

The Second Division consisted of the regular members and in addition Referee Wesley A. Wildman when award was rendered.

Parties to Dispute: { System Federation No. 6, Railway Employees'
Department, A. F. of L. - C. I. O.
(Firemen & Oilers)
{ Baltimore and Ohio Chicago Terminal Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Laborer Tommy Jones was unjustly held out of service of the Carrier from September 7, 1977 through September 29, 1977.
2. That under the current agreement Laborer Tommy Jones was unjustly dismissed from all service of the Carrier effective September 29, 1977.
3. That accordingly the Carrier be ordered to reinstate this employe with all seniority rights, vacation rights, holidays, sick leave benefits that are a condition of employment unimpaired and compensated for all lost time plus 10% interest annual on all such lost wages; also reimbursement for all losses sustained account of coverage under health and welfare and health insurance agreements during the time he was held out of service and in addition all lost wages including the time he was unjustly held out of service prior to the investigation.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant Tommy Jones, a Laborer at Carrier's facility located at Chicago, Illinois was dismissed from service effective September 29, 1977, for attempted theft of Company property.

First, Claimant appeals, in part, on the ground that he was not afforded a just and impartial hearing because of the multiplicity of roles assumed by the Hearing Officer. The Organization representing Claimant notes that the Hearing Officer, in addition to presiding at the hearing, also conducted the preliminary

investigation, preferred the charges, reviewed the record, assessed the discipline, and denied the appeal. This multiplicity of roles, the Organization asserts, led to a biased review of the record, prejudicial determination of guilt, and an unwarranted quantum of discipline.

This Board has read and considered at length the numerous (and sometimes conflicting) decisions discussing the problem of that point at which the multiplicity of roles played by a hearing officer in a discipline or discharge case becomes prejudicial to the interests of a claimant and precludes a fair, just and adequate hearing. Wisely, we think, a clear majority of these cases, in assessing whether minimally adequate due process was present or not, look for a tangible and specific relationship between the multiplicity of roles played by the hearing officer and any prejudicial impediment to Claimant's defense which did, in fact, or probably did in fact, occur. We find no such cause and effect relationship in this case between the multiplicity of roles played here by the Hearing Officer and any significant denial of due process to Claimant.

In short, it is not at all apparent that the evidence on the record in this case with regard to any material issue would be any different than it is had the Hearing Officer played fewer and/or different roles in the handling and processing of this case.

Potentially, the most serious role conflict occurs, of course, when a hearing officer gives testimony at the very hearing he conducts (and, possibly, ultimately judges on appeal). While the Hearing Officer in this instance did make some assertions which relate to the case and which do appear on the record, they are only occasional and relatively unimportant, and are not, in our judgment, significantly material in nature. We conclude that this "testimony" by the Hearing Officer was not procedurally fatal to the cause of a fair hearing for Claimant and was not prejudicial to Claimant. In sum, we are of the opinion that Claimant did, in fact, receive an adequately fair and just hearing.

Moving now to the substance of the charges against Claimant, the Organization asserts that there is not adequate and substantial evidence on the record to support the finding that Claimant was guilty of theft.

The hearing on the charges against Claimant was held on September 12, 1977. Relevant testimony and submissions on the record disclose the following:

At approximately 8:15 p.m. on an evening in September of 1977, three (3) employees, one of whom was identified as Claimant, were observed by a Property Protection Patrolman taking brass journal bearings from the Car Shop at Carrier's facility and loading the brass into the trunk of an automobile. The patrolman immediately reported his observations to his supervisor. Together, patrolman and supervisor arrived on the scene at approximately 10:45 p.m. and attempted to identify the owner of the vehicle in which the brass had been placed. During their investigation they learned that the automobile belonged to a Carman, one Bobby Roy, who had secured permission to bring the car into the shop area in order to change his oil during lunch break. When approached by the security officer, Carman Roy evidently admitted that he was, in fact, in

possession of Company property. Carman Roy accompanied the security officers to his automobile whereupon he opened the trunk which did, indeed, contain Company property as had been suspected. The security officers testified at the hearing that Roy told them (clearly hearsay testimony, of course, with respect to Claimant) that Claimant Jones was one of the other two employees who had been involved in the attempted theft. Roy further related to other Company officials the next day (in what, again, was hearsay testimony with respect to Claimant) that the motive for taking the Company property was a desire by all three employees involved to sell some scrap brass "on the street". Carman Roy, who did not testify at Claimant's hearing, resigned from the service of the Carrier on September 7, 1977.

Claimant denied complicity in the theft, testifying that he did not place anything in the trunk of Roy's car on the evening in question, but was merely doing his job of picking up debris and cleaning the yard area. He professed to not having any idea whatsoever why the patrolman testified as an eyewitness that he (Claimant) was putting the scrap brass into Roy's automobile.

Following exhaustive consideration of the entire record, this Board determines that there does exist substantial proof in the record to support Carrier's findings of Claimant's guilt in the attempted theft. Without giving any weight to the hearsay testimony involved, application of the "one good (eye) witness" rule and other considerations lead us to the judgment that Carrier's conclusion with regard to Claimant's complicity does have adequate verification on the record.

Finally, the Organization takes exception to Carrier's action of suspending Claimant from service prior to the date of the formal investigation, asserting that such action is violative of Rule 26 of the controlling Agreement between the parties. Rule 26 provides in relevant part that "(N)o employee shall be disciplined without a fair hearing by the Carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of thir rule...". We hold that it was not necessarily inappropriate, given the charge of theft, for Carrier to consider this a "proper case" for suspension of Claimant prior to the holding of the formal investigation. Had Claimant been adjudged innocent, he would have, of course, been recompensed for loss of pay during the suspension period.

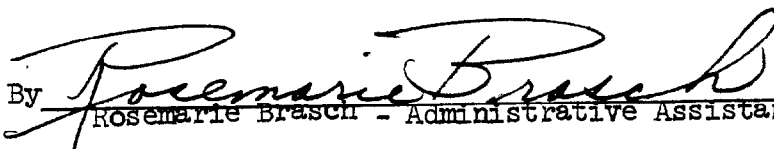
As to the quantum of discipline, we do not find in this case that the imposition of the discharge penalty was arbitrary, capricious, or unnecessarily harsh.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 11th day of June, 1980.