NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25810

THIRD DIVSION

Docket Number MW-25626

Nicholas Duda, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
(Eastern Lines)

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

(1) The dismissal of Welder Helper J. B. Hope for alleged violation of Rules "801" and "802" was without just and sufficient cause and on the basis of a hearing that was neither fair nor impartial (System Files MW-83-48 and MW-83-61).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, the charges leveled against him shall be removed from his record and he shall be compensated for all wage loss suffered beginning April 5, 1983.

OPINION OF BOARD: After receiving a certified letter dismissing him, Claimant sent a letter to the Carrier requesting a hearing and that "L. D. Hope be a witness". Claimant concluded "Please advise time, date and place hearing will be held with copy to Mr. J. R. Solares [Assistant Vice-Chairman] and Mr. W. E. Allen [General Chairman]". In reply, Carrier sent a certified letter setting the time, date and place of the hearing. Although Claimant did not appear, the hearing was conducted on April 26, 1983 without his presence. His Assistant Vice Chairman was present and did participate by asking questions of the three Carrier witnesses. The next day, April 27, 1983, the General Chairman wrote Carrier that Claimant had not received the hearing letter until after the hearing, and the General Chairman had not yet received it. The General Chairman requested "another hearing ... in order for him [the Claimant] to face the witnesses who testify against him". On April 29, 1983, the Carrier sent Claimant a letter sustaining the discharge based on the hearing. Later the Carrier sent the General Chairman a letter denying his April 27 request for another hearing.

The Organization presented two claims, one on the denial for re-hearing and another on the dismissal. The parties agreed that both claims would be filed as one case before this Board.

The Organization seeks to overturn the dismissal on two grounds:

1. The hearing was neither fair nor impartial as required by Article 14B because Claimant, who had not received notice until after the hearing had begun 260 miles away, was not in attendance.

2. The dismissal was without just and sufficient cause.

Without prejudice to its position, the Organization also asserts that dismissal was an excessive penalty. Carrier contends that the hearing notice was proper and that evidence at the hearing clearly showed that Claimant was guilty as charged. Furthermore says the Carrier, in light of Claimant's previous disciplinary record, the penalty was not excessive. On the latter point, the Organization claims that the prior discipline record cannot be considered because it "was not submitted to or discussed with the Organization during the handling on the property".

In Third Division Award 13179, the functions of the Board were stated as follows:

> "In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether:
>
> (1) Claimant was afforded a fair and impartial hearing;
>
> (2) The finding of guilty as charged is supported by substantial evidence;
>
> (3) The discipline imposed is reasonable."

Article 14 stipulates that an Employe dismissed:

> "...will be advised of the cause for such action in writing ...[and] shall, upon making a written request...be given a fair and impartial hearing... [at which] the Employe may be represented by duly accredited representatives...of the B of M of W E...of his choice."

It is generally recognized that Article 14 entitles the Employe to be present, participate and cross examine witnesses at the hearing. As pointed out by the Organization, those rights cannot be effectively exercised unless the Claimant is notified of the impending hearing. Therefore, the critical question in regard to the alleged failure to give a fair and impartial hearing is: Whether the Claimant was properly notified of the scheduled hearing.

The Carrier sent the hearing letter by U. S. Postal Service Certified Mail, Return Receipt Requested, to the Claimant's last known address on record. (The same method had been used successfully about three weeks earlier to transmit the letter notifying Claimant of his dismissal; the dismissal letter had been posted April 5, 1983 and received by Claimant on April 7, 1983.) The hearing letter was posted by the Carrier on Wednesday, April 20, 1983 notifying Claimant of the April 26, 1983 hearing. The Claimant received the letter on April 26, a Tuesday.

Carrier relies on a number of prior awards, particularly Award Number 324 of Special Board of Adjustment No. 100 which considered a very similar fact situation and claim. In that case, the Carrier sent an Employe a Certified Letter, Return Receipt Requested, on a Saturday; the letter stated that an investigation hearing on charges would be held the following Tuesday morning, three days later. No one received the letter when the Postman sought to deliver it on the next Monday, so the Postman left the usual notice about the Certified Letter. The Employe did not receive the letter before the hearing, which was held despite his absence. The Board followed the presumption, long-accepted in railway labor law, of receipt by the addressee of a letter properly addressed and desposited in the mail with paid postage. The Award stated:

> "When the postman notified the claimant there was a certified letter waiting for him at the Post Office... the Claimant was properly notified of the investigation, barring extraordinary facts and circumstances which do not appear to be present in the record.
>
> "The Carrier is not an insurer of the Claimant's receipt of notice of investigation. It cannot do more than utilize reasonable and usual means of written communication to inform the Claimant of the impending investigation...."

In the case before this Board, the Claimant had requested the hearing; he was expecting the notice which was sent to his address which he included in his request letter. The Board notes that the Organization merely relied on the receipt by Claimant after the hearing had begun and did not raise a question or attempt to show that the notice was not timely sent; in the absence of such claim and without any evidence by Claimant, the Board will not consider that question. Furthermore, the record does not show that Claimant offered any explanation for why he did not receive the letter until six days after it was sent by Certified Mail. Under these circumstances, the Board finds no basis to disregard the presumption of receipt. Accordingly, the principle of constructive delivery applies; Claimant was properly notified of the hearing. (Third Division Awards 24129 and 13685.)

General Chairman Allen said in his letter to the Carrier that his office had not received a copy of the hearing notice. It is true that the Carrier's letter does not reflect that a copy was also being sent to the Organization Office. Although the record does not show whether Vice Chairman Solares received advance notice of the hearing, it does show that he was present and participated effectively in the hearing. Therefore, to the extent that an error may have been made in notice to the Organization, it was not prejudicial.

The critical issue in this case is whether the finding of "guilty as charged" was supported by substantial evidence at the hearing on April 26, 1983. A finding of guilt required substantial evidence that Claimant had been insubordinate and used vulgar language on March 18, 1983 in the District Manager's Office at Shriever, Louisiana, as described in the Carrier's April 5, 1983 letter.

The evidence at the hearing consisted of the testimony of three witnesses, District Manager D. F. Brown, Track Foreman M. H. Himel, and Clerk S. M. Underwood. The record of their testimony supports a finding by the Carrier of insubordination and vulgar language by an uninvited visitor who attempted to use the telephone. However, the Organization showed by the same witnesses through cross-examination at the hearing on the property that the association or connection between Claimant and the misconduct is highly speculative and insubstantial. Specifically, the Organization established at the hearing that the visitor had no identification even as an Employe and did not give his name; none of the three witnesses knew the Claimant. The only evidence identifying the Claimant as the visitor is tenuous, contradictory, and of questionable credibility.

Both Mr. Brown and Mr. Himel testified separately that Brown asked the visitor "who he was". The following is taken from the Hearing Transcript:

> "Brown: This man walked into my office about 3:00 p.m. he come through the clerk portion of the trailer and walked into my end of the office in sloppy manner, and when I say sloppy manner I mean that the man had his belt unbuckled, his belt was hanging out of his shirt was unbutton this man gave me the appearance of a hobo an the man walked over to a vacance phone that was on the wall I was on one and my clerk was on the other phone. This man pick up the phone the clerk was on when see that someone was on the line he slam the phone back on the wall. Which at that time I stop my conversation and ask the man what he was doing he told me he was trying to call Mary Jane. I ask the man in a polite manner I wish that he would tell me who he was and if he would ask to used the phone the man stood there a minute just looking at me in a staring manner and then he said well I don't have to use your mother f------ phone. I told the man at that time if that be the case then I would like for him to leave the office. The man stood there a minute looking at me then started toward the door and just as he started out the door he turn and looked at me and said sorry mother f-----. When the man said this I got up and walk up the door and ask him what his name was. He was walking toward his car and still would not tell me who he was. There was some man riding with him standing by the car he told that man get in and lets get out this mother f------ place. Through asking questions through other people I found out that this man was working on Avondale district."

Brown testified that he asked for identification twice, but the man would not "tell" either time. Mr. Himel had a different recollection:

> "Question by Presiding Officer: ...tell me what [the visitor's] reply was to Mr. Brown when Mr. Brown asked him who he was?
>
> Himel: He said he was a Welder Helper working on Steel Gang on the Branch."

Even if Himel's recollection were credited, the evidence at the hearing cannot support the identification of the uninvited visitor as being the Claimant. This was brought out in the cross examination of Brown by Vice Chairman Solares. Solares asked: "How did you identify welder helper J. B. Hope [Claimant] as the person in question?" Brown answered:

> "After the man left my office I started asking questions to who the man was M. Himel said that the man said he was a welder helper on the steel gang. Through call avondale where the steel gang was working I found out that there was only two welder helper on the steel gang one was Mexican origin by the name of Garcia who I know the other was a Black Man who was J. B. Hope. The party who enter my office was a Black man that enter my office."

In other words, the uninvited visitor said he was a Welder Helper and some unidentified person not present at the hearing told Brown that Claimant was a black Welder Helper. From that flimsy hearsay, the Hearing Officer concluded that Claimant had been the uninvited guest. There was not even any evidence at the hearing placing Claimant in the vicinity on the day in question.

When Brown asked for identification a second time, after expressing criticism for use of the phone without permission and other conduct, the visitor was alerted that Brown was at least displeased. The visitor could have, but did not, give his name. On the contrary, his conduct indicated a desire to leave quickly without being identified. Thus, Brown's version that the visitor had not given any identification is plausible. However, even if Himel testified accurately when he said he heard the visitor say he was a Welder Helper, the identification requires corroboration and specification. The necessary further evidence was not shown in the record.

A simple, direct and effective identification could have been made at a hearing where the witness and Claimant confronted each other. Claimant and the Organization sought a rehearing where this would have been possible. The Carrier refused that opportunity. As indicated above, the Carrier was not required to conduct a rehearing, but it acted at its peril if the evidence at the hearing was not substantial enough to support a finding that Claimant had committed the misconduct. Inasmuch as the charge against Claimant cannot reasonably be supported by the evidence at the hearing, which was not substantial, the claim must be sustained. He is entitled to be made whole for wages and benefits he lost less any monies he would not have received but for the improper dismissal.

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.

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 12th day of December 1985.

CARRIER MEMBERS' DISSENT
TO
AWARD 25810, DOCKET MW-25626
(Referee Duda)

The Majority decision is in disregard of the Rules of Procedure of this Board adopted more than 50 years ago in compliance with the requirements of the Railway Labor Act, and followed uniformly in literally hundreds of Awards since that time. What adds even greater injury to the insult is that the Majority selected an out-of-service case to express its unfortunate opinion.

The Majority finds that the Carrier did not support its determination that Claimant was guilty of violating Carrier Rules with substantial evidence adduced at the Investigation. Such position was not taken by the Organization in its handling of the dispute on the property, in its Submission to the Board, in its Rebuttal Submission to the Board, in its oral argument before the Referee at the hearing it requested, or in the panel discussion following the hearing. The Organization's position and argument throughout the handling of this case was that the Carrier violated the Agreement by not scheduling another Investigation following the one at which the Claimant did not appear or, in the alternative, the Carrier violated the Claimant's right to due process under the Agreement by holding the Investigation in the absence of the Claimant. These were the only issues raised by the Organization and, with respect to these issues, the Majority ruled in the Carrier's favor.

When the proposed Award was presented, a further panel discussion was requested and held. Every scrap of evidence presented by the Organization on the property was examined. Nothing could be found to support a conclusion that the Organization had taken the position that the Carrier had not carried its burden of proof at the Investigation that was held. Nor, for that matter, could anything be found in the Organization's Submission or Rebuttal that dealt with the subject. The Referee was

provided with a copy of Circular No. 1 of the Board, entitled "National Railroad Adjustment Board Organization and Certain Rules of Procedure." The Circular was issued by the Board a few months after the enactment of the Railway Labor Act in 1934, pursuant to Section 3, First(v) of the Act (45 USC Section 153, First(v)) which required the Board to "adopt such rules as it deems necessary to control proceedings before the respective divisions...." The Referee's attention was directed particularly to the provisions of the Circular which provide the parties, in taking a position before the Board,

> "...must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."

The Referee was furnished with numerous Awards of all Divisions of the Board that have held, without a single exception, that the Board cannot consider positions, evidence, or argument that the parties had not taken or made on the property. One of the cited Awards was that rendered by the Referee in this case. Thus, in Third Division Award 25647 (Duda), the Board stated:

> "'It is well settled that new issues or defenses cannot be raised for the first time before the Board. This principle applies to an Employe's prior record as well as any other issue.' (Third Division Award No. 24273)"

All to no avail.

The fundamental error of the Majority is highlighted in the Award itself. Thus, the Majority seeks to justify its holding by asserting that the Carrier "acted at its peril" by not holding another hearing as had been requested by the Organization. The Majority conveniently forgets that the Organization had claimed its right to another hearing solely on the ground that the first hearing violated the Agreement because the Claimant was not present; and that such claim had been <u>denied</u> by the Majority. In essence, the Award holds the Carrier responsible because it was not clairvoyant in forseeing that the Majority, long after the fact,

would find determinative an issue never considered to be significant by the Organization and never raised by the Organization. The obvious rationale for the regulation contained in Circular No. 1 of the Board, and the Awards thereafter, is that the record on the property must show that the parties were given the opportunity to respond to the position and arguments of the other side. In this case, the Carrier never had reason to demonstrate that there was substantial evidence to sustain the findings of the Hearing Officer because the Organization never raised the issue.

The Award in this dispute is arbitrary and capricious. It is in violation of the procedures of this Board which were formulated in accordance with the requirements of Section 3, First(v) of the Railway Labor Act as amended (45 USC Section 153, First(v)). It is a prime example of an arbitration tribunal which refuses to recognize that it "does not sit to dispense its own brand of industrial justice," a refusal that was condemned by the Supreme Court long ago in Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

We Dissent.

M. W. FINGERHUT

W. F. EUKER

M. C. LESNIK

P. V. VARGA

J. E. YOST