

Referee Harold M. Weston

PARTIES Railroad Yardmasters of America  
TO  
DISPUTE: The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that -  
Yardmaster I. H. Throckmorton be allowed five day's pay for January 21, 22, 23, 24 and 25, 1970 and that his record be cleared of any citation as result of discipline assessed on January 16, 1970 following an investigation conducted on January 5, 1970.

OPINION OF BOARD: Claimant, a second trick yardmaster at Needmore Yard, Dayton, Terminal, was administered a five-day suspension for failing to notify Train 92 to stop and make a pickup at that Yard.

Claimant was accorded a hearing in the matter and contrary to Petitioner's contention, we find that the notice of hearing served upon him, which specified the time, date and place of hearing "To determine your responsibility, if any, for failure to notify No. 92 to pick up in your yard 4:15 P.M. 12-31-69," was sufficiently definite and clear to enable him to prepare his case and to appreciate the nature and purpose of the proceeding. This notice, in our opinion, satisfies the requirements of Article 7(a) of the applicable Agreement that an employe "be apprised in writing of the precise charge against him."

While we also are in accord with Carrier's view that procedural and formal objections that are not raised at the hearing will be deemed waived, we do not agree that hearing defects of a fundamental character may not be considered subsequent to the hearing, even though Claimant has replied in the affirmative to the hearing officer's questions as to whether the hearing was fair and impartial. The question as to whether a hearing is fair and impartial concerns fundamental concepts that can be resolved only by an analysis of the record and not by how the parties label it in general routine questions and answers.

The record in the present case leaves no question but that the hearing officer failed to observe minimum requirements of fair process and while as a matter of practice we are disposed to give hearing officers considerable latitude in discipline cases in this industry, the error in question goes to the very essence of the fair proceeding concept and cannot be overlooked or minimized.

Early in the hearing, the hearing officer stated:

"Mr Throckmorton, I have information that you failed to notify No. 92 to pick up in your Yard at approximately 4:15 P.M. December 31, 1969. Please state what you know of this incident."

At that point in the proceeding, no evidence had been introduced that Claimant had failed to notify No. 92 to make the pick up and the hearing officer's statement, based on information he had previously received, evidenced a preconception regarding the merits of the case that is incompatible with elementary principles of fair play. Even if we were to assume that this defect could be overlooked on the ground Claimant subsequently testified that he had failed to notify No. 92 of the pick up and therefore was not unduly prejudiced by the hearing officer's statement, the latter's following question cannot be similarly treated:

"Mr. Throckmorton, is it not true that I contacted you at approximately 3:45 P.M., at which time you told me that you had a 29 pick-up lined for No. 92 and that your Car Inspectors were inspecting the train?"

This question, which received a negative response, not only was in the nature of testimony but again made assumptions that were not based on the record and, more important, betrayed preconceptions as to material facts.

Claimant did not receive the impartial hearing he was entitled to and his claim will be sustained.

**FINDINGS:**

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

The carrier and the employee 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 waived right of appearance at hearing, but were granted privilege of appearing before the Division with Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

ATTEST:

*E. A. Killeen*  
E. A. Killeen  
Secretary

Dated at Chicago, Illinois, this 24th day of January, 1972.