

Award No. 8681
Docket No. MW-7948

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it refused to allow Mr. P. F. Huston to exercise his seniority rights as a B&B Foreman following his release from his assignment as a Master Carpenter:

(2) Mr. P. F. Huston now be allowed to exercise his seniority rights as a B&B Foreman;

(3) Claimant P. F. Huston be allowed the difference between what he earned as a B&B Carpenter and what he should have earned and received as a B&B Foreman from August 29, 1955 until such time as he is allowed to exercise his B&B Formans' seniority rights.

EMPLOYES' STATEMENT OF FACTS: On December 16, 1922, Paul F. Huston entered service of the Carrier as a helper in the Bridge and Building and Paint Departments. Subsequent thereto, he established seniority rights as a Carpenter, Assistant Foreman, Foreman and Pile Driver Engineer.

In recognition of Claimant Paul F. Huston's experience and ability to supervise employes and to handle the Carrier's affairs from an Official standpoint and while Claimant Paul F. Huston was working as a B&B Foreman on the Carrier's Southern Division, he was, on February 5, 1945, promoted by the Carrier to the position of Master Carpenter, a supervisory officer's position, in charge of all employes in the Bridge and Building and Paint Departments, as well as all buildings, bridges, waterways, fuel stations, oil stations and water stations over the entire system of this Carrier.

In the case of the Arrest Report made out by the Cheyenne Police Department, which is a public document and competent evidence, admissible in investigations (see Third Division Awards 4749 and 5104) covering the incident growing out of violation of Carrier rules of conduct, the Cheyenne Police Officer who made out the report was present, testified as to the correctness of the report and was available for cross-examination by the Claimant's representative.

The testimony taken from the Claimant leaves no room for any questioning that he violated the rules with which charged, and the Carrier would have been justified in dismissing him from its service.

Assistant Special Agent Greenwald's report, found at page 5 of the transcript of the investigation (Carrier's Exhibit No. 4), refers to a previous occasion in 1952 that appears on the records of the Cheyenne Police Department covering Claimant's arrest on a charge of "drunk" on which he forfeited a \$25.00 bond. Attached as Carrier's Exhibit No. 6 is the Arrest Report of the Denver Police Department for the Claimant, Paul Huston, showing three arrests account "drunk"—two in 1953 and one in 1954. Thus public records in these two cities carry a total of five arrests in a period of slightly over three years for drunkenness on the part of the Claimant. With such a miserable past record, the proper disciplinary action was permanent dismissal from service. It was only an act of extreme managerial leniency that the Claimant was retained in service in any capacity.

In conclusion, the Carrier wishes to emphasize that this is a discipline case, and the evidence adduced at the investigation held on September 2, 1955, when viewed in conjunction with Claimant's past record of misconduct, more than supports the disciplinary action taken. The claim must be denied.

The Carrier affirmatively states that all data herein and herewith submitted has previously been made known to the Employees' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This case must turn on the right of this Carrier to consider a violation of its operating rules, occurring while an employee is holding an excepted position, as a basis for returning him to a covered position lower in rank than that to which his accumulated seniority would otherwise have entitled him.

Claimant in this case had, as of February, 1945, 23 years of service with the Carrier as helper, carpenter and B and B Foreman. His record was clear in his covered positions.

From February of 1945 to August 19, 1955 he held the position of Master Carpenter, a position excepted from the Agreement.

On August 19, 1955 Carrier wrote Claimant that

"* * * it was found necessary to relieve you as Master Carpenter and the only position we can offer you, is carpenter in our B&B force. * * *

"Circumstances which resulted in your being relieved as Master Carpenter disqualified you as a B&B Foreman."

Under date of August 21, 1955 Claimant advised Carrier he would place himself as B&B Carpenter

"* * * under protest as I have the seniority and qualifications for a B&B Foreman and feel that I am justly entitled to such."

Owing to circumstances over which Claimant had no control, and which are not here involved, Claimant sought and secured a leave of absence until August 29, when he reported under protest as carpenter.

That same date, Carrier wrote Claimant notifying him to attend

"investigation * * * for the purpose of ascertaining the facts and determining your responsibility in connection with alleged violation of Rules 'G' and 'Q' at Cheyenne, Wyoming at 8:00 P.M., July 18, 1955 * * *"

when he was in the excepted position of Master Carpenter.

The investigation was held. Under date of September 9, Carrier wrote Claimant, in part:

"Reference is made to the formal investigation accorded you * * * over your demotion effective August 22, 1955, from B&B Foreman to B&B Carpenter.

"Since the evidence developed at the aforementioned investigation definitely confirmed the factual information giving cause to your demotion * * * from the rank of B&B Foreman to the rank of B&B Carpenter * * * I am obliged to affirm such disciplinary action * * *."

The pertinent portions of Rule 11, relied on by the Organization are:

"Employees promoted to official or supervisory positions of the Company or their Organization will continue to accumulate seniority in the department from which promoted. * * * If they are demoted or relinquish such position after one (1) year, they will return to the service by displacing junior employees in their rank in accordance with the provisions of Rule 12. * * *"

Organization contends

"The afore-quoted Rule 11, is not ambiguous and, in plain unequivocal language, simply provides that when employees are promoted from the rank and file to fill official or supervisory positions of the Railway Company or their Organization, **they will continue to accumulate seniority rights in the department from which promoted;** their names will appear on appropriate seniority roster, and if later demoted or they relinquish such position within one (1) year, they will be permitted to return to the position held at the time of their promotion. However, if they are demoted or relinquish such promoted to position after one (1) year, they will return to the service by displacing **junior employees in their rank in accordance with Rule 12 of the effective Agreement.**"

"The fact should not be overlooked that when the Carrier demoted Claimant Huston, * * * he * * * was filling a supervisory position, expressly excluded from the Scope of the effective Agreement. * * *"

Carrier points out that Claimant

"* * * had been employed in such a capacity (Master Carpenter) for over ten years and over twenty-two years before that in the ranks of employees from which he was promoted to supervise. He had been examined several times on the Carrier's rules of conduct, the last time being on February 23, 1955 * * * which was for the purpose of qualifying himself to examine employees under his supervision. How could the Carrier expect understanding and compliance with such important rules by the employees when the officer selected by it as the supervisor of such employees wilfully violated such rules repeatedly. There is no question but the only appropriate disciplinary action was permanent dismissal from the service, however, the Carrier pursued an extremely lenient course of action and merely demoted the Claimant to position of B&B Carpenter."

We believe Carrier's reasoning and action were not violative of the Agreement for 3 reasons:

1. Carrier had a right to consider the occurrence at Cheyenne, Wyoming in determining its course of action both with respect to the supervisory position, of which he was relieved, and his placement thereafter.
2. Its action in determining that the Cheyenne incident, as well as two similar incidents while in the excepted position, would interfere with the supervisory effectiveness a Carrier expects of a foreman cannot be held violative of the agreement unless there is a showing that the Carrier violated the rules pertaining to discipline and the accused's rights thereunder.
3. An investigation was held, and there is an admission in the record that the Organization considered it was conducted in an impartial manner. In so stating the Organization did not yield on its position already set forth in the record.

We will, therefore, hold that Carrier's action, here complained of, was disciplinary in nature and there being no charge of any procedural defects or impairments of Claimant's rights to a fair investigation, or of arbitrary or capricious action, we will not substitute our judgment for that of the Carrier.

However, before so ruling, we wish to take notice of Carrier statement that Rule 11

"* * * simply preserves the lower grade seniority of employees who have been promoted * * * to official positions. * * *"

If Carrier construes the seniority of employees in positions covered by the Scope of the Agreement to be "lower grade" seniority, so be it. But Rule 11 protects all the seniority an employee may have acquired in covered positions and continues it while such employee is holding an excepted position so that he may exercise it—absent any disciplinary action for cause, as here—whenever he relinquishes it or is demoted therefrom in the manner outlined in said Rule. The Agreement itself makes no provision for "lower grade" seniority.

We have noted argument in Organization's behalf that

"* * * before any investigation to determine the circumstances, or reasons therefor, which the investigation did not attempt to develop, Carrier advised Claimant he was to be removed from the Master Carpenter position, which admittedly it had the right to do, but **at the same time** advised him he was being disqualified as a B&B Foreman. *This latter action we submit the Carrier did not have the unilateral right to do.*" (Emphasis theirs.)

The record is clear that effective August 22, 1955 Claimant was both relieved as Master Carpenter and disqualified as a B&B Foreman. It is also clear he was on leave of absence until August 29. And on that day Carrier advised him that "Inasmuch as you were off the property and did not report for work until today, it was not possible to hold an investigation and notify you the time and place of such investigation, until today." The investigation was held, and its disciplinary action was not without cause, as the record clearly shows.

A denial Award will be made.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January, 1959.