

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

(Hardie White  
Parties to Dispute: (  
(Burlington Northern Railroad Company

Dispute: Claim of Employees:

The purpose of this letter is to appeal the dismissal of Hardie White (hereinafter "the Employee") from the employ of Burlington-Northern Railroad. The dismissal letter is dated October 10, 1984 and was received by the employee on or about October 12, 1984.

The dismissal letter reads, in relevant part:

"As a result of investigations accorded you on September 29, 1984 and October 8, 1984, you are hereby notified that you are being dismissed from the services of Burlington-Northern for your dishonesty in connection with your falsification of BN local purchase envelopes number 854424 and 854422 and your conspiracy with R & R Automotive Supply and Lembke Hardware to falsify the invoices of your purchases at BN expense, your subsequent theft and/or unauthorized disposal of a welding cutting outfit Model P-200 AO, which you purchased from Barton Welding Supply Company on August 30, 1984, an automobile radio, which you purchased from R & R Automotive Supply Company on July 23, 1984, an exhaust pipe for a 1980 Chevrolet, which you purchased from R & R Automotive Supply Company on August 30, 1984, a set of sparkplug wires and sparkplugs for a 1980 Chevrolet, which you purchased from R & R Automotive Supply Company on July 30, 1984, a muffler and four shocks for a 1980 Chevrolet and two chrome mirrors, which you purchased from R & R Supply Company on July 31, 1984, and a VCR, which you purchased from Lembke Hardware on a previous unknown date, your failure to report immediately your VN (sic) vehicle accident, which occurred on December 14, 1984, to your supervisor or superior officer and your failure to report as promptly as possible following your BN vehicle accident, which occurred on September 14, 1984 on the proper form to your immediate supervisor."

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 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.

Parties to said dispute were given due notice of hearing thereon.

The Claimant herein was, at the time of the first occurrence herein, employed by the Carrier as a General Foreman. While working as a General Foreman he retained seniority previously acquired under the Collective Bargaining Agreement covering Carmen. He had been in the service of the Carrier since 1971. On September 20, 1984, Claimant was notified by Carrier's Chief Mechanical Officer that, effective that date, he was relieved of his duties as General Foreman Suburban at 14th Street, Burlington Northern Railroad Company, Chicago, Illinois. On the same date, September 20, 1984, Claimant was notified to appear for an Investigation on September 21, 1984.

Also on the same date, September 20, 1984, Claimant filed written request that the Investigation Hearing be rescheduled for Friday, September 28, 1984, which request was granted by the Carrier, and the Investigation was rescheduled to begin at 10:00 A.M., September 28, 1984. On September 21, 1984, Claimant requested copies of invoices and documents, and the names of witnesses to be used at the Investigation Hearing. On the same date, September 21, 1984, the Carrier's Chief Mechanical Officer responded to Claimant advising him that the Carrier was not obligated to provide such information.

While working as a General Foreman Claimant was not subject to any Collective Bargaining Agreement and served at the discretion of the Carrier. He could properly be removed from such position without a Hearing or Investigation. However, as the charge of September 20, 1984, was of such nature as to possibly affect his seniority and employment as a Carman, it was proper that the Carrier to afford him a Hearing or Investigation in accordance with the Discipline Rule of the Carmen's Agreement, which reads:

"Rule 35. (a) An employee who has been in the service more than sixty (60) days, or whose application has been formally approved, shall not be disciplined without a fair hearing by designated officer of the Carrier. Suspension in proper cases pending hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative, will be apprised in writing of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired and compensated for wage loss, if any, less amounts earned in other employment, resulting from said suspension or dismissal."

"Duly authorized representative" as used in the above quoted Rule, means the authorized representative of the Collective Bargaining unit representing the craft on Carrier's property.

At the Hearing or Investigation conducted on September 28, 1984, Claimant appeared with his Attorney who stated that his purpose in attending the Investigation was as a Representative of Claimant in the capacity of personal attorney, he also stated that he was not an employee of the Carrier and was not an authorized Union Representative. The Attorney was then informed by the Conducting Officer that it was the policy of the Carrier that a Representative of an employee in a Labor Hearing was restricted to either an employee of the Carrier or an authorized Union Representative; that the Attorney may remain in the Hearing as an observer, but would not be permitted to counsel or represent Claimant during the Hearing. The Attorney then stated that he and the Claimant were attending the Hearing under protest.

The matter of outside attorneys attempting to represent employee in on-property disciplinary Hearings or Investigations, is not one of first impression before this Board. In Third Division Award No. 25000 it was held:

"As to representation in on-property disciplinary investigations, or hearings, it is well settled that a Claimant's right to representation in an on-property disciplinary hearing arises only from the provisions of the collective bargaining agreement. See *Carle vs. Conrail*, U. S. D. C., Southern District of New York (February 9, 1977) 94 LRRM2719; *Edwards vs. St. Louis-San Francisco R.R.* 361 F. 2d 946, 954, 62 LRRM 2300, 2305-2306, (7th Cir. 1966); and *Broady vs. Illinois Cent. R. Co.* 191 F 2d (7th Cir. 1951), cert. denied 342 U.S. 897, 72 S. Ct. 231, 96 L.Ed.672 (1951). See also Third Division Awards Nos. 15676, 21228, 18352, Fourth Division Award No. 3134."

See also Third Division Awards Nos. 24998, 24999. In Second Division Award No. 6381 it was held:

". . . Claimant was entitled to be represented only as provided in the Agreement. This does not include the attorney."

A copy of the Transcript of the Investigation conducted on September 28, 1984, has been made a part of the record before the Board.

On September 28, 1984, Claimant was notified to attend another Investigation scheduled to begin at 11:00 A.M., October 5, 1984, for alleged failure to report a traffic accident. The Claimant acknowledged receipt of the Notice on September 28, 1984. The Investigation scheduled for October 5, 1984, was postponed to October 8, 1984, at which time it was conducted. A copy of the Transcript of the Investigation conducted on October 8, 1984, has also been made a part of the record.

On October 10, 1984, Claimant was dismissed from Carrier's service as a result of the Investigations conducted on September 28, 1984, and October 8, 1984 as stated in the Claim quoted above.

On October 4, 1984, Claimant requested that he be permitted to exercise his seniority as a Carman at Memphis, Tennessee, which request was denied on the same date:

"You are being withheld currently from service pending the result of the investigation which was held on September 28, 1984. Therefore, your request is denied."

The Transcript of the Investigation conducted on September 28, 1984, contained substantial evidence in support of the charge of September 20, 1984, against Claimant. The "substantial evidence" Rule has been set forth by the Supreme Court of the United States, as follows:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consol. Ed. Co. vs Labor Board 305 U. S. 197, 229.)

Second Division Award No. 6419.

In the Investigation the Claimant declined to review material submitted in evidence or to answer questions concerning alleged improper purchases on the ground that he was denied representation by his Attorney. He refused to make any explanation of his activities, although given every opportunity to do so. In Third Division Award No. 19558 it was held:

" . . . We have stated in a number of similar cases that the rules of evidence in criminal proceedings are not applicable in disciplinary investigations. In Award 4749 we said:

'Employees charged with rule violations who avoid answers to questions touching upon the claimed offense, subject themselves to inferences that the replies if made would have been favorable to the Carrier.' At a hearing of this kind the Carrier may properly examine the accused concerning every point bearing upon his innocence or guilt, whether or not he testifies in his own behalf. (Award 2945)."

In Second Division Award No. 9314 it was held:

"Once Carrier has proven that Claimant refused to answer questions which were properly put to him at an investigatory hearing the Board can only defer to the several awards and Court Decisions cited hereinabove in which it has been concluded that such action on the part of a railroad employee is improper and can be used to justify the disciplining of said employee up to and including discharge."

The burden of the Carrier to supply substantial evidence in support of the charge of September 20, 1984, was amply met. Subsequent to the Investigation or Hearing, the Claimant's Attorney, in his appeal on the property, enclosed what he termed "a copy of a transcript of a 'pre-hearing' which he said took place immediately prior to the investigation of September 28, 1984." A copy of the same document has also been submitted to this Board by the Claimant's Attorney, with his Submission in behalf of Claimant. One of the principles adhered to by the Board is that in discipline cases the parties to such disputes and the Board are restricted to the evidence introduced at the Hearing or Investigation, and the record may not properly be added to after the Hearing or Investigation closes. (Third Division Award Nos. 25907 and 24356.) Under this principle the "transcript of a pre hearing" may not be considered.

In the Investigation conducted on October 8, 1984, on the charge of September 28, 1984, there was substantial evidence, including Claimant's statement, that Claimant did not comply with Carrier Rules concerning the reporting of an automobile accident.

No Rule has been cited prohibiting the Carrier from combining the two Investigations into a single disciplinary notice and penalty.

We point out that at a Hearing before this Board, with the Referee present, on October 6, 1986, the Claimant and Mrs. Shirley I. White appeared, with their Attorney. The Carrier was also represented. Claimant, their Attorney, and the Carrier Representative actively participated in the Hearing.

Based upon the entire record, there is no proper basis for the Board to interfere with the discipline imposed by the Carrier. Acts of dishonesty usually result in dismissal. In Third Division Award No. 22745 it was held:

"It is a generally accepted tenet in the railroad industry that dishonesty is a dismissal offense."

The Board may have been justified in dismissing the entire dispute because of no conference on the property, but considering all the issues involved, we have chosen to dispose of the dispute on its merits.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of January 1987.