Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3747
Docket Number 3742

Referee Kay McMurray

PARTIES TO DISPUTE: Railroad Yardmasters of America

Southern Railway Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Claim of Yardmaster G. Helton, Chattanooga, Tennessee, for pay for time lost incident to his suspension from service for responsibility in derailment and failure to properly perform his duties while serving as Yardmaster at DeButts Yard on February 3, 1979.

OPINION OF BOARD: Claimant, Yardmaster G. Helton, was notified by letter dated Feb. 5, 1979, "to report to the office of the Superintendent of Terminals, DeButts Yard, Chattanooga, Tennessee, at 9:00 A.M., Thursday, Feb. 8, 1979, for formal investigation to determine the facts and place your particular responsibility, if any, for derailment and damage to TTX 474569, which rolled out of Track 58 striking cut being pulled out of Track 59, on/or about 3:00 P.M. February 3, 1979 while you are on duty.

"In this investigation you will be charged with failure to properly perform your duties.

"In the event you desire witnesses and/or representation in the investigation, please arrange to have them present."

The hearing was held as scheduled and following the investigation claimant was notified by letter dated Feb. 15, 1979, that he was suspended from service without pay for thirty (30) days beginning February 17, 1979, and ending at 12:00 midnight on March 18, 1979. That penalty is now before this Board for adjudication.

At the outset the Organization raises substantial procedural objections. The record reveals that Superintendent Hilton was the charging officer, hearing officer, decision officer, and finally an appeals officer. It views such multiplicity of roles as material and prejudicial to the right of fair trial and appeal which the contract requires. We agree. While numerous awards have held that some overlapping of functions in the hearing and decision process is not violative of due process and justice, the inclusion of the appeal hearing in such multiple duties attacks the integrity of the appeal process and denies the claimant the independent, non-prejudical consideration required by the appeal process.

In a similar situation on the same property Second Division Award No. 7119 treated with the problem as follows:

> " We have reviewed the conflicting awards cited by the parties on the question of multiplicity of roles by Carrier officers in discipline cases. We continue to adhere to our earlier general opinions that Carrier combines such functions in one individual at its peril; that some minor overlapping of roles, while not to be encouraged, is not prima facie evidence without more of prejudicial procedural imperfections; that the greater the merging of roles the more compelling the influence of pre-judgement or prejudice and, that each such case must turn on its own merits. In the instant case we find that H. W. Sanders did not actually testify against Claimant in the hearing but that is literally the only function he did not fulfill in this matter. He activated the investigation, preferred the charges, held the hearing, reviewed the record, assessed the discipline, and denied the appeal. In so doing he fulfilled roles of investigator, prosecutor, trial judge and appelate judge. The disinterested development of evidence, the unbiased review thereof and the objective assessment of appropriate penalty inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions. This was not a mere technicality but a substantial denial of Claimant's rights. We are left with no alternative but to sustain the claim. See Awards 4536, 6329, 6439, 6795, and 7032."

This Board concurs with the foregoing decision.

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.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: Nancy J. Dever
Assistant Executive Secretary

Dated at Chicago, Illinois, this 10th day of June 1980.

LABOR MEMBERS' REPLY TO CARRIER MEMBERS' DISSENT
TO FOURTH DIVISION AWARD NO. 3747 (McMurray)

The Dissent itself has nothing whatever to do with an involved principle which may upset or reverse the previous awards of the Board or its case law. It is rather, because it was a sustained Southern Railway case and Southern ordered that a dissent must be written because this Referee had dared to sustain one of their cases.

The Dissenter (Page 2) states:

> "On this property the Carrier and Organization have restricted themselves by agreement with regard to procedures to be used in disciplining employees. The Organization followed the well-established disciplinary process and then was heard to complain that the procedures were violative of due process once they received an unfavorable decision."

Rule 7 of the Agreement agrees without any reservation that any accused will be "granted a fair and impartial hearing." It further grants and agrees that "he shall have the right to appeal to each succeeding higher officer designated by the railroad to hear such matters,. . ."

First the Organization has never restricted itself to such procedures that include the same carrier officer rendering the decision of discipline and then permitting this same officer to make an appeal decision on his original finding. It is not the Organization who dictates which Carrier officer will decide and render the decision. Nor is it a matter of agreement between these parties. And when the Carrier, having the option, permits an officer who is in line as an appeals officer to decide and render the decision, the Organization has no choice except to

appeal to that same officer. And that is so because of Fourth Division Award No. 3567 where in that instance the Organization attempted to by-pass one appeals officer because he had been a witness against the accused.

That Award held:

> ". . .There is no basis for the Board's acceptance of Petitioner's decision to 'opt out' of following the procedures set forth in the Agreement."

The Carrier Members of this Division voted for the adoption of that decision and now state in their Dissent:

> ". . .The Organization followed the well-established disciplinary process and then was heard to complain that the procedures were violative of due process once they received an unfavorable decision."

First the Organization followed the established process of the Agreement because of Award No. 3567. They would not have appealed to an officer who had already made a decision of guilt with any hope of a new and independent consideration of that decision which is guaranteed by Rule 7. Secondly, there was never a question of the accused receiving "an unfavorable decision" because this is a case involving Southern Railway, and even the Carrier Members should know by this time that when you are charged on Southern, there is no other decision except unfavorable regardless of the circumstances.

The Dissentor also states that:

> "The Organization participated in the formulation of the discipline procedures used on the property. And, through collective bargaining procedures they agreed to and implemented the current process. (Pause here for laughs) Now, the Majority has upset, by this erroneous award, a pattern established perhaps 75 years ago."

The Organization participated in the formation of the <u>appeals procedure</u> and voiced continued objection to the formation of the "discipline procedures" wherein this Carrier had permitted the same officer to render the decision and then sit in judgement of his previous decision at the appeals level. And if, as the Dissentor states, this pattern of denial of "due process" has been Carrier's opinion for the

past 75 years we believe it. And when we have seen the Carrier members attempting to defend this disgraceful denial of "due process" for the past 45 years we have no problem believing that either.

And if, as the Dissentor contends, this Award is erroneous, it implies that the Referee erred in writing it. And if he did, then the following Awards and those referees also erred. See:

Fourth Division Awards Nos. 1742 (Weston), 1743 (Weston), 2566 (Weston), 2625 (Weston), 2195 (Seidenberg). Second Division Awards Nos. 7032 (Eischen), 7119 (Eischen), as well as that Division's Awards Nos. 6329, 4536, 6439, 6795, 6313, 5642, 7032, 9832 citing 6329 and 4536 (Seidenberg). See Third Division Awards Nos. 8810 (Bakke), 8431 (Daugherty), 21040 (Sickles), and that Division's Awards Nos. 7021, 8431, 8088, 10015, 17156, 19062, 10410 and Public Law Board Award No. 3 to Board No. 2046.

It is almost unbelievable that so many referees have written so many erroneous awards and that this Referee, following that line of precedent, has further erred. And lastly, see Second Division Award No. 7119, cited as precedent in Award No. 3747 and involving this same issue and this same Carrier. It is just a crying shame that the precedent involving the doctrine of stare decisis would be followed in a Southern case. How would any one even dare?

In their Rebuttal there is quoted an Award supposedly of this Fourth Division which is not identified by Award Number or even by Docket Number so we will dismiss that as being unable to substantiate. They have also cited <u>one</u> Second Division Award (NO. 8367) wherein 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. . ."

And then, after stating and understanding what the issue was, this referee then decided there was no denial of due process and further writes:

> "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."

One would think that the writer of this Dissent would be ashamed to even cite such prejudiced and biased decision, by an unheard of neutral who has already shown that he is not neutral when writing this disgraceful decision. However, as in similar situations, there is always the bright side. If this non-neutral referee has written his way into the ranks of the unemployed, he may get a job as employee of the Southern Railway, as his opinions and views on "fair and impartial" and "due process" are very similar, if not exact.

We stated that the Dissent was being filed, not because of the views of the Carrier Members, but rather, because it was a Southern Railway case. The Award (3747) was adopted on June 10, 1980. The issue decided was that it was a denial of "due process" for the same Carrier officer being the "charging officer, hearing officer, decision officer, and finally an appeals officer."

On that same date of June 10, 1980, Award No. 3746 was also adopted and the same Referee being author of both. In that case (Award No. 3746) the parties were RYA v. L&N and the issue there was also a denial of "due process" and only to the extent that the same officer rendered the discipline and following that became an appeals officer. Both cases were sustained.

Now the question is this: If in the Southern case (Award No. 3747) the Carrier Members found reason to dissent because one of Southern's officers was not permitted to assume the multiplicity of roles as stated above and to the extent of 4 different roles, where is the dissent and dissatisfaction in the Louisville & Nashville case, where that Carrier officer only assumed the two roles of decision maker and appeals officer? Why do the Carrier Members find the decision in Award No. 3747 so distasteful and even erroneous when it is a Southern case? And why did they not find Award No. 3746 equally unpallatable involving Norfolk & Western with only half the number of roles assumed there by one of that Carrier's officers?

The answers are obvious. It is not the issue that is involved, it is the Carrier that is involved and it has always been so and always will be.

R. F. O'Leary

R. F. O'Leary
Labor Members - Fourth Division

CARRIER MEMBERS' DISSENT
TO
FOURTH DIVISION AWARD 3747
(Referee Kay McMurray)

This case involved a thirty (30) day suspension and the subsequent challenge of that discipline on procedural grounds.

The Organization raised a procedural objection to the disciplinary process as employed by this Carrier.

The Majority has sustained the claim on the procedural technicality that a Carrier official participated in too many levels of the discipline process thereby violating the claimant's right to procedural due process.

The Majority concluded:

> "At the outset the Organization raises substantial procedural objections. The record reveals that Superintendent Hilton was the charging officer, hearing officer, decision officer, and finally an appeals officer. It views such multiplicity of roles as material and prejudicial to the right of fair trial and appeal which the contract requires. We agree. While numerous awards have held that some overlapping of functions in the hearing and decision process is not violative of due process and justice, the inclusion of the appeal hearing in such multiple duties attacks the integrity of the appeal process and denies the claimant the independent, non-prejudicial consideration required by the appeal process."

The threshold question is whether the participation of the Carrier official in more than one level of the discipline process impaired to any appreciable extent the due process rights of the claimant. That question was not addressed nor answered by the Organization. To the contrary, the Carrier clearly demonstrated there was in fact no violation of the claimant's rights. Rather, Carrier Members of this Board vigorously argue that the referee has exceeded his arbitral authority and has in effect attempted to rewrite the contractual rules which have historically governed these parties. By issuing this award the Majority has circumvented the statutorily prescribed process

of contract negotiation and rewritten the rules through the interpretation of an agreement.

In determining whether claimant's due process rights have been impermissably burdened, it is also appropriate to examine the legitimacy of Petitioner's challenge to the disciplinary procedure. Here, there is no substance to the Organization's broad sweeping assertion. Instead, it appears as a feeble attempt to erect a procedural screen to block a careful, judicious evaluation by this Board, which would have uncovered the spurious nature of this claim.

The Carrier in its Rebuttal demonstrated that the multiplicity of roles played by Superintendent of Terminals Hilton was not unusual nor contrary to the Agreement. In fact, the discipline rules clearly spelled out the avenue of appeal to be taken by the Organization in progressing a claim. In this case, the proper procedure was followed by the Petitioners as Superintendent Hilton was the designated Officer to hear the appeal.

The Organization participated in the formulation of the discipline procedures used on the property. And, through collective bargaining procedures they agreed to and implemented the current process. Now, the Majority has upset, by this erroneous award, a pattern established perhaps 75 years ago.

The Majority has failed to properly interpret the Carrier's Agreement. The Carrier Members refuse to accept this blatant usurption of the Carrier's managerial prerogative to collectively bargain for disciplinary rules and thus we will consider the award a nullity with no force or effect.

On this property the Carrier and Organization have restricted themselves by agreement with regard to procedures to be used in disciplining employees. The Organization followed the well-established disciplinary process

and then was heard to complain that the procedures were violative of due process once they received an unfavorable decision.

It is a well established principle at this Board that procedural requirements to which a Carrier must conform in handling a discipline case are made by agreement and in the absence of a rule requiring a particular procedure the Employees have no right thereto.

The United States Court of Appeals in reviewing an Adjustment Board Award (Thomas v. NYC + StL 185 F.2d 614, 617) declared:

> "While the Board under the statute has jurisdiction to handle an individual grievance, it is not authorized to write a contract for the parties nor to create substantive rights."

Obviously the Majority here did not heed the advice of the Court when it chose to restructure the Carrier's disciplinary system.

Further, in Edwards v. St. Louis - San Francisco R. Co., 361 F.2d 946 (1966), the seminal case involving the issue of an employee's due process rights when in a disciplinary proceedings, the Court said:

> ". . . This appellant was dismissed from his employment and deprived of his livelihood after forty years on the job on the sole basis of hearsay evidence. Moreover, when considered as a whole, the evidence adduced at the company hearing really indicated nothing more than the fact that a passenger charged a conductor with an act which the latter denied . . . (Page 952) * * * *
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> "The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property. . . (Page 953) . . . Therefore, when a railroad employee questions the propriety of the initial hearing held on carrier property, his claim must be based on the provisions of the collective bargaining agreement relating to that subject . . .

"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." (Emphasis added)

Award 3747 is not supported by the Agreement, the record before this Division, the awards of this Board, nor the case law in the Federal Courts. For these reasons, we are compelled to issue this vigorous dissent.

D. M. Lefkow

W. F. Euker

P. V. Varga