Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7031
SECOND DIVISION Docket No. 6665
2-SCL-MA-'76

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

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers, AFL-CIO
(
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employes:

1. That under terms of the agreement Machinist Cecil F. Lowe was given unjust suspension from service for period October 20 through December 18, 1971.

2. That accordingly the Seaboard Coast Line Railroad Company be ordered to compensate Machinist Lowe eight (8) hours pro rata rate of his assigned position Monday through Friday, first shift for period October 20 through December 18, 1971, plus fringe benefits lost during (60) calendar days suspension.

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 instant claim challenges the sixty (60) day suspension imposed by Carrier upon Claimant Cecil F. Lowe for the period October 20 through December 18, 1971. Mr. Lowe, a 40-year employe of Carrier, was employed as a Machinist at Jacksonville, Florida but was also active in local politics and at various time during his employment he served on the City Council. He also served as Council President and Acting Mayor. In 1966 Claimant and several other city officials were indicted by a Florida Grand Jury on multiple counts of grand larceny, conspiracy and perjury. Following protracted and highly publicized litigation Mr. Lowe pled guilty to one count of conspiracy and one count of petit larceny on August 23, 1971. Claimant was fined and given a jail term of one and one-half years which was suspended by the Court.

Thereafter Carrier ordered Claimant to appear for investigation and notified him on September 23, 1971 as follows:

> "You are hereby advised that that portion of my letter to you dated September 15, 1971, reading:
>
> 'You are charged with that portion of rules and regulations of the Mechanical Department of the Seaboard Coast Line Railroad, Rule 12, a portion of which reads as follows: 'Disloyalty, dishonesty, wilful neglect, inexcusable violation of rules, making false statements or concealing facts concerning matters under investigation.'
>
> is hereby amended to read:
>
> You are charged with that portion of rule 12 of the Rules and Regulations of the Mechanical Department relating to dishonesty."

Following the hearing and evaluation of the record Carrier notified Claimant on October 18, 1971 as follows:

> "Reference is made concerning investigation that was held in the Master Mechanic's office Jacksonville on September 28, 1971 concerning your actions.
>
> This will advise that effective October 20th you will serve sixty (60) calendar days actual suspension, which will be through December 18, 1971."

The Organization on behalf of Claimant protested this decision and requested payment to Mr. Lowe for "...all wages lost, fringe benefits, such as hospitalization and etc. ...." The claim was not resolved on the property and was appealed to our Board for disposition.

The Organization asserts that the discipline was unjust, arbitrary and capricious because: 1) The Rule 12 relied upon by Carrier is a rule of the merged Carrier now known as the Seaboard Coast Line Railroad Company and was not in effect at the time Claimant was indicted in 1966 or in 1961-62 when he committed the crimes which he admitted 2) There was no connection between Mr. Lowe's employment and the crimes 3) Claimant was a long-time employee with a good service record 4) The investigation was untimely held 5) Claimant was not afforded due process or a fair hearing. Based on all of the foregoing the Organization insists that the suspension was arbitrary, unreasonable and capricious.

We have reviewed the record carefully and cannot concur with the Organizations position. As we understand the record, Claimant was charged with conviction of petit larceny and conspiracy, criminal charge to which he pled guilty and was sentenced in August 1971. Thus, the Organizations arguments premised on untimeliness, and non-existence of Rule 12 in 1961 or 1966 are irrelevant. At the Board hearing the Organization waived the procedural objection and thus, the only issues left are whether there is substantial evidence to support the charge against Claimant and whether the penalty was appropriate.

Claimant admitted at the hearing that he pled guilty to the criminal offenses and was sentenced. His reasons for doing so are not material in these proceedings and the conviction is a matter of public record. It is quite true, as the Organization asserts, that ordinarily employes may appropriately be disciplined for misconduct off the job only if some connection is shown between the misconduct and the employment relationship. Typically these cases present a situation in which the employer's reputation or public image is negatively affected by association with the employe's notoriety. In our judgement the record herein supports such a finding. Newspaper articles in the record describe the indictment, litigation and conviction of Claimant. In at least one such newspaper story Claimant was identified as a long time employee of Carrier. There is no doubt that under authority of several prior Awards the Carrier was justified in imposing discipline. See Awards 6824, 6862 also, 1860, 2787, 5043. Nor can we say that the imposition of a 60-day suspension was arbitrary, unreasonable or capricious in all of the circumstances, including - Claimants long service.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of April, 1976.

LABOR MEMBER'S DISSENT TO

AWARD NO. 7031, DOCKET NO. 6665

This Award is in contradiction to other sound correct Awards of this Board concerning off-duty conduct of Employes.

The majority piece-meals the record in this case, completely out of context, in order to arrive at conclusions through their distorted reasoning. Such reasoning as wherein stated:

> "XXX The Organization asserts that the discipline was unjust, arbitrary and capricious because: 1) The Rule 12 relied upon by Carrier is a rule the merged Carrier now known as the Seaboard Coast Line Railroad Company and was not in effect at the time Claimant was indicted in 1966 or in 1961-62, when he committed the crimes which he admitted xxx."

> "XXX We have reviewed the record carefully and cannot concur with the Organizations' position. As we understand the record, Claimant was charged with conviction of petit larceny and conspiracy, criminal charge to which he pled quilty and was sentenced in August 1971. Thus, the Organizations' arguments permised on untimeliness, and non-existence of Rule 12 in 1961 or 1966 are irrevelant xxx."

This astonishing conclusion emanating from a majority with legal training and background is most amazing and distressing. Could anybody in their right mind even conceive the implications of retroactive changes in law? Nobody, but nobody, is held accountable for changes in laws, or rules, occuring years afterwards and holding that some previous actions were improper even though at the time of occurrence they might not have been.

The Award dictum goes on to state:

> "XX The Claimant admitted at the hearing that he

> pled guilty to the criminal offenses and was sentenced. His reasons for doing so are not material in these proceedings and the conviction is a matter of public record xxx."

What the majority is casually and insensitively brushing aside as "not material' is the fact that the claimant had fought these charges for all of those years until he was mentally, physically and financially drained. With prospects of facing many years of the same he was forced to enter a lesser plea due to the exhaustion of all his finances as well as to his other physical resources. In the hearing record, as well as throughout the entire record, he steadfastly maintained his innocence of any wrongdoing.

The majority continued the distorted reasoning as:

> "XXX It is quite true, as the organization asserts, that ordinarily employes may appropriately be disciplined for misconduct off the job only if some connection is shown between the misconduct and the employment relationship. Typically these cases present a situation in which the employer's reputation or public image is negatively affected by association with the employe's notoriety. In our judgement the record herein supports such a finding. Newspaper articles in the record describe the indictment, litigation and conviction of Claimant. In at least one such newspaper story Claimant was identified as a long time employee of Carrier xxx."

The record factually showed that the court involvement of the Claimant never interfered with his duties whatsoever and the Company couldn't, and didn't, attempt to charge him with a single day, or hour, absence due to this issue. So it is factual that it didn't interfere with his work and his employment relationship in any degree.

It is further astonishing that the majority would seize on one single news media mention that the Claimant was an employe of the the Carrier. Keeping in mind that this case had been in the courts

for years this one single mention was certainly a negligible, if any, reflection on his employer. In fact the record unrefutably showed where this same pious Carrier utilized his civic position on three different occassions to gain concessions for their own interests. Even once against the best interest of his own Organization and now a majority winks at the standards of the Master while condemning the Servant under a different standard.

Other, more soundly reasoned Awards have held that these Carrier unilateral rules do not apply to every minute of off-duty conduct. Such as Third Division Award No. 18405 in pertinent part:

> "xx Rule G has never been held to be a regulation which extends to every minute of an employe's private life and inflexcibly dictates off-duty conduct xxx."

Also Third Division Award No. 20637 stating in pertinent part:

> "xxx We do not agree with Carrier's conclusions with respect to the alledged Rule G violation. First, Claimant had left the property and was clearly not on duty, but engaged in personal business when he was arrested; at that time he was not subject to the provision of Rule G xxx."

Even more inexplicable was the holdings of this same neutral in Third Division Award No. 20874 in pertinent part:

> "xxx Our consideration of this matter and especially study of the authorities cited in Award 20703 leads us to conclude respectfully but firmly that the general rule is mistated therein. The correct standard is that an employe's off duty misconduct may be the subject of employer discipline where that conduct was found to be related to his employment or was found to have an actual or reasonably forseeable adverse effect upon the business. The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs.

In this latter connection mere speculation as to adverse effect upon the business will not suffice. Elkouri & Elkouri, How Arbitration Works, 3rd. Ed. B.N.A., Inc. Wash. D. C. 1973 pp. 616-618. (Emphasis added)

In applying the foregoing principles to the instant case we must conclude that under different circumstances Claimant's off duty conduct might have presented grounds for discipline but the record in this case is not sufficient to permit our endorsement of Carrier's discipline. There is no showing whatever that Carrier's reputation was connected in any way to Claimant nor that the employer - employee relationship was a matter of public record let alone notoriety. Moreover, the six-month time delay between the off duty incident and Carrier's charges against Claimant, during which time Carrier suffered no apparent or proven adverse effect, is additionally probative that no actual or foreseeable causative link existed between the conduct and the employer-employee relationship xxx."

The facts of that case square with this instant case in that the Carrier in no way suffered any adverse effects upon either its' business or professional posture with the community. Also no purpose was herein accomplished by the imposed discipline except in a vindictive manner. Even though this quoted Award only preceded the instant one by several months this neutral must have exhausted his capacity for understanding and turned hardened and deaf ears to this Claimants' plea for justice.

The distorted reasoning within this Award demands this vigorous dissent..

G. R. DeHague

George R. DeHague
Labor Member