

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { International Association of Machinists and
Aerospace Workers

Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement and the Burlington Northern, Inc. schedule of rules, the Carrier unjustly suspended Machinist Helper G. R. Tarrence effective August 31, 1979, and following formal investigation unjustly dismissed Machinist Helper Tarrence effective September 21, 1979.
2. That, accordingly, Burlington Northern, Inc. reinstate Machinist Helper Tarrence, compensate him for all wages lost as a result of said suspension and dismissal, and restore to him, unimpaired, all other rights and privileges of employment.

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.

On August 30, 1979, Claimant, a Machinists' Helper at Carrier's Havelock, Nebraska Wheel Plant, with a seniority date of April 4, 1977, was assigned to work as a bearing washer/cleaner on the 3:00 p.m. - 11:00 p.m. shift. At approximately 9:15 p.m. on said evening Foreman E. G. Kahler entered the bearing room and allegedly observed Claimant standing idle talking with a co-worker, Gerald Kumath. Supervisor Kahler maintains that he approached the two men and instructed Claimant "... to fill up the nine empty bearing parts baskets that were setting on the floor". Claimant allegedly responded, "F--- y--, we got our 200 bearings. We are not going to fill them (baskets) up." Claimant maintains, however, that he did not make such a statement and that following Supervisor Kahler's directive to him he (Claimant) "... walked around and went over by the table where John Gear was and sat there".

At that point, Supervisor Kahler left the bearing room and went to summon a security guard for the purpose of removing Claimant from the property. Supervisor Kahler and Special Agent B. E. Harris returned to the bearing room and confronted

Claimant. When Supervisor Kahler informed Claimant that he was being removed from service, Claimant allegedly "... threw some rags down and mumbled 'you rotten m----- f-----'". Claimant was then escorted from the property and he left the premises without further incident.

On September 6, 1979, an investigation was held for the purpose of ascertaining the facts and determining Claimant's responsibility in connection with his alleged insubordination on August 30, 1979. Pursuant to said investigation Claimant was adjudged guilty as charged and he was discharged from Carrier's service effective September 21, 1979. Said dismissal is the basis of the instant dispute.

Organization's contentions in this dispute are related almost exclusively to various procedural objections which have been raised. First, Organization argues that Carrier's suspension of Claimant prior to the conduct of the investigation was a violation of Rule 35 of the parties' Agreement because the precipitating incident of August 30, 1979, was not of a serious nature as contemplated by said Rule (Second Division Award 8100); and further because at the time of the suspension Carrier failed to indicate to Claimant the specific reason for which he was being suspended as is required.

The second procedural argument raised by Organization is that Claimant was denied a fair and impartial hearing because various questions which were addressed to Claimant by the Hearing Officer at the hearing clearly indicated that the Hearing Officer was predisposed to a finding that Claimant was guilty of the charge which had been brought against him (Second Division Award 5223).

Subsequent to the holding of the investigation and the imposition of Claimant's termination by Carrier, Organization's General Chairman, in correspondence dated January 31, 1980, directed to Carrier's Assistant to the Vice President Labor Relations, further alleged that the investigation transcript was incorrect and that the written statement of witness Leadman John Gear was improperly attached to the transcript by Carrier. According to Organization, because Organization "... had no knowledge of its contents or existence until reviewing the investigation transcript ..." and was "... not given the opportunity to review this statement or ask questions of its source", then said statement may not now be considered by this Board.

Carrier maintains that this case is procedurally defective because the claim itself was not stated properly; the proper time limits were not followed by Organization in appealing this matter (Third Division Award 20063); Organization modified the original claim which also is improper; and the claim was not presented to the proper Carrier officer in accordance with the applicable rules. Accordingly, Carrier maintains that the claim should be dismissed.

Regarding Organization's argument concerning the removal of Claimant from service prior to the holding of the investigation, Carrier contends that such action was proper because Claimant was charged with "insubordination" and "use of profanity toward a supervisor" which are serious infractions of the rules (Second Division Awards 5360 and 7150; Third Division Awards 16948).

As for Organization's contentions concerning the attachment of Mr. Gear's written statement to the transcript, as well as the accuracy of the transcript itself, Carrier maintains that Organization failed to raise these issues early in the procedure and thus is barred from raising them at this time. Moreover, Carrier further maintains that the disputed attachment was prepared by Carrier in response to Organization's request and were not prejudicial to Claimant's position.

Regarding Organization's allegation that Claimant's hearing was unfair, Carrier argues that this contention was not made at the hearing either by Claimant or his representative nor was such an argument included in any of the initial appeals which were made by Organization. Thus, according to Carrier, this contention must also be rejected (Second Division Awards 3874 and 5360).

Turning to the merits portion of this dispute Carrier asserts that there is substantial evidence in the record which clearly supports Claimant's guilt in this matter (Second Division Award 6443); and that such proven infractions (insubordination, refusal to obey a direct order by supervision, and use of vulgar and abusive language toward a supervisor) are serious offenses which warrant Claimant's dismissal (Second Division Awards 5360, 5541, and 6489).

In addition to the foregoing, Carrier also maintains that Claimant's denial that he made no vulgar utterance to Supervisor Kahler is merely self-serving testimony on the part of Claimant, whereas Supervisor Kahler had no reason to fabricate his version of the incident. More importantly, however, in situations such as the instant case where there is a conflict in the testimony "... it has been uniformly held that the credibility of the witnesses and the weight to be given to their testimony is for determination ..." Carrier (Second Division Awards 4136 and 6955). Still yet further regarding this same point, Carrier contents that Claimant's failure to deny that he "sat down" after receiving Mr. Kahler's order to fill the baskets and his (Claimant's) failure to deny that he uttered a second vulgar statement to Supervisor Kahler and Special Agent, is itself ample evidence by which to support the charges.

Carrier's final general area of argumentation is that having proved that Claimant is guilty of the infractions as charged, the fact that "... just four months prior to this occurrence ... Claimant was disciplined for failure to comply with instructions and failure to protect his assignment..." further demonstrates that Carrier was justified in terminating Claimant in the instant case and that there can be no basis for mitigation of penalty at this point.

Upon a careful review of the complete record in this dispute, the Board concludes that Claimant's termination must remain undisturbed. In the first instance, Organization's procedural objections are found to be unpersuasive. Claimant obviously was sufficiently aware of the reasons for which he was being removed from service on the evening of August 30, 1979; and said charges clearly were "serious charges" as contemplated within the meaning of Rule 35. Indeed, in the railroad industry the charges of "insubordination and the use of vulgar and abusive language toward a supervisor" can only be viewed in such a manner; for to do otherwise would be to invite chaos and possible calamity. Furthermore, having just refused to perform the assignment which had been given to him by

Supervisor Kahler, would Organization now suggest that Claimant should have been kept on the payroll and paid for doing nothing for the remainder of his shift? In this regard Claimant himself admits that, subsequent to his discussion with Supervisor Kahler, he (Claimant) "... walked around and went over by the table where John Gear was and sat there". Of further consideration in this same context is that Referee Lieberman's decision in Second Division Award 8100 which Organization cites as precedential and supportive of its position, is clearly distinguishable from the instant case since the former involved a mere "twenty (20) days suspension for sleeping on the job". The distinguishing differences between the two cases are quite obvious.

As for Organization's contention that Claimant was denied a fair and impartial hearing because the Hearing Officer's questions to Claimant demonstrated that he had prejudged Claimant's guilt in this case, there simply is no proof for this allegation in the record. Once again, Organization's case citation (Second Division Award 5223) contains significant differences from the instant case (Hearing Officer had made prehearing pronouncements regarding Claimant's guilt and, in addition, during the cause of the hearing, the Hearing Officer "... further betrayed his predisposition when ... he assumed the veracity of investigators' statements that he had read into the record"); and even more significantly, this particular objection was not made at the hearing either by claimant or his representative nor was it raised at any time later when the matter was being handled on the property (Emphasis added by Board). For these reasons, therefore, this element of Organization's position cannot now be considered by this Board.

Having made the foregoing determinations our focus next turns to a consideration of the merits of this dispute. Upon such a consideration it is clear that Carrier has adduced sufficient evidence in the record to support Claimant's guilt for the infractions as charged. Even without any consideration given to the disputed attachment of Employee Gear's written statement to the hearing transcript, there is still ample evidence in the record to sustain Carrier's position as presented herein. Claimant's very own admissions are evidence enough in this regard as well as previous disciplinary action which has been assessed against Claimant for somewhat similar infractions.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of March, 1983.