

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 18, 2001 when it issued the Claimant, Mr. B. R. O'Neal a 30-day Suspension, 5-days served, and 25-days deferred, for allegedly using improper tools to perform his duties which resulted in a personal injury.
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier's File 14-01-0229. Organization's File 90-1313-0115.CLM]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Trackman/Truck Driver B. R. O'Neal, was injured on the job on August 16, 2001. Consequently, an investigation was held on September 13, 2001, pursuant to Rule 13 of the Parties' Agreement, to determine his responsibility, if any, in connection with his injury.

Following the investigation, on October 18, 2001, the Claimant was notified that he was assessed a 30-day suspension, with five days actually served, 25 days deferred, and a one-year probationary period (during which the deferred days might be actually served), for violation of several named rules.

The Board notes that the letter of charge was signed by the Carrier's Division Engineer, Mr. J. M. Solano; the Conducting Officer at the investigation was the same person, Mr. Solano; and the officer issuing the disciplinary assessment was the same, Mr. Solano. The letter of charge read as follows, in part:

"Please arrange to attend investigation . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with not using the proper equipment to perform your duties which resulted in injury to Mr. O'Neal . . ."

[Underscoring added]

The Carrier's disciplinary decision was appealed by the Organization. The appeal addresses two procedural issues, as well as the merits of the case. This Board's disposition makes it unnecessary to address the issue of whether the notice of charges was adequate, in that it did not cite any rules allegedly violated. Similarly, we do not get to the merits of the case.

The General Chairman argued that, "Carrier failed to provide the Claimant with a fair and impartial hearing whereby, Division Engineer Solano wore the hat of prosecutor, witness and judge. . . . Furthermore, Division Engineer Solano has personally participated in the entire factual background of this dispute, he was in effect the principal witness when he drew upon his own knowledge in asking leading questions of the accused. First Division Awards . . . have all ruled, where the hearing officer had preferred the charges, conducted the hearing, taken part as a witness and issued the notice of discipline, was a violation of the Claimant's right to a fair and impartial hearing."

The Carrier's highest designated officer to handle such disputes, the General Director - Labor Relations, rebutted, "Contrary to the Organization's argument it is not a fatal flaw for a Carrier Officer to perform Multiple rolls [sic] during a disciplinary process. First, in this case while the hearing Officer did issue the discipline he was not also the reviewing officer. This is not a fatal flaw and is no reason to set aside the discipline. It is well established that Carrier Officers can hold multiple rolls [sic] and as long as the process is subject to independent review, as this case now is; and the record demonstrates that a fair and impartial hearing occurred wherein the employee received all his agreements rights, as this record does, . . ."

The Board has carefully studied the transcript of the investigation afforded the Claimant. The Organization suggests that the Division Engineer "was in effect the principal witness" when he asked leading questions. The Division Engineer did not appear as a witness in the investigation, of course, as he was the Conducting Officer. But the impact of his prior knowledge is illustrated, for example, in Question and Answer No. 47, and the following series of questions and answers, in which he asked, "Mr. Martin, you stated Mr. O'Neal was a truck driver, is that correct?" Mr. Martin answered affirmatively, and that question and answer triggered several leading questions which indicate the Conducting Officer had formed his own notion of how the work which resulted in the Claimant's injury might have been better performed. But, in fact, the transcript does not contain a previous statement by Mr. Martin that the Claimant was a truck driver. The question was, indeed, leading the witness, and served as the springboard for an exposition of the charging/conducting officer's preconceived theory about the accident, thereby demonstrating the (probably unintended) consequences when an officer performs multiple roles in the disciplinary process.

The Board believes that the purpose of the investigation prescribed in Agreement Rule 13 is to develop the facts pertaining to the alleged offense. It is not intended to be a forum to develop by whatever means necessary, the evidence to support a preconceived theory generated in

the charging officer's mind. The fairness and impartiality of the process is compromised when it is used to expose how the officer with the most interest in the case would rather have had the job performed. Fairness and impartiality imply that the Conducting Officer not have a vested interest in the outcome. When the same officer issues the notice of charges, conducts the investigation, and then assesses the outcome and determines the Claimant's responsibility, fairness and impartiality are inescapably called into question, even where the officer acts with the best of intentions. Finally, as the assessor of discipline, he inevitably becomes the arbiter of his own purposes.

True enough, as the General Director - Labor Relations points out, the decisions of the Division Engineer are subject to independent review by the highest designated officer. That those decisions were not overridden at that point does not prove that the process was fair and impartial. Further, the notice of charges stated the charging officer's preconceived determination that the Claimant's injury resulted from "not using the proper equipment to perform your duties." In a fair and impartial investigation, that cause would have been the subject of inquiry, rather than pursuit of evidence to support the cause already determined.

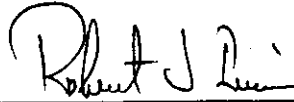
The Parties cited a number of decisions by a Public Law Board and the National Railroad Adjustment Board, addressing cases in which carrier officers occupied multiple roles as complainant, hearing officer, assessor of discipline, and appeal officer. We have read and considered all those listed awards. The most compelling is Third Division Award 32643, in which the same officer investigated the alleged infraction, decided that an investigation was warranted, conducted the investigation, determined the charged employee's guilt, assessed discipline, and denied the initial appeal. That Award held that the charged employee was nevertheless afforded due process, and there was no discernable prejudice to his right to present a defense arising from the conducting officer's multiple roles.

While there is considerable merit to the tenet that prior awards treating the same circumstances should be followed, in the interest of consistency, boards established under Section 3 of the Railway Labor Act cannot be expected to act in mindless lock-step, when to do so would perpetuate error. In short, this Board does not agree with the findings of Award 32643, above. Disciplinary hearings in this industry are under the control of the carriers. There is simply no reason that procedural due process safeguards cannot be fully ensured.

The Board concludes that the multiple roles performed by the Division Engineer impaired the Claimant's due process rights and, consequently, the discipline imposed thereby should be rescinded. The claim is sustained. Because of the circumstances peculiar to this case, this Award is not intended to establish any kind of precedent.

AWARD

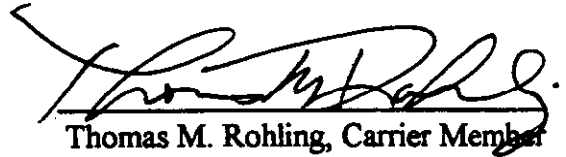
Claim sustained. The Carrier shall comply with the Board's decision no later than sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member



Date