NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Form 1

Award No. 12519
Docket No. 12416
93-2-91-2-219

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Daniel Hatfield
(
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"1. That, under the current and controlling agreement, I, laborer Daniel Hatfield, was unjustly dismissed from service on August 15, 1988, following an investigation/hearing held on date of November 10, 1987. On September 5, 1990, a request for an appeal conference was made to Mr. R. E. Dinsmore, Director of Labor Relations, on my behalf. In letters dated November 12, 1990 and December 12, 1990, Mr. Dinsmore denied this request.

2. That accordingly, I, Laborer Daniel Hatfield, be restored to service with Springfield Terminal Railway Company, be made whole for lost time, with all seniority rights, vacation, health and welfare, hospital, life and dental insurance, all unimpaired. Be paid effective, October 26, 1987, the payment of ten percent (10%) interest rate be added thereto and my personal record expunged of any reference to this dismissal from service."

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 waived right of appearance at hearing thereon.

Claimant was dismissed for allegedly abusing, harassing and threatening two electricians with bodily harm. The incident which gave rise to the charges occurred on October 26, 1987. The hearing was held on November 10, 1987. On August 15, 1988, Carrier notified Claimant of his dismissal. On September 15, 1988, an International Vice President and General Chairman of the International Brotherhood of Firemen and Oilers (IBFO) wrote to Carrier, "Appealing...dismissal...imposed upon D. Hatfield..." and requesting that the matter be docketed for discussion "at our next regularly scheduled monthly meeting." On September 23, 1988, Carrier replied that it was not aware of any regularly scheduled monthly meeting but that it was willing to discuss Claimant's discipline.

The next correspondence in the record is a letter dated November 30, 1988, from Carrier to the IBFO General Chairman, referring to a conference held on November 10, 1988, and denying the Claimant's "verbal appeal and claim." The letter was not properly addressed. The record follows with a letter dated September 5, 1990, from the IBFO General Chairman to Carrier which makes reference to a conversation on August 28, 1990, where the General Chairman learned for the first time of the existence of the November 30, 1988 letter. In the September 5, 1990 correspondence, the General Chairman requested a conference. Carrier responded on November 12, 1990, refusing the request on the ground the IBFO was not Claimant's recognized collective bargaining agent.

At the investigation, written statements from the two electricians were received. In their statements, the electricians attested that Claimant called them "niggers" and "scabs" and threatened them with physical harm. Claimant's foreman testified that he heard Claimant call the electricians by these derogatory names and threaten them with physical harm. Claimant admitted using the derogatory language but denied making any threats.

Claimant argues several grounds for overturning his dismissal. First, he contends that Carrier acted improperly by waiting over nine months after the hearing to rule on the charges against him. Second, he contends that Carrier denied him a fair hearing by introducing the electricians' written statements, because Claimant was unable to cross-examine the electricians. He further maintains that the evidence against him was inconsistent and did not sustain the charge that he threatened the electricians with bodily harm.

Carrier contends that this division lacks jurisdiction because Claimant is employed as a generic railroader, rather than in a traditional craft or class. Consequently, jurisdiction, in Carrier's view, resides in the Fourth Division.

Carrier attributes the nine month delay between the hearing and the dismissal to a strike which began two days after the hearing. Carrier observes that the strike lasted through June 1988 and that "[e] very Carrier officer, including those responsible for the review of [C]laimant's hearing and the assessment of appropriate discipline, was pressed into service in an attempt to keep the railroad running." Carrier contends that the applicable agreement does not place a time limit on the assessment of discipline and urges that we excuse the delay because of extenuating circumstances.

Carrier also raises several procedural objections to Claimant's appeal. Carrier cites Rule VI of the UTU agreement as requiring a written appeal within thirty days following the discipline. Carrier observes that its file contains no written appeal and contends that Claimant failed to comply with Rule VI. Carrier further argues that Claimant's claim was considered in conference and denied on November 10, 1988. Carrier admits that it misaddressed the letter of November 30, 1988, but contends that once the conference was held, Claimant knew his claim was denied. In Carrier's view, there was no excuse for Claimant's failure to take any action to advance his file for almost two years. Thus, Carrier asks that the claim be denied because of Claimant's laches. Furthermore, in Carrier's view, Claimant's claim is defective because it was advanced on the property by the IBFO, which was not Claimant's bargaining agent.

On the merits, Carrier argues that the evidence proved the charges. Carrier relies on the foreman's testimony, as corroborated by the electricians' written statements and Claimant's admission of the use of derogatory language. Carrier observes that Claimant was involved in several prior serious incidents and contends that dismissal was an appropriate penalty.

We first address the jurisdictional argument. Numerous prior decisions involving this particular Carrier make it clear that our jurisdiction is determined not by what Carrier calls its employees but by what those employees' job duties actually are. See, e.g., First Division Award 24019; Third Division Awards 28726, 28767, 28768, 28816. However, where the carrier does not classify an employee as a member of a particular craft or class, it must be apparent from the record that the employee's duties did fall within the jurisdiction of the division in which the claim was filed. Third Division Award 28872.

We have examined the record to discern whether, in light of Claimant's duties, we have jurisdiction. At various points in his pleadings, Claimant refers to himself as a "railroader", "fireman and oiler", and "laborer." Just as Carrier cannot preclude our jurisdiction merely by what it calls Claimant, Claimant cannot confer jurisdiction on us merely by what he calls himself. However, Claimant's foreman testified that at the time of the incident he had assigned Claimant to perform a B test, consisting of a filter change and under lube. This is work which falls within this division's jurisdiction. Accordingly, we reject Carrier's contention that we do not have jurisdiction.

We next consider the delay between the investigation and the notice of discipline. Carrier is correct in its observation that Rule VI does not specify time limits for issuance of the notice of discipline. Rule VI does prohibit discipline "without a fair hearing." Thus, the issue is whether, considering all of the facts and circumstances, the nine month delay denied Claimant a fair hearing.

Our judgement on this issue is informed by Third Division Award 26485. In that case, the Board considered a six month delay between the investigation and notice of hearing to be "far too long," admonished the carrier that "this lengthy hiatus should not prevail in the future," but denied the claim. There is no indication in Award 26485 that the carrier offered any explanation for the delay.

Although the delay in the instant case was a little longer, Carrier has explained that it was due to the extenuating circumstances of a lengthy strike. It is highly unlikely that Claimant would have been available for work during this period. Under these circumstances we cannot conclude that the nine-month delay provides a sufficient basis for sustaining the claim. 1/

---

1/ We note that the first written reference to the strike is found in Carrier's submission to this Board. We also note that Claimant's appeal letter of September 15, 1988, did not mention the delay in issuing the notice of discipline or any other specific basis for the appeal. It appears that the specifics of the appeal and Carrier's responses were discussed orally on November 10, 1988. Therefore, we cannot tell from the record whether the delay or Carrier's explanation were considered during the handling on the property. Under these circumstances, we consider it more appropriate to consider the entire circumstances of the delay on the merits rather than speculate that all or part of the issue might not have been addressed on the property.

Carrier has argued that several procedural defects bar the appeal. Carrier's contention that it was not proper for IBFO to advance Claimant's case because the United Transportation Union is the appropriate bargaining representative has been rejected in prior awards interpreting Rule VI of the agreement. See, e.g., Third Division Awards 28726, 28767.

We have examined Carrier's other procedural arguments and concluded that, in light of the state of the record, they should not preclude us from reaching the merits. Although Carrier maintains that there was no written appeal, Claimant attaches as an exhibit a letter which purports to be a written appeal. Carrier's laches argument rests on the almost two year delay following the November 10, 1988, conference before further action was taken on this matter. But it is clear that Carrier misaddressed the November 30, 1988 letter which formally denied at the conference. Latches is an equitable defense and the record is unclear whether the balance of the equities so favor Carrier as to warrant our not reaching the merits.

Although the procedural and jurisdictional issues in this case are rather complex, the merits are quite straight forward. It is well-established that Carrier's use of the electricians' written statements did not deny Claimant a fair hearing. The written statements were not the sole evidence supporting the finding of guilt. The primary evidence against Claimant was his foreman's eye-witness testimony. Indeed, Claimant himself corroborated the foreman's testimony in part, to the extent that he admitted making the derogatory remarks. Although Claimant denied threatening the electricians with physical harm, the review on the property credited the foreman's version of events and we are unable to disturb that credibility determination.

We note that Claimant's prior record was discussed on the property during the conference of November 10, 1988. In view of the seriousness of the offense, particularly in light of the prior record, we are unable to say that the penalty was arbitrary or capricious.

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 3rd day of March 1993.