PUBLIC LAW BOARD NO. 5715

Case No. 1
Award No. 1

Parties to dispute:

United Transportation Union

and

Soo Line Railroad Company
(CP Rail System)

Statement of claim:

Reinstate Trainman D. W. Schessow to active service with all time lost, seniority rights and privileges restored, including vacation, and all references expunged from the record.

Opinion of Board:

The Carrier dismissed Claimant alleging misconduct during July and August of 1994 while he was on a picket line during a strike by Soo Line employees represented by the United Transportation Union.

It is the position of the Organization that there are errors in the procedure which the Carrier followed, that those errors violate the Agreement between the parties, and, for these and other reasons, the discipline should be overturned.

The record shows that some person or persons in the Carrier's family of officials authorized to do so caused a law firm to be retained to bring civil action against the Claimant, charging that he harassed others working during the strike. The law suit, we are shown, is based on affidavits of seven working Soo Line employees alleging specific acts and statements.

The suit was filed on August 29, 1994, in the Milwaukee County Circuit Court, Milwaukee, Wisconsin, (Case No. 94 CV 009762).

On September 14, 1994, the Carrier charged Claimant with making verbal and physical threats, obscene comments and gestures, racial slurs and otherwise intimidating employees of the railroad under the labor agreeement between the parties. The Carrier also charged that Claimant had been arrested during the picketing process.

The Carrier's charge under the labor agreement, it is acknowledged in the record, was based on the same seven affidavits which were the basis of the Milwaukee court proceeding.

It is the position of the Organization that Rule 9 (c) of the labor agreement was violated. That rule says:

> *"Employees continued in service or not censured pending an investigation of an alleged offense shall be notified within seven days after a company officer having authority to order an investigation has information of the offense of the charges pending. Within seven days thereafter, an investigation shall beheld, and a decision shall be rendered within ten days after the investigation."*

It is further the position of the Carrier that only one official had the authority to make the charges, a certain Division Manager, and that the information upon which he acted was provided to him on September 12, 1994, by a member of the Carrier's Labor Relations Department staff. Thus, the Carrier contends, there was compliance with Rule 9(c).

The Organization, however, believes that Rule 9(c) does not limit the charging official to a single individual. It contends that, by definition, officers senior to him or her would have equal or more authority, and that their having information is sufficient to trigger the seven-day limit.

In the affidavits, the individuals made such general statements as:

> *"Periodically through the whole strike I had spoken with the company lawyers and documented with the company police each incident as they happened."*

There are references of conversations with the highest Carrier official, though these are vague as to this Claimant.

In order to determine when the outside law firm was retained, when and which Carrier officers knew of the information used in charging Claimant in court and under the agreement, the Organization asked, by letter:

> *"Also, please arrange to have present at the investigation lawyers for the firm of Godfrey, Brown and Haze. They handled the request of the restraining order and will have the information as to the date and time the Carrier was aware of the charges."*

No such witness was called, other than the charging officer, who followed the policy of saying he was the person who would have the authority to "order

an investigation", and that he received the information two days before the charge here considered was made.

Thus, the record is silent as to all information concerning the relationship between the Carrier and the retained law firm, and involvement of the Carrier's special agents or police. We do not know who retained the law firm for the purpose of working on the law suit, or when; who accumulated the affidavits; what officials were involved and when. We are aware that the attorney-client privilege might have been invoked on these questions.

However, for purposes here, it is obvious that the case was prepared before August 29. Since the same evidence was used in the Wisconsin court and before this Board, the evidence must have been accumulated before the date of filing. While it is reasonable to assume that the Carrier was aware of on-going evidence collection before the date of filing the law suit, it certainly was aware of all of the information on and after August 29.

The charging officer testified during the labor agreement investigation. He explained that when he received the information, in final typed form on September 12, and provided explanations and interpretations about certain policies and rules of the Carrier involved here. He characterized the charges as having a "common denominator" of "harassment, sexual harassment and attempted intimidation." The charging officer appeared on the second day of the hearing and his testimony continues for 28 pages of the transcript.

Following the investigation, the charging officer issued, by letter of October 6, 1994, the discipline.

That dismissal letter repeated the identical charges contained in the letter establishing the investigation. It also included the statement that Claimant's activities in regard to the strike had caused him to be arrested by the City of Milwaukee Police Department, and that was a basis for the discipline. However, the record shows that he was not so arrested.

We conclude that the first time "a Carrier officer having authority to order an investigation" received information of the offense here charged could not possibly be later than the filing of the court document in Milwaukee on August 29, 1994. We do not believe Rule 9 (c) limits the authority to charge to a single official.

For lack of testimony we simply do not know specifically when officers knew of the information alleged against Claimant. But we can be certain, based on the facts of the matter, that the information was available on or before August 29 to others within the Carrier's cadre of officers senior to the charging officer.

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The Carrier can not set up such a barrier as to thwart the intent of prompt action which Rule 9 (c) requires. If the rule allowed one person only to be designated as the operative party, and absolved all others, the Carrier could protect that person from knowledge on any matter and disable the intent of time limit provisions.

There is in the railroad industry a presumption that investigations held under the discipline provisions of the various agreements will be "fair and impartial." It has been held that fairness and impartiality are absent when a single individual, who, in the first instance, has the authority to determine whether the individual should or should not be charged, proceeds to charge, appears and testifies as to facts at issue, responds to questions surrounding the incident, and, finally, makes the decision as to guilt or innocence. He can not indict, testify, decide.

We find that the Carrier failed on the procedural steps of which the Organization complains. The abridgments of the Agreement, and fairness are sufficiently flagrant to cause the discipline to be reversed without considering the further merits of the matter.

Findings:

That the Agreement was violated.

Award:

Claim sustained.

Dated this 23rd day of June, 1995, at Minneapolis, MN.
Carrier is directed to make this Award effective on or before 30 days from date.

John B. Criswell, Neutral Member

Larry E. Nooyen, Carrier Member

Eugene F. VonEssen, Organization Member