

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION
Referee Jacob Seidenberg

PARTIES TO DISPUTE:

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION
THE NEW YORK CENTRAL RAILROAD COMPANY
(NEW YORK DISTRICT)

STATEMENT OF CLAIM: It is the claim and request of the Petitioning Organization that:

1. Respondent Carrier has violated the terms of Rule 18—Discipline—of the effective agreement. Carrier also violated letter of understanding of May 3, 1960. The Carrier suspended Mr. J. D. Lent from his position for two (2) days and gave him a five (5) days record suspension. They allege that he improperly handled the employes under his supervision and violated the preamble of the effective agreement.

2. Carrier shall be required to pay Mr. J. D. Lent for said two (2) days suspension and clear his record for their arbitrary, unjust and unwarranted actions resulting from investigation held December 7, 1964.

OPINION OF THE BOARD: This case devolves about the effect of a letter of instruction issued by the Carrier on May 3, 1960, upon discipline rule 18 contained in the collective bargaining agreement in effect between the parties to this dispute as well as the way in which the disciplinary proceedings were conducted and administered.

The operative facts of the case are that the carrier disciplined the claimant by a five day record suspension after a hearing held on December 5, 1964. The carrier contended that seven (7) of the nineteen (19) men under the claimant, a regular relief assistant foreman, had failed to turn their time cards in at the end of their tour of duty and had left work as much as two hours early without obtaining permission from the claimant. The carrier, through the person of J. S. Fadale, General Superintendent of Shop, charged the claimant with the improper handling of employes under his jurisdiction and failure to comply with the preamble of the collective agreement. After the investigative hearing, at which the claimant was represented by General Chairman Abendroth, and District Chairman Burkhardt, and Local Chairman Spinola, Superintendent Fadale informed the Claimant that the aforementioned discipline was being impaired upon him. A copy of the Notice of Discipline, dated December 16, 1964, was timely served on the Claimant and District Chairman Burkhardt but no such notice was given to General Chairman Abendroth.

The relevant portion of discipline rule 18 reads as follows:

"(b) A Supervisor who has been in the Carrier's service as such 60 calendar days or longer and against whom the Carrier has preferred charges shall not be disciplined or dismissed without a fair hearing at which he shall be permitted to have a representative or representatives of his choosing and witnesses to testify on his behalf. The hearing shall be held within 15 calendar days from the date the occurrence becomes fully known to the proper official. Decision shall be given within 15 days after the close of business.

"NOTE: Neither Rule 17 nor Rule 18 attempts to abrogate the Carrier to refuse permission to a Supervisor to present his own claim or grievance or represent himself in a hearing involving charges against him or to have representation of his own choosing in any case. The effect of these rules is to recognize the rights of the Supervisor as an individual and at the same time to require that the authorized committee or its accredited Representative be permitted to be a party to all conferences, hearing or negotiations between the 'claimant or accused Supervisor and the Representative or Representatives of the Carrier'."

The Carrier's letter of instructions of May 3, 1960 addressed to Supervisors in the Maintenance of Equipment Department, with copies to Organization officials, states:

"It is customary in disposing of discipline cases to give copy of such disposition to whichever Organization representatives were present at the hearing to represent the accused, as well as the accused himself.

"We have experienced very little difficulty in this respect in the past; however, we have had recent complaints from the A.R.S.A. Committee on Shop Labor.

"While the local disposition in the case was upheld because the discipline rendered was merited, we believe that the case would not have been proposed beyond the local level had the A.R.S.A. representative been informed of the discipline rendered in the customary manner.

"You should, therefore, advise all in your jurisdiction, who have occasion to handle discipline matters, that the employe representative(s), who appear on the employe's behalf at a hearing, 'should also be advised of the disposition resulting from the hearing'."

It is the Organization's basic contention that Rule 18 and the Carrier's letter of May 3, 1960, gave it the recognized right to have the Representative who represented the claimant notified within 15 days of the discipline imposed, if any. The May 3 letter has become part of the Agreement in effect between the parties. Since it is not disputed that Mr. Abendroth did not receive the Carrier's Notice of Discipline, dated December 16, 1964, the Carrier breached Rule 18 and the discipline imposed thereunder must necessarily fall.

The Organization also interposed, an objection to the procedural aspects of this case in that Superintendent Fadale, who preferred the charges against the claimant, also testified against him at the hearing, and finally acted as the

judge of the claimant's guilt and the penalty that should be imposed against him. The conduct of the Superintendent in these conflicting roles denied the claimant a fair hearing and cannot be condoned.

The Organization also maintains that the discipline imposed was unwarranted in that it was not possible within the time available to claimant, in light of the physical layout of the shop, for the claimant to cover the entire area to ascertain the whereabouts of all the employes under his jurisdiction. It states that if the Carrier wants closer supervision of its employes it should employ more Supervisors.

The Carrier, on the other hand, denies that there is any merit to the Organization's procedural objections and that substantively the evidence clearly shows that the claimant was delinquent with regard to his responsibilities concerning employes under his work jurisdiction.

The Carrier denies that the May 3, 1960 letter could be construed as part of the Agreement. It was a letter addressed to Company officials and not signed by both parties to the Agreement. It did not in any way modify the Agreement. The Carrier points out that Rule 18 does not specify to whom the Notice of Discipline shall be given, and therefore it could have been given to anyone and there would have been compliance with the Rule. The Carrier states that no rights of the claimant were abridged and the failure to give the General Chairman notice caused no delay in prosecuting the claimant's appeal. The Carrier states that Award No. 2145 of this Division, comparable to instant case, has recently ruled against the Organization.

The Carrier also denies that the claimant did not receive a fair hearing because Superintendent Fadale acted in several capacities. It states that it is not improper or unusual on this property for Mr. Fadale to have acted in those capacities which he did. A review of many exhibits of both parties will show no exception was raised to this procedure on this property.

The Board finds that one of the procedural objections made by the Organization is well taken. The several functions exercised by Superintendent Fadale, wherein he preferred charges against the claimant, then testified against him at the hearing, and finally passed judgment as to his guilt based on the record made at the investigative hearing, are clearly incompatible with the concept of a fair and impartial hearing guaranteed the claimant by Rule 18. The roles occupied by Mr. Fadale, permitted him, among other things, to pass judgment on his own testimony.

The Board finds no merit to the Carrier's contention that the aforementioned practice has existed on the property for many years without challenge. However, the Board is now faced with the move that the Organization has challenged the practice, and the Board has no recourse but to rule on this practice and, after review, find it violative of the basic concept of a fair and impartial trial to have the same company official act as "accuser," "witness," and "judge" of the accusations or charges.

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

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **FOURTH DIVISION**

ATTEST: Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 28th day of November, 1966.