Award No. 5358
Docket No. 5176
2-BRofC-FO-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

THE BELT RAILWAY COMPANY OF CHICAGO

DISPUTE: CLAIM OF EMPLOYES:

1. That Mr. Joseph J. Herron was unjustly discharged from the service on January 13, 1966.

2. That Joseph J. Herron be reinstated with seniority right unimpaired and compensated for all time lost.

EMPLOYES' STATEMENT OF FACTS: Joseph J. Herron, hereinafter referred to as the claimant has been employed on the Belt Railway Company of Chicago, hereinafter referred to as the Carrier, for approximately eighteen years.

The claimant's workweek starts on Thursday and his hours are from 7:30 A. M. to 3:30 P. M.

Under date of January 10th, V. L. Smith directed a letter of charge to the claimant, a copy of which is attached as Exhibit A.

Mr. Herron was given a hearing as scheduled on January 13, 1966, a copy of hearing transcript is attached as Exhibit B.

A discharge notice was directed to the claimant, dated January 13th, a copy of which is attached as Exhibit C.

This dispute was handled with Carrier Officials designated to handle such affairs, who all declined to adjust the matter. The Agreement effective October 27, 1937, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that the claimant believes he was unjustly dealt with and accordingly said dispute was handled in accordance with Rule 11, which reads as follows, in part:

business without proper authority. At the 1964 investigation he was asked if the second job was not interfering with his work for The Belt to which he replied, "I have been working both jobs for 12 years and it is only the last 9 months that I have been having difficulty.' It is obvious that the 1964 discipline, even though it was mild, did not have the desired effect.

Mr. Herron's claim that he was unjustly discharged is without any foundation. The facts prove conclusively that he violated the company rules, that he was warned immediately preceding this last violation and that he had previously been disciplined for a similar violation.

The claim is declined."

Mr. Herron was not "unjustly discharged" as alleged in Part 1 of the Statement of Claim therefore there is no valid basis for Part 2 of the claim. The claim as presented to your Board should be denied and I so request the Board.

All data submitted in this submission has been presented to the union and made a part of this dispute.

It was not alleged in any of the handling on the property that any collective bargaining agreement was violated in this case. In any event a copy of the agreement between The Belt Railway and the Brotherhood of Firemen and Oilers is on file with your Board.

(Exhibits not reproduced.)

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

The carrier or carriers and the employe or employes 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.

Parties to said dispute waived right of appearance at hearing thereon.

The claimant was discharged for failing to comply with the order of his supervisor not to leave work early on January 8 and 9, 1966.

The Employes claim that the claimant was unjustly discharged (1) because this discharge was too severe a penalty for the claimant's infraction in light of his 18 years of service and (2) because the rule referred to in the notice of the charge against the claimant has not been made part of the record before this Board.

Discharge was not too severe a penalty. This Board can set aside a punishment only if it is so incommensurate with the misconduct viewed in light of the employe's previous record and the other surrounding circumstances that it appears that the Carrier must have been acting on the basis of personal animosity toward the offending employe. E.g., Award 2–5183 (Harwood); Award 2–4532 (Seidenberg); Award 2–3874 (Anrod); Award 2–3828 (Doyle); Award 2–3430 (Murphy). No such conclusion is possible in this case.

The undisputed evidence shows that claimant quit work an hour early on Saturday and Sunday because of a conflict with his second job, although his request for permission to leave early had been denied and he had been warned of the consequences of disobeying the order not to leave early. The claimant had been given a five day suspension for similar misconduct a year and a half prior to this incident. It appeared that the present incident was the result of a scheduling conflict which would reoccur in the future and that it was the claimant's intention to resolve all such conflicts in favor of his second job.

Previous awards have upheld the discharge of employes who take matters in their own hands and leave work in defiance of their instructions under circumstances more favorable to the employes than those presented by this case. E.g., Award 2–4873 (McMahon); Award 2–4623 (Whiting); Award 2–3568 (Carey).

The claimant's discharge was not defective because the rule referred to in the notice of the charge against the claimant has not been made part of the record before this Board. The notice stated:

> "Please arrange to be in my office . . . for investigation to determine your responsibility, if any, for failure to comply with orders of your supervisor not to leave the property before the close of your tour of duty on January 8 and January 9, 1966. This is in violation of General Rule 'H' . . ."

The Employes argue that this Board cannot evaluate the propriety of the claimant's discharge without knowing the content of Rule H. Rule H is apparently a unilateral rule promulgated by the Carrier.

As discussed above, the conduct of the claimant justified his discharge without regard to the content of any particular rule. Employes do not need a rule or regulation to inform them that leaving work in defiance of the orders of their supervisors is cause for discharge. The claimant was charged with such misconduct. The Carrier's statement in the notice of the charge that this misconduct violated Rule H appears to be cumulative and gratuitous. Rule H was immaterial to this proceeding unless it somehow misled the claimant into believing that his conduct would not be cause for disciplinary action or the reference to Rule H in the notice of the charge against him somehow prejudiced claimant's defense of the charge that he had left work early in defiance of instructions not to do so. No such contentions are advanced by the Employes. If they were, it would have been the Employes' responsibility to get before this Board the necessary evidentiary support for such affirmative defenses.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.

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