

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23427
Docket Number CL-23451

A. Robert Lowry, Referee

PARTIES TO DISPUTE: {
(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(GL-9322) that:

(1) **Carrier** acted in an unreasonable **manner** when it dismissed Mr. David P. King from its service effective March 6, 1979, as a result of an investigation held on **March 5, 1979**.

(2) Carrier shall now be required to restore Mr. King to service with all rights and privileges unimpaired **and** compensate him for all **time** lost beginning February 27, 1979, and continuing until corrected.

OPINION OF BOARD: **This** discipline case contains serious procedural defects which will be the basis of the decision and for this reason we will not burden the record with a discussion of the merits.

Carrier officer, Mr. J. F. **McCaffery**, Material Manager, filed charges against the Claimant, Mr. David P. King, for being unfit for duty. An investigation was held on **March 5, 1979**, copy of the transcript was made a part of the record.

The charging officer, **McCaffery**, appeared as a witness in the investigation **testifying** against the Claimant. **This same** officer, **McCaffery**, **made** the decision dismissing the claimant from his employment with the Carrier. This same officer, **McCaffery**, made the decision on the first level of appeal, re-affirming his earlier decision, dismissing the Claimant.

This is a flagrant abuse of "due process".

We are not dealing with a novice. This Carrier has a long history of conducting itself **in** the **labor-management** arena with maturity and considerable **expertise** in this field. For this reason It cannot be excused for failure to guard against any abridgement of any of the procedural rights written into the collective **bargaining** agreement. The Carrier has within its hands the basic machinery of the judicial process upon the property. Consequently, it must bend over backwards at every stage to give the accused every opportunity to defend himself against charges which can cost him his job and considerable money. See Third Division Award 17511.

While the discipline rule of the agreement, Rule 24, does not contain the words "fair and impartial", the term "investigation", which is **in** the rule, has long been recognized in the industry as meaning a "fair and **impartial** hearing" with the right to representation **and full** opportunity to defend. It is inconceivable that accuser-witness **McCaffery** could **possibly** be "**impartial**" when **making** his decision based on his own testimony! The **same** reasoning **applies** to the first level of **appeal** decision. **McCaffery** merely **confirmed** his earlier **judgment** which was based at least in part on his own testimony: Again, it **is inconceivable** that this Carrier, so well experienced in this sensitive labor-management arena, would **permit an** alleged due process procedure that would allow a single officer to be the "accuser", "witness", "judge" and, to top it off, the "**appellate court**"!

The right of appeal **is** neither technical nor mechanical. **It** is an important and meaningful right that is not to be **regarded** lightly or ignored. The obvious purpose of the appeals machinery **is** to provide Claimant **with independent** consideration of his appeal at each appellate level. See Fourth Division **Award 2642**. In this case the appeals officer, **McCaffery**, could not be considered impartial or independent.

This overwhelming evidence proves that Carrier violated the basic fundamental rights of Claimant to due process. **This Board must** sustain the claim.

FINDINGS: The **Third** Division of the Adjustment Board, upon the whole record and all the evidence, finds **and** holds:

That the **parties** waived oral **hearing**;

That the Carrier and the Employee involved in this dispute are respectively Carrier and **Employee** 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:

A. W. Paulsen

Executive Secretary

Dated at Chicago, Illinois, this **3rd** day of November 1981.

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 23427, DOCKET CL-23451
(REFEREE LOWRY)

The Dissenters complain that, "In this case the Majority not only threw out the baby with the bath water, but also the tub, soap and toys."

It is evident, however, that the Dissenters were not deprived of all of their "toys" for they have spent some ten **pages** "toying with words" in order to say that they disagree with the Award.

Dissenters cite some fifteen Referees as though all of them would oppose the findings and conclusions reached in Award 23427.

Nevertheless, Award 23427 speaks for itself and the only "error" therein was a typographical **17511** rather than **17311**. **However**, the "teaching" of both Awards 17311 and 23427 is that Carriers must afford a fair, not an unfair, hearing.

If that lesson is lost because of the Dissenters' views then neither the Carrier nor this Board have been well served.

The Award is correct, the Carriers' case, presented again in it's best light by the Dissenters, could not, and did not, overcome the Employes' case.

The Award is correct, and the Dissent does not detract therefrom, but only offers to cause mischief: I am confident

that a majority of the fifteen Referees cited by the Dissenters would also have found the actions of Carrier in this case so repugnant that they, too, would have sustained the Claim.


L. C. Fletcher, Labor Member
Third Division - NRAB

12-17-81



**. DISSENT OF CARRIER MEMBERS
TO
AWARD 23427, (DOCKET CL-23451)**

Dissent to this decision is required not only because of the self-serving **homile** that **is being passed** off as reasoned **judgment**, but also because of the facts completely ignored by the Majority **in** reaching this myopic mishmash.

This was **an** "under the Influence" **case** in which the Claimant himself admitted the rule violation, and this was substantiated by **cor-roborating**witnesses.

TESTIMONY OF AGENT CAPPS:

"Q. Did you ask him **if** he had been **using** intoxicants?

"A. Yes.

What **was** his response?

II:- He replied that he had had a couple of drinks at noon, I believe. **He** said he had a couple of **VO's** and Seven at a tavern where he had gone to cash his check."

"Q. When you were **in** the automobile in close quarters en route to the hospital, did you have further occasion to detect the smell of intoxicants?

"A. Yes."

TESTIMONY OF AGENT EUPRIS:

"Q. During the **interview with** Mr. King, **was** it **obvious** to you that he was **in** an unfit condition to properly **perform** his duties? .

"A. He was. "

"Q. Could you **detect** the odor of intoxicants on his person?

"A. Yes sir. "

"Q. Was Mr. King asked if he had been using intoxicants or drinking?

"A. Yes, he was."

"Q. And what was his response?

"A. He stated that he had two drinks during lunch when he went up to cash his paycheck. "

"Q. Would it appear to you that he had had considerably more than two drinks?

"A. He appeared to me that he was intoxicated, yea."

TESTIMONY OF CLAIMANT:

"Q. Were you using intoxicants during your tour of duty?

"A. Yes, I was."

"Q. Do you feel that you were in compliance with this rule on February 26?

"A. No, I guess not since I did have a few drinks and did take the medication? (Emphasis added)

It has long been held by this Board that admissions of wrongdoing substantiates the violation.

Third Division Award 8423 - Lynch:

"Claimant, by his own admission at the investigation, as reflected by the above quotations from the transcript, concedes his own guilt in violating Rule 807, upon which Carrier predicated its disciplinary action...."

Third Division Award 9033 - Hornbeck:

"Suffice to say, that by Mr. Benton's plea of guilty he admitted all of the material elements of the charge against him. Even if the Carrier had failed in its proof, which is not the fact, the plea of guilty removed the necessity of proof of the charge that Mr. Benton had violated a safety rule of the Carrier in the particulars alleged. " (Emphasis added)

Third Division Award 14700 - Rohman:

"In view of the Claimant's own admissions at the investigation, this Board would be usurping its powers were it to substitute its judgment for that of the Carrier. Innumerable awards of this Board have enunciated the controlling principles in disciplinary cases."

Third Division Award 18903 - Ritter:

"It **is** the further opinion of this Board **that** Carrier had no alternative than to assess punishment in this instance, **if** for no other reason, the admissions of the named Claimants."

Third Division Award 21962 - Searce:

"It is apparent from the **testimony** of record, including **Claimants'** own admissions and the **uncontroverted** testimony of Carrier's **witnesses**, that **there** is substantial evidence to **support** the charges. The **discipline** administered by **Carrier** **is** commensurate with the **gravity** of the proven offenses and we **will** not substitute our judgment for that of the **Carrier**."

Third Division Award 22564 - Searce:

"**The** testimony in the hearing record, including claimant's own testimony, clearly establishes that, by his actions and/or lack of action, he was **primarily** responsible for the **machine** 'run-away' and resultant collision."

Second Division Award 8069 - Cushman:

"At the **investigation** the Claimant testified and admitted **that** he had placed 20 rolls of masking tape **which** was the property of **AMTRAK** in his automobile **with** the intention of using it to tape a car that he was going to paint."

Clearly, Claimant's guilt was established on the record. **However**, such matters of record **are** not to be considered pertinent or even **worthy** of note **when** one has embarked on an evangelical mission.

The Majority contends that this case **involved** a "**flagrant** abuse of 'due process'". Yet the **Majority** concedes and does **agree** at Page 1 of the Award that "the procedural **rights written into** the collective bargaining agreement" is the source of Claimant's allowance **of** "due process"; not **some** feeling of equity or perceived judicial **entitlement**.

Third Division Award 5104 - Parker:

"One of the purposes responsible for the enactment of the Railway Labor Act was to provide a simple and inexpensive method for the disposition of disputes between Carriers and Employees, including those similar to the one here Involved. For that reason it has come to be generally recognized that in the conduct of the hearings and investigations neither technical nor legalistic rules of evidence are binding and we have repeatedly held, that where - as here - the contract does not specify the type of evidence that can be submitted at such hearings or investigations, statements of witnesses with references to the facts pertinent to the dispute, even though unverified, are competent and therefore properly received as evidence. (See Awards Nos. 1989, 2746, 2770, 2772, 3985, 4142, 4154 and 4251)."

* * * * *

"The guarantee of due process found in the 5th Amendment, and in the 14th Amendment, to the Federal Constitution, is intended to protect the individual against arbitrary exercise of governmental power and does not apply to actions between individuals or add anything to the rights of one citizen as against another (see 16 C.J.S. 1149 Sec. 568; 12 Am. Jur. 259 Sec. 567; Davidow v. Lachman Bros. Inv. Co., 76 Fed. 2d. 186)."

Third Division Award 22427 - Searce:

"We are well aware that it is not within the province of the Board to consider questions of equity; we are equally aware that questions of 'due process' are not properly before us. We are obliged to look to the provisions of the Agreement and to the record of the case at hand and will not do otherwise here. While we may have some reservations over the events leading to this point, we find no basis under the Agreement to affirm the Claims herein." (Emphasis added)

Third Division Award 22224 - Lipson:

"The Union has strongly objected to the search of the automobile Involved, to the taking of pictures of the Claimant without his consent, and to the seizure of the bottles described above, on the basis that constitutional and other

"basic rights were thereby violated. A similar argument. was addressed in Award No. 5104, Docket Number PM-4929, by a Third Division Board, with Jay S. Parker as Referee. The Board in the above case observed that 'the guarantee of due process found in the 5th Amendment, and in the 14th Amendment to the Federal Constitution, is intended to protect the individual against arbitrary exercise of governmental power and does not apply to actions between individuals or add anything to the rights of one citizen against another (citations provided)."

Third Division Award 22128 - Wallace:

"Careful review of the entire record in this case convinces this Board that Claimant has received all the due process rights to which he is entitled under the Rules Agreement." (Emphasis added).

Fourth Division Award 3490 - McBrearty:

"Any rights which an employee has during a discipline investigation flow not from the Constitution, but solely from the collective bargaining agreement negotiated under the Railway Labor Act. This has been firmly established by both courts of law and this Board. [See Clark v. S.C.L., 332 F. Supp 380, 381 (N.D. Ca. 1970); Edwards v. St.L-S.F., 361 F 2d 946, 953 (7th Cir. 1966); Third Division Award 15676; Second Division Awards 6963, 6381, and 18211."

The Majority asserts that the Carrier:

". . . must bend over backwards at every stage to give the accused every opportunity to defend himself against charges..."

This dictum is in error on at least two counts. First, there is no contractual requirement that Carrier bend over backwards. The Carrier's responsibility is to apprise the Individual of the asserted charges so that he can prepare a defense and to provide the individual an opportunity as prescribed in the contract to rebut and to submit evidence that the contentions and assertions made in the notice of charges are in error or that there are

other causes responsible. In this industry **it is** Incumbent on **all parties** to submit **all** facts and evidence into the hearing **record** because **it is** that record on which the finding of guilt **is** made, and it **is** on that **record** that the appeal of the discipline assessed is progressed.

Second, "every stage" of **appeals reviews** the record that **is** made. It **is** not an opportunity to re-try **the matter de novo**, but a review of the facts established and whether **the** discipline assessed was commensurate with the established violation. That is the contractually established appeal process in disciplinary **Majority's** this industry. c t u m lacks contractual support.

Third Division Award 16678 - Perelson:

"We find nothing in the Agreement involved in this dispute that prescribes who shall prefer charges, conduct **investigations** and/or render decisions; there is no rule which **specifically** states that the officer conducting the **hearing** must render the decision or assess the discipline. See Awards 15714, 14021, 13383, among many others.

"Further, the record in this dispute indicates that the procedure followed is the established practice for the handling of discipline cases on this Carrier.

"The fact that the **Superintendent** rendered the decision did not preclude **his** acting as the appeals officer. See Award 15714.

"With reference to **point** two, this Board has held on any number of occasions that our **function** in discipline cases is not to substitute our **judgment** for that of the Carrier or to decide the matter in accord with what we might or might not have done had it been **ours** in the first **instance** to **determine**. We do pass

"upon the question whether, without weighing it, there is **some substantial** evidence in the record to sustain a finding of guilty. Once that **question is** decided in the affirmative the penalty imposed for the violation is a matter which rests **in** the sound discretion of the Carrier and we **are not warranted in** disturbing the penalty imposed unless we can say that **it** clearly appears from the record that the action of the Carrier **with** respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of **discretion. Whether** or not the penalty imposed **is justified** depends upon many factors and the circumstances in each case. **In order** for this Board to overrule, reverse, set aside or reduce the penalty imposed, **it** is incumbent upon the Claimants to **show** that the Carrier **in** assessing the penalty was **vindictive, arbitrary or malicious.**"

Finally, the Majority's reference to Third **Division Award 17511** is totally misplaced. **That case** involved a claim filed, after an agreed-upon settlement, with this Board that the Carrier's **action was improper. The claim** was dismissed for **failure** to handle the matter in the usual manner on the **property.** There is no relevance of this **Award** to **this** case at all.

The one fact tenaciously relied upon by the **Majority** here is the participation of Mr. **McCaffery** in a number of steps in the contractual **disciplinary** process. **No** objection was made to the fact that Mr. **McCaffery** issued the charges, **testified** at the **hearing** and assessed the discipline. **McCaffery's** testimony consisted in simply relating what **Agents Burris** and **Capps** had found in their investigation and to which they testified at the hearing. **McCaffery's** testimony was simply corroboratory. Claimant's admission and the direct **testimony** of Agents **Burris** and **Capps** was the substantial evidence entered into the record **concerning** the charge of being "under the influence". It is a gross presumption, absent any **evidence,** to conclude that **McCaffery** improperly executed **any** duty. The Employees' whole argument has been that Carrier's action was a per se violation of due process. That **argument** was never substantiated with evidence.

Third Division Award 20194 - Bergman:

"We have examined the record and do not find any statement made in the handling on the property that the decision made and penalty imposed was improper because it was made by a supervisor who was a witness. It cannot now be raised for the first time, Award 17424, 19746, 19977 and Awards cited therein."

Further, there must be some evidence as opposed to suspicion or conjecture to **support** such an allegation.

Second Division Award 8367- Wildman:

"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."

Second Division Award 8219 - Larney:

"We first turn our attention to the procedural point as to whether or not Claimant was afforded a fair and impartial investigation. In addressing such procedural objections as those raised in the instant case, we have in numerous cases over the years reached our decisions on the case by case basis by applying the following general formula:

"That where there **exists** an objection regarding the **mix** of roles performed by a Carrier officer in connection with the charge against Claimant, the resulting investigation, the imposition of discipline, and the appeal process, such **mix of roles must be balanced against** the tenets consistent with fair play and due process. These tenets include: that claimant be properly and timely notified of the charge against him and the date, time and place of the investigation; that claimant be well represented; that claimant be **allowed** any witnesses of his **own** choosing; that **claim-** and be given every opportunity to present any and all testimony believed to be relevant to the situation; that both the claimant and his representative be allowed to cross-examine all witnesses; and **that** at the conclusion of **the** investigation the claimant and his representative be afforded the **opportunity** to express any exceptions they might have to the manner in which the hearing had been conducted."

"Upon a thorough review of the record and a careful weighing of the alleged procedural defects against Claimant's having been afforded **due process** at the investigation, we conclude Claimant did in fact receive a **fair and impartial hearing.**" (Emphasis added)

Note : Second **Division** Awards **7196, 8103, 8537**; First Division Award **17304**; Third Division Award **21241**, and Fourth Division Award 3770.

In Third Division Award 10547 - Daly - we stated:

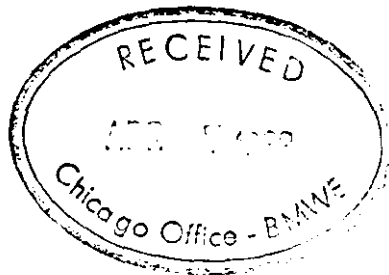
"Although the Claimant's guilt is not an issue **in** this case - the fact that the Claimant **is** undeniably guilty **is** an **im-
portant** consideration in our deliberations.

"This latter fact brings up an usual and interesting point. If the Claimant was admittedly **guilty** - a second '**fair and impartial** hearing as prescribed by Rule 22(c) could have no different result **from** the investigation. Therefore, since a second such **hearing** could have resulted only in the same conclusions, one might **ask** what difference does it make whether the **appeal** hearing complied **with** the letter and the **spirit** of the law.

"There is, **however**, a far broader **implication** involved. A **guilty party** - no matter how often heard impartially - **will** remain guilty. The outcome of guilt is guilt, but, it is a big **BUT** - the innocent **party** who has possibly not been **vin-
dicated** by the first investigation - has the opportunity pro-
vided by Rule 22(c) to prove that innocence in a 'fair and
impartial hearing' and **thus**, receive his just deserts.
(**Emphasis** ours)."

In this case the Majority not only **threw** out the baby **with** the bath water, but also the tub, soap and toys. The expectation was a reasoned and supposedly **well** informed **review** of the record. What was provided was **evan-
gellcism**.

We dissent.



P. V. Varga
P. V. Varga

W. F. Euker
W. F. Euker

D. M. Lefkowitz
D. M. Lefkowitz

J. R. O'Connell, jr
J. R. O'Connell

J. E. Mason
J. E. Mason