

Corrected (2nd)

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10780
Docket No. 9826
2-FGE-CM-'86

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

Parties to Dispute: (Fruit Growers Express
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(Brotherhood Railway Carmen of the United States
(and Canada

Dispute: Claim of Carrier:

1. That Carrier did not violate the controlling agreement when Carman R. E. Meares was dismissed from service for breach of fundamental employee-employer relationship with respect to loyalty. The charge was precise, timely, and proven by Carrier. Mr. Meares' past disciplinary record was properly introduced into the disciplinary proceedings. He did receive a fair and just hearing.

2. Carman Meares should be denied restoration to service, and Carrier's disciplinary action should be sustained in its entirety.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

Although this case is extremely complex, involving multiple forums and hearings throughout its lengthy progression, the facts which are critical in the resolution of this matter are not really controverted, and the Board believes, therefore, that it is unnecessary to offer a recapitulation of those facts at this point. The parties have been intimately involved with this case since its inception on October 12, 1978; they undoubtedly are well aware of the background of the case having reviewed it numerous times previously, and thus they do not need another detailed recitation thereof.

Claimant was charged with ". . . breach of fundamental employee-employer relationship with respect to loyalty." Specifically, Claimant was accused of volunteering information and documentation to an Attorney representing a non-employee Plaintiff in a serious personal injury liability suit in which Carrier was named as a co-defendant. Said suit was settled out of court for a substantial amount of money which Carrier maintains, would have been considerably less had Claimant not made his damaging disclosures to the Plaintiff's Attorney.

Pursuant to a Hearing which was conducted on June 5, 1981, Claimant was determined by Carrier to be guilty as charged, and he was terminated.

Carrier contends that its action in this matter was not unreasonable, arbitrary nor capricious; that Claimant was afforded a fair and impartial Hearing; that Claimant's guilt was supported by the evidence and that, considering the gravity of the offense and its adverse impact upon Carrier, the discharge penalty was not an unreasonable penalty to impose upon Claimant under the circumstances.

Organization contends that Claimant's dismissal was "arbitrary, capricious, completely unwarranted and a direct violation of Rule 27 of the controlling agreement." According to Organization, Claimant's dismissal:

" . . . clearly demonstrates the Carrier's relentless effort to persecute the Claimant for exercising his rights as a citizen to provide information in a case pending in a judicial system . . . (and) . . . (T)he Claimant, like any other citizen in the country, should be free to make a true factual statement without jeopardizing his employment rights."

Organization also argues that at the time of his dismissal for the disloyalty charge, at issue in the instant dispute, Claimant was already in a dismissal status for a prior, unrelated incident. According to Organization, because of Carrier's termination of the employee-employer relationship as a result of the prior incident, Claimant, therefore, could not have breached such relationship during the subsequent period because he was no longer an employee of Carrier.

Continuing, Organization also argues that Claimant's termination was improper because the charge of disloyalty is itself improper since ". . . it is not based on any specific violation of the labor agreement or any stated company rule or policy."

Still yet further, Organization also contends that Claimant's termination was procedurally defective because: (1) the disloyalty charge was untimely having been issued by Carrier several months after Carrier was aware of Claimant's involvement in the personal injury suit; and (2) Carrier's letter of charges which was sent to Claimant in this matter was, in actuality, two separate letters which contained variations in them, thus constituting an infringement of Claimant's due process rights.

The initial point of departure in this analysis is Organization's contention that Claimant, at the time Carrier charged him with disloyalty, was not an employee of Carrier and thus was immune from any such type of disciplinary action. Organization's contention in this regard must be rejected for the simple reason that Claimant's initial charge was under appeal and was in the process of being resolved at the time; and the parties, in fact, had reached a tentative agreement which was in the final stages of being

implemented when Claimant became involved with the personal injury liability suit which ultimately led to his discharge for disloyalty which is at issue in this case. Additionally, Organization throughout the handling of this matter and in its Submission, has referred to Claimant's situation as being "in dismissal status," rather than being "dismissed," thus implying to this Board that both Claimant and Organization were cognizant that the initial matter had yet to be finalized. For these reasons, therefore, Claimant's continuing status as an employee of Carrier cannot reasonably be challenged (First Division Award No. 15316 and Second Division Award No. 1585).

The second significant aspect of this case which warrants consideration at this point is Organization's contention that since there is no specific Rule, policy or portion of the Labor Agreement regarding employee loyalty, then Carrier is precluded from assessing discipline against an employee for such action. In this regard, suffice it to say that arbitral authority has established that some aspects of employee behavior are so basic, so fundamental in an employee-employer relationship that they are presumed to be applicable, and therefore enforceable, even though they may not have been written down or the product of negotiations between the parties. An employee's loyalty to his employer is deemed to be one of these considerations.

The third and perhaps most significant aspect of this case is essentially a two-fold inquiry: (1) whether Claimant's action did, in fact, constitute disloyalty to Carrier; and (2) if so, whether such action warranted termination? A positive finding on the first of these two questions, it is believed, is sufficient to warrant a similar finding on the second question because the undisputed facts of record in this case clearly demonstrate that Claimant's collaborative efforts with the Plaintiff's Attorney in the Civil Injury Suit resulted in a higher out of court settlement than Carrier reasonably expected to pay -- if any. Having incurred such a loss, Carrier, unquestionably, has the right to take appropriate disciplinary action against the offending employee up to and including discharge. The critical question, therefore, is whether Claimant was disloyal?

The Board has given careful thought and consideration to this particular aspect of the case and is persuaded that Claimant's action did constitute disloyalty on his part toward Carrier. In reaching this determination the Board believes it to be of primary significance that Claimant's action clearly exceeded any proper degree of cooperation which would have reasonably been expected of him in an Investigation such as that which was being conducted by the Plaintiff's Attorney. After having given his deposition -- which, in and of itself, cannot be faulted -- Claimant's role in this matter progressed from that of a potential witness to that of an informal investigator whose specific intent was to obtain and provide information for the Plaintiff's Attorney which would be damaging to Carrier's position. It is that progression of roles which this Board finds to be totally inappropriate and unacceptable, and for which Claimant must now bear responsibility.

Another factor which the Board has considered in the formulation of its rationale herein is that there is evidence available in the record to indicate that Claimant's collaborative efforts with the Plaintiff's Attorney were motivated not by any degree of moral or social responsibility on his part toward the injured City Products employee, Rene Nord, but rather by a sense of

vindictiveness and retaliation directed at Carrier because of the delay in resolving the theft charge which was pending against Claimant at the time. Claimant's feeling of frustration toward Carrier, while somewhat understandable, did not give him right to take matters into his own hands and to engage in a type of "vigilante justice." Having done so, Claimant made himself vulnerable to severe disciplinary action.

The final considerations in this analysis are the two (2) procedural questions which have been proposed by Organization.

The first of these is that the disloyalty charge which was brought against Claimant was imprecise because Claimant received two (2) different charging letters which contained variations in each of them. The second question is that of Carrier's alleged delay in formally charging Claimant with disloyalty in this matter.

Regarding the first of these two questions, the Board is persuaded that the cited variations in the charging letters are merely typographical errors, abbreviations of one form or another, or handwritten corrections, which did not change either the sum or substance of the specific charge which was being raised against Claimant. While Carrier obviously should have taken proper steps to make sure that errors of such a nature were eliminated (particularly in light of the gravity of the charge itself, the fact that Claimant was Organization's Local Chairman, and as such, Carrier knew or should have known that Organization would be closely scrutinizing Carrier's handling of the matter), said errors, nonetheless, merely amounted to "sloppy office practice." Moreover, given to the mountainous volume of the record in this case, as well as the comprehensiveness of Organization's argumentation therein, it can hardly be said that either Claimant or Organization was disadvantaged because of the now contested variations in the charging letter (Third Division Award No. 4749).

The second procedural issue (Carrier's delay in charging Claimant), unlike the foregoing, is deemed to be a matter of extreme importance in the ultimate resolution of this dispute; and, as a result of which, Carrier's overall position herein is indeed vulnerable to attack. In reviewing this particular aspect of the case, the Board is of the considered opinion that it is inexcusable and patently unfair -- regardless of the seriousness of the alleged infraction or the reason for the delay itself -- that an employer would wait approximately nine (9) months before charging an employee, or effectively suspending an employee and then waiting until that employee's behavior had reached a point at which the employer had sufficient evidence to charge and convict him for an incident arising out of the employer's initial suspicions. Not only is timeliness of charge a fundamental due process right of an employee in an employment relationship, but there is also a basic principle in labor arbitration which provides that, in order to be effective, both the charge and imposition of discipline must be reasonably related in time to the occurrence of the cited infraction(s). Said principles are of sufficient import to have been used by this Board and numerous other Boards on the various Divisions to warrant the reinstatement of an employee even though the employee's behavior was deemed to constitute an otherwise dischargeable offense. Despite the uniqueness of the instant case and the peculiar set of factual circumstance attendant thereto, the significance of these principles cannot be ignored or diminished.

After long and careful consideration of this particular point, the Board finds that, despite Carrier's obvious procedural error, given the serious nature of Claimant's proven offense and given the fact that Claimant's action has so "poisoned" his relationship with Carrier so that any effort at reinstatement or positive rehabilitation in that relationship would be an exercise of futility, Claimant's reinstatement, therefore, cannot and will not be authorized. For that reason, and although a remedy of some sort appears to be justified because of Carrier's procedural error, arriving at that remedy has been an elusive undertaking. Clearly, the only remedy which can be directed is one which recognizes the seriousness of each party's proven infractions, the equities of the parties, the realities of attempting to maintain a positive and productive labor-management relationship between the parties, as well as the significance of the total record which has been presented. Such a remedy, the Board believes, shall be that which is directed below.

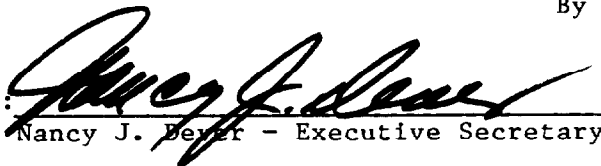
Carrier's termination of Claimant was neither arbitrary, capricious, unjust, or improper; and Claimant's termination, therefore, shall remain undisturbed. However, because of Carrier's undue delay in charging Claimant in this matter, Claimant shall be considered as having been an employee of Carrier for the period of June 16, 1980 up to and including March 12, 1981. Claimant shall receive full, regular wages and all seniority as well as all other contractual rights and benefits which would have normally accrued to him as an employee of Carrier during that specified period of time.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of March 1986.