# NATIONAL MEDIATION BOARD
# PUBLIC LAW BOARD NO. 5436

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
MICHAEL D. MCCARTHY, CARRIER MEMBER
LEON FENHAUS, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

THE BELT RAILWAY COMPANY OF CHICAGO

**Award No. 1**
**Robert L. Scheri - Dismissal**

*Date of Hearing - September 24, 1993*
*Date of Award - September 30, 1993*

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Machine Operator R. L. Scheri was without just and sufficient cause, based on a hearing that was neither fair nor impartial, capricious, unsupported and in violation of the Agreement.

2. Claimant R. L. Scheri shall now be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 5436, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

Shortly before 11:15 am on Saturday, April 6, 1991, a member of Claimants' tie gang used a fusee to light a "taco fire" to be used in warming gang members' lunches. The fire raged out of control and spread to the property of XTRA Corporation, adjacent to Carrier's tracks, where it destroyed 13 trailers. A Chicago Fire Department Report, completed on the incident, indicated that the fire was caused by welding equipment being used by Belt employees. Carrier's Police Department determined that this conclusion was inaccurate, because no welding equipment was being used in the vicinity at the time. In interviews with the members of the tie gangs that were working in the area, Carrier investigators were told that the fire had not been started to heat lunches as all employees had ordered out from a restaurant that day.

Additionally, the investigators were told that four juveniles were seen fleeing the scene of the fire on bikes at the time.

Claimant knew that this information was not factual. He had knowledge of who had started the fire and why it was started. He knew that all employees had not ordered their lunches from a restaurant that day and he knew that the story of juveniles being observed fleeing the scene was a fabrication, concocted by members of the gang (Claimant included) who feared that layoffs might ensue if the cost of the damaged XTRA equipment would be taken from the engineering department budget. And, while it has not been established that he actually participated in making these misrepresentations to the investigators, by his own admission to this Board, he chose to remain mute first, while listening to others do so and second, when he was asked what he knew about the start of the fire.

XTRA, following the loss of 13 of its trailers, immediately sought recovery of their value from Belt. On the basis of the belief that the fire was caused by unknown juveniles, Carrier resisted payment of XTRA's claims.

Seven or eight weeks after the fire Claimant maintains that he informed his supervisor as to its true origin. The Supervisor indicates that this was not the time that Claimant shared with him the correct details on the incident. Instead, the Supervisor noted that the discussion occurred more than nine months later when they were both in attendance at a social function at a local bar.[1]

In early November, 1991, Claimant contacted representatives of XTRA and identified himself as a Belt employ who possessed knowledge concerning the origins of the fire. He asked if XTRA was offering a reward for information on the matter. He was told that the matter would have to be checked with XTRA's attorney. About a month later, Claimant had a luncheon meeting with the XTRA representative and an XTRA attorney and supplied them with at least some of the details concerning the origin of the fire and the conspiracy of the tie gang members to fix blame on juveniles. At least in part on the basis of the information Claimant supplied XTRA, Carrier was sued. The Complaint alleged, *inter alia*, that Belt:

a. failed to properly supervise maintenance employees in the operation of their duties while defendant's maintenance employees were working at the aforementioned property;

b. failed to use reasonable care in preventing a fire to start and spread to plaintiff's property;

c. failed to use reasonable care in allowing defendant's maintenance employees to start a fire;

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[1] It is not necessary for this Board to make a determination on what version of the incident is correct, Claimant's or the Supervisor's, although review of the transcript would suggest that the Supervisor's version is more believable, and it is obvious that the hearing officer credited his testimony and not that of Claimant. What is important from this testimony is that even if Claimant's version is correct, it would still be long after the incident before he shared the true facts with someone in authority.

d. failed to use reasonable care in allowing the fire to spread to plaintiff's property

e. was otherwise careless and negligent.

Subsequently a number of employees from the tie gang, including Claimant, were noticed to submit to discovery depositions. Claimant gave his deposition on April 9, 1992. Present at the deposition was Carrier's General Attorney.

Following the deposition and a subsequent meeting between Claimant and Carrier's General Attorney, at which Claimant informed the attorney that he had approached XTRA because he was interested in reward money and further that he was upset because a junior employee was operating a track machine, there were inadequate washroom facilities and that track employees were generally mistreated because they were Hispanic, Mr. Scheri was terminated for violating Belt Railway Company Rules A, E and F. These rules read:

RULE A

All employees are subject to these rules and special instructions and must be conversant with and obey them. If in doubt as to their meaning, they must apply to the proper authority for an explanation. Foreign line employees are subject to these rules and special instructions while operating on this property.

New rules or changes in present rules or special instructions will be covered by general order.

RULE E

Employees must render every assistance in their power in carrying out the rules and special instructions and must report promptly to the proper official and any violations thereof. They are required to report any misconduct, negligence or incident affecting the interests of the company. Withholding such information will be considered as proof of negligence or indifference and treated accordingly.

RULE I

Employees must not be indifferent to duty, insubordinate, dishonest, immoral, quarrelsome or vicious. They must conduct themselves in a manner that will not bring discredit on their fellow employees or subject the railroad to criticism or loss of goodwill.

Grievant, upon being notified of his dismissal, requested a written notice of the specific charges placed against him, as contemplated by Rule 42 of the Agreement. Further, he timely requested a hearing on the dismissal, as provided in Rule 43. This hearing was conducted on May 8, 1992. On May 14,

1992, Claimant was notified that his dismissal would not be altered. Appeal was taken by the Organization and the ensuing grievance remained unsettled and was eventually appealed to this Board, as provided by the Agreement and applicable law.

Carrier argues that Claimant's conduct in withholding critical information concerning the fire was in violation of its published rules, impeded its investigation into the matter, caused it to initially develop incorrect conclusions concerning the cause of the fire, which resulted in delay and embarrassment, and additional expense in satisfying its obligations and liabilities with XTRA. Claimant, breached implied conditions of loyalty to his employer, his dismissal was warranted, it is argued.

On the matter of procedural defects alleged by the Organization, Carrier notes that in scheduling the investigation, it adhered to practices followed under the Agreement over the years, indicating that these practices have never heretofore been challenged by the Organization. Carrier contends that the Organization is mistaken when it alleges that the decision was reached before the transcript of the hearing was received. Carrier points out that it changed an appeal officer who had been involved in the investigation to ensure that fair review was afforded. It denies that Agreement requirements and due process considerations were not satisfied in this matter, but contends, even if there existed a technical breach, the Organization is unable to demonstrate the Claimant was prejudiced thereby.

The Organization places considerable emphasis on perceived procedural defects in the scheduling of the investigation, the hearing itself and subsequent appeal. It contends that Rule 43 requires that the investigation be scheduled within seven days of the date of request, but was not done so until the 14th day. With respect to the hearing, it notes that the officer who placed the charges against Claimant and testified against him was also an appeal officer. After the dismissal was appealed the Carrier unilaterally changed the appeal procedure. Claimant was denied independent review

On the merits of the charge, the Organization contends that Carrier has not satisfied its proof requirements. It questions an implied obligation of loyalty in the circumstances present, noting that Carrier was intent on avoiding any responsibility in the matter, disputing XTRA's claims, etc. Further, with regard to the alleged violation of several operating rules, it has not been demonstrated that Claimant's conduct was in any way at odds with there terms.

Rule 43 of the Agreement is the operative rule with regard to the hearing. Rule 43 reads:

RULE 43-HEARINGS

> An employee suspended or discharged shall have a fair and impartial hearing provided written request is presented to his immediate superior within seven (7) days of advice of discipline. The hearing shall be granted within seven (7) days thereafter and decision will be rendered within seven (7) days after the completion of hearing. If dissatisfied with

> the decision he will have the right to appeal in succession up to and including the highest official designated by the Management to handle such cases if notice of appeal is given in writing to the official rendering the decision within fifteen (15) days thereafter. Subsequent handling by the parties will be in accordance with the time limit provisions as set forth within Rule 48.

The Organization argues that the language in the Rule that the "hearing shall be granted within seven days" requires that the hearing be held within seven days. The Carrier argues that it is only required to grant a hearing when it has been requested, but that the hearing may actually be scheduled outside the seven day period. In support of its argument Carrier references the dictionary definition of the term "granted" and cites previous practices accepted by the Organization in the past. The Organization counters with argument that recently it changed Committees representing its members on this Carrier and the new Committee is insistent that Agreement requirements be literally followed.

First the Board must note that the Organization is incorrectly reading the requirement to "grant a hearing within seven days" the same as a requirement to hold a hearing within seven days. The terms "grant" and "hold" are not synonyms, the have differing meanings. If the parties drafting the language used in Rule 43 intended that the hearing be held within seven days it would have been simple to so state this result in the rule. If they intended this result, but nonetheless used the term "grant," the Rule is then ambiguous. Ambiguous language is to be interpreted by practice, custom and usage.

The evidence in the record, on practice, custom and usage, demonstrates that Claimant's investigation was scheduled in harmony with the practice previously followed by the parties. This evidence on practice followed under the Rule is a clear expression on what was intended. Accordingly, the Organization is not now privileged, simply because it changed Committee representation, to insist that the accepted practice of scheduling investigations under the Rule be altered, because the new Committee considers "grant" and "hold" to be synonyms.

On the issue of changing appeal officers, the Organization notes that Carrier has published the order of appeal and the list of appeal officers. It complains that after Claimant's appeal was made to the officer Carrier had designated a different officer was substituted. It objects to the timeliness of the substitution as well as the substitution itself. Objecting to the timeliness of the substitution seems to be frivolous. Carrier had no cause to make a substitution until after appeal was taken. Remote as it may be, the possibility existed that perhaps no substitution was needed because the discipline may have been accepted and appeal foregone. A judge or an arbitrator does not recuse from a matter until the matter comes before him. An appeal officer need not be changed because of prior involvement in the disciplinary procedure until appeal is actually before him.

Which takes the Board to the second facet of the Organization's argument. In this matter serious procedural defect would have obtained if the

Carrier allowed the removed appeal officer to participate in the appeal process. This officer was the individual who preferred charges against Claimant. Also, he testified at the hearing. Without question, it would have been an affront to the process to allow him to set in on the matter again on appeal. His prior involvement, as well as due process requirements compelled that he be removed from the appeal procedure. Replacement in such circumstances is not procedurally defective. In fact it contributed to the preservation of due process procedures in Claimant's behalf.

One final point on procedural defects alleged by the Organization, before proceeding to a consideration of whether or not Carrier had just cause to effect Claimant's dismissal. After, the discipline was issued, and contemporaneously with Claimant's request for a hearing under Rule 43, Claimant directed a handwritten note to Carrier's Director of Labor Relations requesting written notice on the charges against him. This note was responded to by the Director. The Director was also the final appeal officer before submission to this Board. The Organization hints that this is somehow or other a further procedural defect. In the circumstances of this case the Board finds the arguments of the Organization unpersuasive. The fact that the Director of Labor Relations advised Grievant of the charges placed against him is not, *per se*, proof that any entitlements to a fair investigation and fair consideration on appeal were breached. Advising an individual as to what the specifics of a charge may be is not the same as development of the charge, is not the same as inquiry into the charge, is not the same as issuing the charge, is not the same as hearing the evidence on the charge, is not the same as testifying on the charge, etc. If the Organization expects to prevail on this facet of this matter it must do more than merely mention the point. It must demonstrate that the Director's conduct was more involved than merely administratively complying with Claimant's request for specifics. To this end it must demonstrate that the Director's conduct in answering Claimant's note was, indeed, prejudicial.

On the merits of the matter, there is no essential disagreement as to the facts and Claimant's conduct. Claimant failed to promptly report misconduct, negligence and an incident affecting the interest of the Belt. What is worse, Claimant later seized upon this incident as an opportunity to secure an unwarranted financial benefit for himself. His excuses for doing so are simply not believed, For example, his comment that he went to XTRA because it bothered him that juveniles were being blamed for something the did not do, and his conscience was bothering him, begs the question, "Why didn't he go to his own employer?" The answer seems obvious. He was involved in the initial conspiracy to conceal the actual cause of the fire, the work gang profited from this concealment because no discipline was issued at the time and now when the construction and repair season was drawing to a close Claimant believed that he could profit by selling information on the concealment conspiracy to someone else.

Further, Claimant's observation that he was unaware of the requirements of Carrier Rules E and J, if true, still does not excuse his conduct. He is not in the same category as a "whistle blower." It was not Belt that was trying to conceal the actual cause of the fire from XTRA, it was a number of Belt employee conspirators that were doing so. Without evidence to the

contrary, it must be believed that had Belt known that its employees actually started the fire to heat their lunches that it would have immediately stepped forward and satisfied its liability to XTRA.

Finally, Claimant's own testimony before this Board indicates that he continues to have misdirected notions in the matter and the relationship and obligations between employee and employer generally. Emotional statements critical of Belt's dealings with XTRA, Carrier's attempts to find the juveniles, etc., conveniently ignores that it was the fire started by a coworker and the ensuing conspiracy participated in by Claimant and his coworkers that caused the mess in the first place. The Board perceives, from his remarks at the hearing, that Claimant harbors the notion that he was dismissed solely because he talked to XTRA Corporation representatives. That is not the case. According to Superintendent Spano's July 27, 1992 letter he was dismissed because of his:

> ... failure to promptly report what he witnessed placed him in violation of Company Rule E.

This determination is consistent with the April 30, 1992 charge, contained in Supervisor Diemer's letter, that the investigation was being held to:

> ... determine [Claimant's] responsibility, if any, in connection with [his] concealment of, and attempt to profit from [his knowledge of the fire].

This record leaves no doubts that Claimant timely failed to talk to Belt Railway officials and be truthful with them concerning the fire, and further that he attempted to profit from this concealment, conduct which is manifestly in violation of Rules E and J.

Accordingly, the Board concludes that Carrier had just cause to effect the dismissal of Claimant. Further, the investigation was timely and fairly held and adequate evidence was presented thereat to support the charges placed against Claimant. Claimant's appeal was handled in accordance with accepted applications of the appeal process. The discipline assessed will not be disturbed.

A W A R D

Claim denied.

John C. Fletcher, Chairman & Neutral Member

Leon Fenhaus, Organization Member

Michael D. McCarthy, Carrier Member

Mt. Prospect, IL., September 30, 1993