

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: ( Brotherhood Railway Carmen of the United States  
( and Canada  
(  
( Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employees:

1. That the Elgin, Joliet and Eastern Railway Company unjustly suspended Carman Everett Lenoir from service for a sixty (60) day period commencing September 30, 1979 through November 28, 1979 as a result of an investigation held on September 20, 1979. Said suspension is in violation of Rule 100 of the current Agreement as well as being arbitrary, capricious, unfair, unreasonable and unjust.
2. That the Elgin, Joliet and Eastern Railway Company be ordered to compensate Carman Everett Lenoir for all working days lost during the suspension period including pay for holidays lost during this suspension period.

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 employees 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.

This case arose out of the following underlying facts. On August 27, 1979 a Division General Car Foreman had written a letter to Claimant which criticized Claimant for, on August 22, 1979, after inspecting cars omitting to report a certain bad ordered car. (He did report three other bad ordered cars.) On September 6, 1979, at approximately 7:30 A.M., Claimant and an Organization representative entered the office of the Foreman who had written this letter seeking to discuss it. In the course of the Foreman's explanations, Claimant allegedly began interrupting, talking loudly, becoming argumentative and, finally, allegedly began to pound on the Foreman's desk. The Foreman, then, allegedly requested Claimant to leave his office, advising the Organization representative to handle any grievances Claimant might have, through normal appeal channels. Allegedly, Claimant did not honor this request to leave the Foreman's office or subsequent ones to do so. Only, allegedly, after the Foreman advised Claimant and the Organization representative that he had called the railroad police to have them remove Claimant from his office did the two men leave.

In a letter dated September 12, 1979 Carrier advised Claimant to report for an investigation, on September 20, 1979, for the purpose of developing "all facts, and to determine your responsibility, if any, in connection with your allegedly being loud, argumentative, belligerent and threatening in your behavior ... at approximately 7:30 a.m., September 6, 1979. You were also allegedly insubordinate when you failed to leave the office promptly..." Pursuant to the results of such investigative hearing Carrier advised Claimant, in a letter dated September 28, 1979, that Claimant would be suspended from service for a sixty day period, September 30, 1979 through November 28, 1979.

The Organization contends that Claimant was suspended in violation of Rule 100 because he did not receive the fair hearing required by that rule and because he was not "apprised of the precise charge against him" as stipulated in the Rule.

The Organization founds this last assertion on the fact that the letter of charge accused Claimant of being loud, argumentative, belligerent, threatening and insubordinate while the letter assessing discipline, pursuant to the findings of the investigative hearing, mentioned violations of Rules F and O of the General Regulations. The Organization contends that since there is no mention of these rules in the letter of charge Claimant and his representative could not "properly defend against these additional hidden charges. The Claimant was not apprised of the precise charge!" However, Carrier's September 28th letter of discipline states: "In ... investigation it was developed that you were responsible as charged above (allegedly being loud, argumentative, belligerent and threatening ...) with the one exception, that of threatening ... and thereby you are in violation of Rule F and the second paragraph of Rule O of the General Regulations Governing Maintenance of Equipment Employees." (Emphasis added) Rule F states, in part: "Civil, courteous and socially acceptable conduct is required of all employees in their dealings with each other. Boisterous ... or abusive language is forbidden .... Employees who are insubordinate ... quarrelsome, or otherwise vicious ... will not be retained in the service." Paragraph 2 of Rule O states, in part: "Employees must ... comply with the instructions issued by the supervising official on duty." Thus the discipline letter, in effect stated that Claimant was found to have violated Rules F and O because those charges (excepting one) which had been clearly stated in the letter advising him to report to the investigation had been substantiated at the investigation. Thus, the references to Rules F and O did not unfairly surprise Claimant as they were simply rules summing up the nature of those actions in which Claimant had been clearly charged with improperly participating. In other words, if Claimant had been successful in defending against the allegations, as to which he was clearly apprised, that he had been loud, argumentative, etc. he would not have been found in violation of Rules F and O (Note the word "thereby", as quoted above, in the letter of discipline.) In connection with this finding that there is no substance in Organization's contention that Claimant was not precisely apprised of the charges against him or its assertion that he was sanctioned for an offense as to which he was not precisely charged, it is interesting to note that Claimant's service record indicates that at least on two previous occasions he'd received discipline (dismissal later reduced to suspension, as well as a suspension) involving infractions of Rule F (The second suspension also mentions Rule O).

The Organization also contended that the investigative hearing itself was

conducted defectively from the perspective of affording Claimant a fair hearing.

The first aspect of the hearing which Organization asserts as unfair relates to the Hearing Officer allegedly permitting the Interrogating Officer, in his questions, to stray from the letter of the actual charges and also to lead witnesses. A review of the record indicates that such straying from the actual charges even assuming it is acknowledged that any occurred, was extremely minimal and in no way prejudiced Claimant's and/or his representative's ability to defend against and refute, the actual charges lodged against him.

A review of the transcript of the investigative hearing can lead to an interpretation that on infrequent occasion the Interrogating Officer, by the form of his questions, may have led a witness to give evidence that the Interrogating Officer presupposed. However, given the infrequency with which this seems to have happened, and the purposes which it achieved, as revealed by a review of the record, it cannot be said that Claimant's ability to establish a defense to the offenses with which he was charged was in any significant way, whatsoever, impaired, as a result of such possible occurrences.

Another point raised by Organization, in support of its contentions that the hearing was unfairly conducted, relates to several of Carrier's witnesses being permitted to read prepared statements into the record without such statements being made available for inspection to Claimant, and/or his representative or attached to the transcript of the investigative hearing as exhibits. The Organization points out that the Hearing Officer, upon being requested to do so by the Organization representative, had at first agreed to furnish copies of such statements to Claimant's representative, but had reneged upon objection from one of the Foreman, who was a Carrier witness and who had read from such a statement. Pages 6 and 7 of the transcript reveal this last description to be a factually accurate account. Page 22 of the transcript also reveals another instance where an Organization request to see a statement being read by a Foreman, who was a Carrier witness, was refused by the Hearing Officer. However, as pointed out by the Hearing Officer the only evidence which counts against Claimant is that which becomes part of the record. In this case that would only be that part of the written statement which the witnesses chose to enunciate -- which, of course, would then be heard by Claimant and his representatives. Similarly, anything on the written statements but not actually audibly articulated into the record by witnesses in no way counts against Claimant in the sense of contributing to carrying that burden of proof which Carrier must meet to prove the charges against Claimant. Thus, while having an opportunity to examine the written statements might have minimally assisted Claimant and his representatives in cross-examining Carrier witnesses, perhaps, e.g., regarding attacking their credibility, failure to have access to the statements does not, seriously prejudice Claimant from the point of view of, in any way, short circuiting Carrier's considerable responsibility of carrying the burden of actually proving, by substantial evidence, Claimant's commission of the offenses charged.

Moving to the substantive question of whether the charges were, indeed, adequately proved we find the following. While there is conflicting testimony on several exact facts, such as precise times, places, et. and while certain of the statements of Carrier's witnesses seem to have been somewhat impeached

under cross examination, by Claimant and/or his representatives, a basic factual scenario seems to emerge from a consideration of the record as a whole. Claimant and an Organization representative sought to appeal to Foreman Reed regarding a letter of reprimand Claimant had received respecting negligence in the exercise of his duties. Reed tried to explain the basis of the letter but Claimant did not accept his explanation and began asserting the justice of his position in a vigorous and involved manner. (There are indications that Claimant felt racial prejudice had played a part in the reprimand.) As things heated up in this way Reed told Claimant and the Organization representative that he did not have time to further discuss the matter at that time and that they might seek to arrange for an appointment for a discussion by a formal request through letter or that they might seek to formally pursue the matter as a grievance. Claimant seemed to take offense that Reed would listen to no more of Claimant's side of the story, right at that point, and more or less continued asserting the justice of his objections to the letter of reprimand. Subsequently, at several points, Reed indicated that he would have nothing further to do with the matter at the current time and that Claimant should leave the Car Department office. At some point, by his own admission, as well as that of his representative, Claimant pounded on a table while arguing his position, and Claimant and his Organization representative did not immediately respond to one or more of Reed's indications that they should leave his office. Reed advised that if they did not leave he would call the police and he had to resort to doing so before they in fact left.

From the sum and substance of this account it can be seen that it might well be fairly thought that Claimant's loudness, argumentativeness, belligerence and insubordinate response to a foreman's indication that he should leave the latter's office have been made out by the production of substantial evidence to such effect. (Carrier's letter of suspension acknowledged, in effect, that the charge of "threatening" had not been established by the evidence adduced at the hearing.)

However, it should be recognized, as is intimated by the scenario just referred to, that Claimant and his representative sought to speak to Foreman Reed respecting a matter about which Claimant was highly indignant. It can be appreciated how his sense of righteous indignation would intensify when his desire to fully air a matter in which he thought he had been dealt with unjustly was one as to which Foreman Reed could devote no more than a few minutes and one as to which the latter, at that time, sought to shut off discussion by Claimant. As the Claimant became more exercised in his emotional involvement in what he regarded as the justice of his cause, insult was added to injury when the Foreman told Claimant to leave his office. It can be appreciated how this would only accentuate Claimant's argumentativeness, induce sharp testiness toward the Foreman and only exacerbate any aspects of Claimant's behavior which might, already, be fairly characterized as belligerent.

Because the uncivil conduct of Claimant may be viewed as mitigated by the types of factors just mentioned and his deep emotional immersion in the situation, in general, the question of the appropriateness of the 60 day suspension is raised.

Carrier, however, contends for the appropriateness of the discipline assessed by pointing, in particular, to several instances in Claimant's past disciplinary

record. For example, it cites the following: 1) An August 15, 1978 warning letter regarding an improper freight car inspection; 2) a September 8, 1978 warning letter respecting Claimant having been observed lying prone on a bench in the Car Inspector's locker room; 3) a dismissal from service on October 19, 1978 in connection with a charge of threatening a Foreman; (a November 24, 1978 letter advised Claimant that this dismissal was reduced to a suspension ending November 26, 1978); 4) a June 4, 1979 15 day suspension in connection with Claimant's failure to follow instructions issued to him by a Foreman. It is Carrier's position that in light of this past disciplinary background dismissal would have been warranted in this case because of, what Carrier alleges as, the demonstration of Claimant's abusive and insubordinate attitude. In any event, asserts Carrier, a sixty day suspension was assessed against Claimant, in the hope that the imposition of more severe disciplinary action than had, in the past, been exercised against Claimant would induce, in the latter, an appropriate, on the job, behavioral attitude.

Carrier further asserts that the Board may not substitute its judgment for that of the Carrier with respect to the discipline imposed unless it can be demonstrated that such discipline is excessive, arbitrary or represents an abuse of managerial discretion. In support of this posture Carrier calls attention to an Award such as No. 1787, in which a Machinist Helper, with a previously unblemished ten year work record was suspended for fifty days for failure to execute a work order issued by a Foreman. The Board did not set aside, change or modify this discipline in any way. (It might be pointed out, however, that the instant case may be considered distinguishable from the facts in Award No. 1787, at least to the extent that no order regarding the performance of work was given here by Foreman Reed, to Claimant. There is also some ambiguity as to how to exactly characterize (order?, request?, demand?) Reed's indication that Claimant should leave the Car Department office.)

We are thus left with two competing approaches to an analysis of the appropriateness of the discipline assessed in this case. Claimant has been disciplined in the past and has been disciplined, in particular, respecting charges closely related to the type of offense with which he was here charged. This suggests the appropriateness of the rather heavy degree of discipline which Carrier assessed in this instance. On the other hand, Claimant seems to have sincerely felt that a glaring injustice had been done him, involving, perhaps, racial prejudice, had an urgent need to give his side of the story, seems to have become greatly agitated when it was indicated that Foreman Reed had no further time, at the point at which Claimant sought to make his case, to listen to that side of the story and, all in all, seems to have been so emotionally wrought up in convincingly detailing why he believed an injustice had been done him that he became intensely exercised to the point of being loud, argumentative and belligerent in his actions. The Board feels that the assessment of a sixty day suspension against Claimant represents excessive discipline in these premises. Taking into account the mitigating factors, as detailed, which motivated Claimant's actions the Board finds that a thirty day suspension would have been adequate discipline to achieve the objective of deterring such behavioral attitudes on the job, on the part of Claimant in the future.

A W A R D

Claim sustained to the extent that the sixty day suspension assessed is modified to a thirty day suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of March, 1982.