Award No. 18963

Docket No. TE-19130

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Lehigh Valley Railroad, T-C 5788, that:

1. Carrier violated the Agreement because it assessed thirty demerit marks against the record of Mr. R. P. Waterhouse and suspended him for ten days following investigation held on May 14, 1969, on the basis that the notice of the investigation and investigation were improper, the hearing officer was obviously prejudiced and unfair, and the charge was not proven.

2. Mr. R. P. Waterhouse should be reimbursed for all time lost (ten working days) at the regular rate of his position (P&L Junction Tower), his record cleared of any wrongdoing for the incident investigated and reimbursement for expenses incurred in attending the investigation held on May 14, 1969.

CARRIER DOCKET: None

OPINION OF BOARD: Claimant was advised in writing by Carrier in part as follows:

"Arrange to report to the Conference Room at 360 Dingens Street, Buffalo, New York at 10:00 A.M., E.D.S.T., Wednesday, May 14, 1969 for hearing to develop the facts and determine your responsibility, if any, in connection with your failure to relieve E. J. Murray on your regular assignment on April 30, 1969."

As a result of the investigation, Carrier suspended Claimant from service for a period of ten (10) working days and assessed him thirty (30) demerits to be placed on Claimant's service record.

The Organization in its ex parte submission to this Board sets forth the issues to be as follows: (1) Did the notice of May 5, 1969 to appear for hearing meet the requirements of the Agreement? (2) Was Claimant afforded a fair and impartial hearing, prerequisite to a finding of guilt and assessment of discipline? (3) Was Claimant responsible for failing to relieve the first shift towerman at P & L Junction Tower on April 30, 1969?

In regard to the first issue, whether the notice given Claimant in this instance satisfied the requirement of Rule 28 of the Agreement, as to apprising him of the precise charge against him, we find that the notice given to Claimant herein sufficiently apprised Claimant of the offense charged so that he was able to properly defend himself, and thus satisfied the requirements of said Rule 28 of the Agreement. See Award No. 12898 among others.

Claimant testified that he reported for work on the date in question, but that he was unable to work because of the unsanitary conditions existing at the Tower; that he found the toilet at P & L Junction Tower to be unsanitary and unuseable; that he refused to defecate on the ground again, which he testified he was forced to do that same week.

In regard to the second issue as to whether or not Claimant was afforded a fair and impartial hearing, we find that Carrier, in this instance, failed to grant Claimant a fair and impartial hearing. We reach this conclusion upon close examination of the record, wherein Carrier's hearing officer, Trainmaster H. A. Rugh, did not permit Claimant and/or his representative at the hearing to interrogate witnesses as well as Claimant to the condition of the chemical toilet prior to April 30, 1969, the date in issue, or permit Claimant to fully explain why he did not relieve on his regular assignment on the date in question.

An example of the unfair restriction placed on Claimant's representative, Mr. J. Finnegan, by Carrier's hearing officer, Mr. Rugh, is clearly seen in Mr. Finnegan's attempt to cross-examine Carrier's witness, Crew Dispatcher, G. Barlow, as follows:

"Q. Have you ever worked at P & L Junction tower?

A. Yes.

Q. Could you say for the record when you last worked there?

A. I would have to check back records, year or two, off hand I could say not any more than two years.

Q. During that period of time when you worked there can you at this time,

Mr. Rugh interrupting:

At this time I would like to object and insist you confine your statements to the notice which relates to failure to relieve E. J. Murray on your regular assignment on April 30, 1969, please.

Mr. Finnegan: (speaking)

Mr. Rugh, I was under the impression that this hearing was called to develop all the facts as stated in your notice and to determine responsibility. I feel that my line of questioning Mr. Barlow is in the bounds of this notice. The very principle of a hearing is to develop all of the facts both good and bad and I want to say for the record that your interjecting yourself into my cross examination is an indication

that we will not be given a fair and impartial hearing and also indicates pre-judgment on your part. I am going to continue until you stop me. May I proceed?

Mr. Rugh:

You may proceed with your line of questioning only to the scope of the notice of May 5, 1969. Mr. Barlow as the company witness and crew dispatcher is instructed only to relate answers relative to the scope of the notice failure to relieve E. J. Murray on assignment April 30, 1969.

Mr. Finnegan:

Again you are indicating the lack of fairness and impartiality required of a hearing officer by taking the notice out of context. The notice as spelled out in the record includes the entire notice and as I said and I quote the notice said 'for hearing to develop the facts.' All I am trying to do is develop facts in connection with Mr. Waterhouse' alleged failure to relieve Mr. E. J. Murray on April 30, 1969. As it is your wish not to allow me to cross examine Mr. Barlow in my own way, then I will abide by your wishes but I want that noted.

Mr. Rugh:

It is so noted."

Cross-examination of witness Barlow was further unfairly restricted by Carrier's hearing officer and this is also clearly seen by the following taken from the record:

"Q. In your testimony you said that Mr. Waterhouse called to say that he would not work under these circumstances. Did he elaborate what he meant under these circumstances and, if so, what were they?

A. Yes. He said that he had checked the toilet facilities and that, in his opinion, they were full and he would not work under these conditions.

Q. When he said full, did he indicate that he meant it was unsanitary condition?

A. That I could not determine.

Q. Did he ever make this complaint prior to April 30, 1969?

Mr. Rugh interrupting:

I object, please confine your questioning to the scope of the notice.

Mr. Finnegan:

> I feel this is within the scope of the notice, even under the limited lines that you have restricted me to. However, I will proceed under protest and take up a different line of questioning as long as the record notes that you have given me a very limited area in which to develop the facts."

Carrier's hearing officer unfairly restricted Claimant's representative from interrogating Carrier's witness Barlow in regard to identifying a picture of the commode at P & L Junction Tower. Carrier's hearing officer also refused to allow Claimant's representative to introduce into evidence a letter from the State of New York Department of Health because it was dated September 17, 1968, although Claimant testified that the said letter did have an effect on his actions on April 30, 1969.

This Board does not require strict adherence to the rules of evidence used by judicial tribunals. See "How Arbitration Works" by Elkouri, page 173 thereof. Further, Volume 29 of American Jurisprudence, titled "Evidence," Section 300, page 345 thereof, reads as follows:

> "It has sometimes been held, in view of the general principle of inadmissibility of evidence of similar or comparable facts having no probative value, and probably also because of the circumstances of the particular case, that evidence that a condition existed at a specific time is not admissible for the purpose of showing a condition or state of affairs at some other time. However, in view of the inference or presumption of the continuance of a condition or state of facts once established by proof, it is more generally held that when the condition of premises or of an appliance at a particular time is in issue, evidence of the condition of such premises or appliance at a time prior or subsequent to the time in question is relevant and admissible, provided it relates directly to the issue in question and is not too remote in point of time. So far as such interval of time is concerned, the nature of the thing or condition and the particular circumstances of the case are controlling, and therefore no fixed rule can be laid down other than that the evidence must relate closely enough to the time in question to make it apparent that the condition has not been changed or it must appear that the condition is one which is so constant or permanent that lapse of time will not make a material difference."

It is important that a Claimant be entitled to develop testimony which may have been pertinent to the case in order to insure that a Claimant receives a fair and impartial hearing. This is also important to Carrier because by having the testimony developed fully at the hearing, Carrier is thus in a much better position to evaluate the evidence and assist it in properly assessing any warranted disciplinary action.

In this instance Carrier's hearing officer did not know whether or not testimony concerning matters existing prior to April 30, 1969 would be relevant to the issues until first they were developed at the hearing, and that is reason enough for such testimony to be admissible. It may be in this instance that such testimony would not have had any material effect on the outcome of the hearing; but in the interests of fair play, Carrier's hearing officer should have permitted Claimant and/or his representative to have developed testimony and introduced exhibits concerning events sur-

rounding the date in question and which may have been relevant to the actions taken by Claimant on the date in issue, April 30, 1969.

Thus, we feel that Carrier's actions in restricting the cross-examination of Carrier's witnesses by Claimant as well as the restriction placed on the testimony of Claimant and the introduction of exhibits, all as set forth aforesaid, prevented Claimant from receiving a fair and impartial hearing, and we will sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1972.

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