Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9747
SECOND DIVISION Docket No. 9506
2-C&O-MA-'83

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

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
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(Chesapeake and Ohio Railway Company

DISPUTE: CLAIM OF EMPLOYES:

1. The Chesapeake and Ohio Railway Company arbitrarily and capriciously dismissed Machinist Blane E. Perry from service effective June 27, 1980, following investigation held on June 9, 1980.

2. Accordingly, Machinist Blane E. Perry should be immediately restored to service, paid for all time lost and his record cleared.

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.

Claimant was dismissed from the service of the Carrier following a formal investigation on the charges of "conduct unbecoming an employee of the Chesapeake & Ohio Railway Co. resulting in your arrest on charges of possession of illegal narcotics at approximately 12:05 p.m. on April 30, 1980, absent without permission from 12:30 p.m. until approximately 2:00 p.m., and falsification of reason for absence." The Organization contends that the Carrier acted in an arbitrary and capricious manner in their dismissal of the Claimant in that the claimant failed to receive a fair and impartial investigation in that Claimant was denied his contractual rights under the collective bargaining agreement prior to the investigation, during the investigation, and subsequent to the investigation.

On April 30, 1980, the Claimant was employed at the Carrier's Huntington Locomotive Shops, with his assignment being from 7:00 a.m. to 3:30 p.m., and lunch period from 12:00 noon to 12:30 p.m. Shortly after the commencement of their lunch period, the Claimant and two passengers were arrested by the local municipal police, formally charged with possession of marijuana and held in the county jail until their bond was posted. Prior to their return to work at approximately 2:00 p.m., the claimant phoned his supervisor and informed him that they were experiencing "car trouble" and would be delayed in returning to work from lunch.

The Organization contends that the Claimant was not afforded a fair and impartial hearing in accordance with Rule 37 of the Agreement, which states in pertinent part:

> "No employee will be disciplined by suspension or dismissal without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, and in cases not requiring discipline as severe as dismissal, shall not be deemed a violation of these rules. At a reasonable time prior to the hearing, the Employee shall be appraised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by his duly-authorized representative. If the judgment be in his favor, he shall be compensated for the wage loss, if any, suffered by him."

We cannot agree with the contention of the Organization. Referee Carter First Division Award No. 5197 succinctly states the nature and purpose of this rule:

> "The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused will be appraised of the charge preferred against him, that he will have notice of the hearing with a reasonable time to prepare his defense, that he shall have an opportunity to be present in person and by representative, and he shall have the right to produce evidence in his own behalf and the further right to cross-examine witnesses testifying against him."

We also find it significant in our review of the transcript, that when asked if they were ready to proceed, both the Claimant and his representative responded in the affirmative. We believe that had the Claimant and/or his representative been unable to proceed with the hearing, the time to have raised this intention was at the onset of the hearing, not after a finding and decision had been rendered. Specifically, we address this point because of the Organization's forceful and serious contention that the Claimant was not permitted to consult an outside attorney on May 23, 1980 during his assigned shift. We concur with the position of the Carrier that the Carrier is under no obligation to grant employes permission to be away from duty for personal business, especially when this business could easily have been undertaken on off-duty hours. However, even if we were to agree with the contention of the Organization, we find that in the approximately six weeks from the date the Claimant was involved in the incident that gives rise to the charges he faced, until the date of the investigation, there was more than ample time in which to consult with legal representatives of the Claimant. The Carrier's action did not place the Claimant in any position of undue hardship. See also Second Division Award No. 8323 (Dennis) and Award No. 18 of Public Law Board No. 1952 (Zumas).

With respect to the Organization's second contention that the hearing was not fair and impartial and that the evidence as adduced from the hearing did not meet the Carrier's burden of proof substantiating Claimant's guilt of the charges Claimant faced, we also must disagree. In essence, Claimant faced three serious charges at the formal investigation: (1) conduct unbecoming an employee; (2) absent without permission; (3) falsification of reasons for absence. Even if we were to completely disregard the charge of conduct

unbecoming an employe, which we do not, there can be no dispute that the Claimant admitted at the formal investigation that he did not have permission to be absent from 12:30 p.m. to 2:00 p.m., and he, by his own admission, lied to his supervisor as to the reason he was absent. Referee Perelson said in Third Division Award 16168:

> "Dishonesty, in any form, is a matter of serious concern, and dishonesty usually results in dismissal..."

See also Second Division Awards 6285 (McGovern), 6606 (Yagoda), and 7570 (Wallace).

We believe that more than enough evidence is patently contained in the record to support the findings and conclusions of the hearing officer. We find it unnecessary to delve into the Organization's contention surrounding the charge of conduct unbecoming an employe, conduct in this case involving the alleged possession of marijuana and arrest by local authorities. Award No. 2 of Public Law Board 3017 (Peterson) states:

> "It is certainly understandable that the Claimant would have apprehensions about staying away from work for too long a period of time and of being concerned as to what effect the marijuana arrest would have on his employment status. However, instead of being honest and forthright about the situation, he elected to foolishly try and cover up the situation. He gambled and lost. A blameless man with a clean record might have fared better had he looked for help from a judge in pursuing his proported innocence and in looking for an understanding ear from the Carrier."

Lastly, with respect to the burden of the Carrier in disciplinary cases, we find Second Division Award No. 7492 (O'Brien) relevant to the case before us:

> "In the conduct of investigations and hearings to determine guilt or responsibility in a particular case, the Carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case, or even by a preponderance of evidence as does the party having the burden of proof in a civil case. The accepted maxim in railroad discipline is that there must be substantial evidence in support of the Carrier's action. 'Substantial evidence' has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229)."

The Organization further contends that the Claimant was assessed excessive discipline. We cannot agree. The Claimant had been in the service of the Carrier for approximately 109 months. As previous mentioned, the Claimant admits that he lied to the Carrier and that he did not have permission to be absent. Referee Fitzgerald, in Second Division Award 8130, stated the position of the Board:

"All Divisions of this Board have consistently recognized the fact that the Carriers owe to employees and to the public a heavy legal obligation to maintain discipline among those in their employ, and that it would be both illegal and improper for this Board to attempt to impose any restriction upon a Carrier's complete freedom in disciplinary matters except to the extent of recognizing and applying restrictions created by an applicable labor agreement. Otherwise, we do not substitute our judgment for that of the Carrier; we do not weigh evidence; we do not attempt to resolve conflicts in testimony; we do not pass upon the credibility of witnesses."

It is a long standing principle that this Board will not substitute its judgment for that of the Carrier. It is true that this Board has done so in instances where we have found the measure of discipline to be excessive or not supported by the record. Our thorough examination of the records before us and the submissions the parties yields no basis in which to upset the determination and measure of discipline as assessed by the Carrier in the instant case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of December, 1983