what I was doing in the back was in line with my duties as operator, as I am responsible for supplies. Mr. Large in the past had advised me that he is going to send me a Safety Kit, but it is loose in a paper bag, being it is loose I put it in my locker and had the carpenter make me a small cabinet. Last week it was delivered to me and I asked him to put it under the locker, when I get a chance I would fix it. This morning I decided to go in back and fix it, and that is how Mr. Stewart found me in what he calls, in a lying position, which is not true."

It can readily be seen why the Majority was not too interested in discussing the evidence in this case.

We dissent.

W. F. Euker

R. A. DeRossett

C. H. Manoogian

G. L. Naylor

W. M. Roberts