Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4221
Referee Robert W. McAllister Docket Number 4208

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

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

Yardmaster R. A. Hannah be paid 8 hours and 30 mintues at yardmaster rate for attending investigation, February 16, 1982 and for all time lost as a result of the discipline of 30 days (ACTUAL SUSPENSION) beginning 12:01 p.m. March 15, 1982 and ending 12:01 p.m. April 14, 1982, including any overtime that claimant would have been entitled to during the period of actual suspension. Further, that claimant's service record be cleared of all charges and discipline and/or reference thereto.

OPINION OF BOARD: On February 11, 1982, the Claimant, Yardmaster R. A. Hannah, was instructed to attend an investigation based on the following charges:

"You are charged with responsibility in connection with allegedly absenting yourself from duty without permission from your immediate supervisor, doing work for yourself or for others during working hours and attempting to dispose of Railroad property without authorization by the Company at approximately 5:30 P.M., February 8, 1982, in the Curtis Bay area."

A hearing was held on February 26, 1982, and, thereafter, the Carrier assessed Claimant with a thirty-day actual suspension. The Organization initially raises two procedural arguments: that the Carrier violated Article 22(a) in that the charges were not "specific" as required by the Rule, and secondly, that the Carrier failed to furnish a copy of the Transcript record on the decision therein rendered to the Regional Chairman. Citing the initial objection raised at the hearing, the Organization contends the charges do not state who (the Claimant's) immediate Supervisor was, the charges do not state what kind of work (the Claimant) was allegedly performing for himself or others, and the charges do not state what type of Railroad property (the Claimant) was attempting to handle.

This Board has examined the numerous prior rulings submitted by the Organization and agrees that we are dealing with disciplinary rules which require that Yardmasters "...shall be apprised in writing of the precise charge against him...". This is a contractual right necessitating strict construction of its application. Herein, unlike the examples highlighted in the numerous prior awards submitted demonstrating lack of specificity, the Board finds the Carrier's charge was not vague, properly identified the Claimant, alerted him that his immediate Supervisor was involved, indicated the time and place of the asserted wrongdoing, and spelled out the basic actions allegedly involved. On balance, we, therefore, conclude the Claimant was the recipient of the pertinent information required of a precise charge in order that he had the opportunity to fully prepare his defense.

The second procedural error raised concerns compliance with Articles 22(a) and (b). The Organization argues the Carrier sent a copy of the Transcript and the discipline notice to the former Regional Chairman, R. L. Plitt, and not the new Regional Chairman, R. W. Suter. The reason underlying the requirement the Regional Chairman be given copies of the hearing Transcript and discipline notice is to insure that the Organization may properly defend the Claimant and undertake his appeal. It is undisputed that Vice-Chairman Evans represented the Claimant at the investigation and was timely provided with a copy of the Transcript and the disciplinary decision. Secondly, Regional Chairman Suter was present at the investigation.

Thirdly, the Claimant's initial appeal was advanced by Vice-Chairman Evans. In other words, rather than showing any substantive or material denial of right the evidence is to the contrary. Furthermore, the incumbent of a particular Union office is strictly an internal matter. In the changeover from one individual to another, it is unreasonable to expect this Board to find that service to the former Regional Chairman only a few days out of office imposes no duty upon him and is a substantive breach of the Agreement as contemplated by the parties.

With respect to the merits, the record readily demonstrates a serious conflict between the testimony of the Claimant and that of Patrolman Weiner and Lieutenant Barnes. The Board has repeatedly held that the trier of facts is generally vested with the exclusive authority to resolve conficts of evidence. Our function is to examine the whole record to insure the Claimant received a fair and partial investigation and that substantive evidence exists to support the Carrier's conclusions and imposition of discipline. In summation, the Board concludes the evidence herein establishes the Claimant absented himself from duty without permission of his immediate Supervisor and was engaged in work or activities other than his Yardmaster's duties. Accordingly, we will deny this claim.

FINDINGS:

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

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:

Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March 1985.

LABOR MEMBERS' DISSENT
TO
AWARD NO. 4221 DOCKET NO. 4208
REFEREE: ROBERT W. MCALLISTER

The Majority in this Award has misinterpreted and misapplied the discipline rule controlling in this dispute.

At issue here was an interpretation of Article 22 (a) and (b) wherein the parties, in unambiguous language, guaranteed the Regional Chairman would be furnished a copy of the stenographic report taken at the investigation and a copy of the decision following the completion of the investigation.

The contract language chosen by the parties leaves no room for interpretation. The Article is emphatic in its guarantee of receipt of the above mentioned documents in a discipline case. However, the Majority has applied the agreement as a Board of Equity rather than an appellate forum.

The Majority recognized a breach of the agreement, but stated it was not a "substantive breach." The Award asserts the untenable position that the former Regional Chairman had a duty to attempt to right the violation.

This is not the first occasion the subject of failure to supply the Regional Chairman with required documents has been adjudicated by this Division and between the same parties. This is the fourth occasion the subject has be a matter addressed in awards, i.e., Award Nos. 980, 3797, 3850, 4211. All were sustaining awards. The latest Award, 4211, is squarely on point and stated:

"In addition, Carrier suggests that Claimant's rights were not adversely affected, even if the Regional Chairman did not receive a copy of the notice of discipline. Thus, Carrier concludes that any procedural violation, if proven, should not result in a sustaining award.

* * *

"First, the Organization timely raised the allegation that its Regional Chairman had not received a copy of the discipline notice. In so doing, the Organization shifted the burden to Carrier to prove that the notice was timely sent (see this Board's Award 4124). Normally such proof consists of a copy of a registered mail receipt. Here, no such proof exists. Thus, we must conclude that a copy of the discipline notice was not mailed to the Regional Chairman, as required by Article 22(b) of the Agreement.

* * *

"Our finding on this issue is consistent with a long line of precedent which far outweighs cases cited by Carrier (see for example, this Board's Award Nos. 3234 and 3097). In addition we have carefully read the Dissent in Award No. 3850. The issues contained in that Dissent are not present in the instant dispute. There, the Local Chairman had been verbally advised as to the date a hearing would be scheduled. In addition, in that case, Claimant elected to waive his right to representation. Here no such verbal advise or waiver exists. Thus, we do not believe that the Dissent in Award No. 3850 is applicable to the facts of this claim.

"Second, we note that this issue is concerned with the Organization's receipt of a copy of the notice of discipline. We believe that the Organization has as much right to learn of Carrier's decision after the investigation as to the holding of the investigation itself. The Organization must be given all documents upon which it can frame a proper appeal. Clearly one such document is the notice of discipline. Thus, Carrier's failure to provide the Organization with such notice represents a significant procedural error. Moreover, it clearly violates Article 22(b) of the Agreement. Thus, we find that the claim must be sustained on this ground alone."

For the Carrier members of the majority to support the award was to recant their steadfast arguments made in innumerous disputes wherein it was demanded the agreement be applied as written because the parties knew how to put conditions or exceptions in the agreement if they so desired. One such example would be the following used to support precedent awards on the subject:

> ". . .we call your attention to the attached Court decision from the U.S. District Court - Middle District of Georgia - involving Woodrum v. Southern Railway (September 12, 1983) affirmed by the U.S. Court of Appeals - Eleventh Circuit - January 15, 1985. The District Court made this salient observation:
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> > '. . .The plaintiff correctly notes that judicial review may be had under Section 9 of the Railway Labor Act for fraud by a party. 45 U.S.C. Section 159 third (c). He therefore argues that it was the intent of Congress to allow judicial review for fraud by a party under Section 153 first (q).
> >
> > '(1,2) Of course, this argument cuts both ways. If Congress had intended that fraud by a party was sufficient for judicial review, then Section 159 third (c) is evidence that it knew how to say so. By failing to employ this language in Section 153 first (q), this court must assume that Congress intended what was enacted. . .'"
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> Award No. 4221 is of no precedent value in future disputes.

For the foregoing reasons, we dissent.

FOR THE LABOR MEMBERS

D R Carver

D. R. Carver
Labor Member
Fourth Division

CARRIER MEMBERS' ANSWER
TO
LABOR MEMBER'S DISSENT
TO
AWARD 4221, DOCKET 4208
(Referee McAllister)

The claim filed with the Division in this case sought to overturn Carrier's 30 day discipline of a yardmaster who was found guilty of being away from his work place engaging in suspicious activities not related to his Yardmaster duties.

The Dissent is more notable for what it fails to say than the point it seeks to make. It doesn't discuss the facts of the case nor the evidence submitted at the trial establishing proof of the charge. By implication it concedes Claimant was guilty as charged, but the Dissentor is annoyed because the frivolous argument the Organization advanced dealing with an alleged deprivation of contractual due process was not persuasive to the Majority.

In this case, the Organization attempted to have the discipline reversed because the Carrier notified the previous Regional Chairman of the discipline and not his successor. For some undisclosed reason, the Dissentor does not set out the facts dealing with this issue, so for the benefit of those who review this decision we will do so. The facts disclose that:

> "Concerning your allegation that Article 22 of the Agreement was violated when former Regional Chairman Plitt was copied with the transcript and with the letter of discipline instead of the incoming Regional Chairman Suter, we note initially that, as the Organization states in its letter to General Manager Edwards, the effective date for Mr. Suter to assume his post as Regional Chairman was March 4, 1982. As you are aware, Mr. Plitt was still the Regional Chairman at the time the charges were set (February 11, 1982) and at the time the investigation was scheduled (February 18, 1982). In any event, Yardmaster Hannah was represented at this investigation by Vice General Chairman Evans, who was also given a copy of the letter of discipline and the transcript. Additionally,

> "it is significant to note that Vice General Chairman Evans initially appealed Terminal Superintendent Gray's decision to Superintendent of Operations Snyder and that Regional Chairman Suter, who was present at the investigation as an observer only, did not participate at all in the appeal process. Therefore, there can be no doubt that the Carrier's transmitting of the discipline letter and the transcript to the Organization through former Regional Chairman Plitt and through Vice General Chairman Evans did not hamper the Organization's efforts in representing Yardmaster Hannah or in making a timely appeal." (Emphasis Supplied)

In the light of these facts, the reader can judge whether the argument offered by the Petitioner and defended by the Dissent has any validity. It should be noted that the criticism of Award 4221, now advanced by the Dissentor had nothing to do with the trial or proof of the charge or the guilt of the Claimant. It concerned a matter dealing solely with the notification of the Organization representative so that an appeal could properly and timely be presented. Such an appeal was promptly and timely presented by the duly appointed representative in this case and the Dissentor does not challenge this.

In Third Division Award 20423 (Lieberman) the same question was addressed and the disposition was remarkably similar to our Award 4221 and reads:

> "At the outset we must point out that the disciplinary process in this industry does not follow the careful technical procedures required in criminal trials; on the other hand the rights of employes to due process and equity in the investigative process must be scrupulously preserved. The Board's function, in reviewing the disciplinary activity on the property, is of course restricted. In this case such review is limited to determining whether or not the Carrier's failure to furnish timely information in any fashion impaired Claimant's rights to a fair hearing and subsequent handling of the discipline. We find no evidence presented by Petitioner to indicate the impact of Carrier's error and we can find no effect on any rights accruing to Claimant. It is clear that the purpose of Section 3 of Article V was to enable Claimant to perfect his appeal in normal fashion and in this case he was not hampered. In Award 4781 we said:

> 'The purpose of the rule (requiring notice) patently was not to provide a technical loophole for escape from deserved discipline, but to enable the employe to prepare his defense.'

"In Award 11775, in a very similar factual situation, we held that Claimant was not prejudiced by Carrier's inadvertent failure to send a copy of the disciplinary decision to the General Chairman. We said:

> 'We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed.'

"Claimant's undenied guilt is significant in our consideration. The Claim herein does not allege a violation of the Agreement in Carrier's error per se, but rather through the improper dismissal of Claimant. Under these circumstances it would be entirely improper for this Board to reinstate Claimant with substantial back pay in accordance with Article V Section 5-a; such justice could be considered arbitrary and capricious (Award 10547). It would be impossible to hold that the charges against Claimant have not been sustained and there is no contractual remedy provided for violations of Section 3 unless there was some negative affect on Claimant's rights to due process. The Claim must be denied."

The foregoing decision pretty well sums up the point we have been making for some time that the Organization will endeavor to avoid consideration of the merits in discipline cases and uses every conceivable tactic to have the decision reversed on procedural grounds. Unfortunately there are cases where they have been successful as evidenced by Award 3850 (Carlton Sickles), cited by the Dissentor, where an admitted thief, who was found guilty of appropriating Carrier property in a duly constituted court of law and sent to prison, was, nevertheless, returned to service and compensated, except for the prison time, on the completely unsupported premise that his procedural rights were violated.

While we might be appalled that Dissentor would ever cite that decision, for the reasons fully explained in the Dissent to that Award, we are certainly not impressed by the conclusions reached therein. Indeed the Dissentor voted with the Majority in Award 4211 which carefully distinguished the facts related therein as compared to Award 3850. Apropos to this discussion, Judge Learned Hand, one of the most distinguished jurists to ever serve on the Federal Bench, in U.S. v. Garsson 291 F. 646 (U.S.D.C. - S.D. of N.Y.) stated:

> "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. * * * Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalisn and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." (Emphasis Supplied)

In this case the Majority refused to permit "archaic formalism and watery sentiment" to defeat the ends of justice.

For the reasons outlined above, the Majority's decision is unassailable.

W. F. Euker

P. V. Varga

T. F. Strunck