



Award No. 16800
Docket No. TE-15257

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kansas City Terminal Railway, that:

1. Carrier improperly dismissed Towerman W. W. Enyart from service.
2. Carrier shall be required to reinstate Towerman W. W. Enyart with all rights unimpaired and pay for all time lost beginning February 22, 1964.

OPINION OF BOARD: Claimant had been in the employ of the Carrier since June 1, 1954. He worked as a Towerman and held seniority in Seniority District No. 2. Except for a short period of time when he occupied a bulletined temporary assignment, he was an extra employe.

Under date of February 24, 1964, the following communication was addressed to the Claimant:

February 24, 1964
10-1
PR

Mr. W. W. Enyart
4204 Hawthorne
Kansas City, Missouri

Dear Sir:

Report to Room 204, Union Station Building, Kansas City, Missouri, Thursday, February 27, 1964, at 10:00 A. M. for formal investigation to develop the facts and determine your responsibility, if any, in connection with your failing to comply with instructions given you Friday afternoon, February 21, 1964 when you called the office of the Trainmaster and made a request for the proper authority to be excused from duty as Train Director, Tower No. 5, 11:00 P. M. February 21, 1964 to 7:00 A. M. February 22, 1964.

At approximately 4:00 P. M. during your personal conversation with Trainmaster J. P. Maher, he informed you that your request to be excused from service on date in question was denied, and that you were marked up for the assignment, making it your responsibility and obligation to protect the assignment. Further in regard to these instructions, when you later contacted Ass't. Trainmaster D. R. Patterson by Bell telephone seeking proper authority to be excused from this same assignment, you were advised by Ass't. Trainmaster Patterson that the instructions previously issued by Trainmaster Maher to protect this assignment had not been and were not to be altered under any circumstances, except extreme emergency.

You are charged with violation of pertinent part of Rule N, third paragraph:

' * * * Employes who are insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or who do not conduct themselves in such a manner and handle their personal obligations in such a way that the Railroad will not be subjected to suits, criticism or loss of good will, will not be retained in the service.'

of Kansas City Terminal Railway Company Operating Rules. Also, Rule H in addition to Rule 26 of the General Rules for Guidance of Employes.

The following will appear as Company witnesses:

Robert Shankland
J. P. Maher
D. R. Patterson

If you desire representation or witnesses, you should so arrange in accordance with scheduled agreement.

Please acknowledge.

Yours truly,

/s/ W. R. Apple"

The hearing was held as scheduled before Mr. W. R. Apple, the Carrier's Superintendent. The Claimant was present at the hearing and was represented by Mr. R. L. Lunsford, General Chairman, The Order of Railroad Telegraphers.

Under date of March 4, 1964, Mr. W. R. Apple, Superintendent, addressed the following communication to the Claimant:

"March 4, 1964
10-1
PR

Mr. W. W. Enyart
4204 Hawthorne
Kansas City, Missouri

Dear Sir:

Referring to formal investigation held in Room 204, Union Station Building, Kansas City, Missouri, Thursday, February 27, 1964,

at 10:00 A. M., for formal investigation to develop the facts and determine your responsibility, if any, in connection with your failing to comply with instructions given you Friday afternoon, February 21, 1964, when you called the office of the Trainmaster and; and made a request for the proper authority to be excused from duty as Train Director, Tower No. 5, 11:00 P. M. February 21, 1964, to 7:00 A. M., February 22, 1964.

The evidence adduced by testimony and witnesses at this investigation proved conclusively you were insubordinate when you failed to comply with instructions given you by Trainmaster Maher. Therefore, you are dismissed from the service of the Kansas City Terminal Railway Company effective February 22, 1964.

Attached is copy of formal investigation.

Yours truly,

/s/ W. R. Apple"

We note from the record "that Claimant W. W. Enyart was reinstated in the service of the Carrier by agreement between the parties effective March 15, 1965, with full seniority rights and without prejudice to the pending claim for pay for all time lost."

A transcript of the testimony adduced at the hearing is made part of the record.

We find from the record that Claimant received a fair and impartial investigation and/or hearing. Indeed we find no claim on the part of the Claimant, when this dispute was being considered on the property, that he did not receive a fair and impartial hearing. The claim was that the Claimant was "improperly dismissed" and that he be "reinstated with all rights unimpaired and pay for all lost time."

An examination of the transcript of the testimony adduced at the hearing discloses that on February 21, 1964, the regular occupant of the third trick Train Director position at Tower 5, starting at 11:00 P. M. was absent which required the filling of the position with an extra employe. The Claimant was scheduled to fill the vacancy.

At about 4:00 P. M. of that day, approximately 7 hours before starting time, Claimant called Trainmaster J. P. Maher requesting that he be excused from duty that night. The Claimant claims that he advised Mr. Maher the reason for his request. Mr. Maher denies that any reason was given. His request was denied. Approximately 25 minutes later, Claimant again communicated with Mr. Maher and renewed his request and again the request was denied. The record also discloses that the Claimant made calls to Assistant Superintendent Patterson and to Coach Yard Clerk, Mr. Shankland, requesting that he be excused from duty that night. All requests were denied.

It is evident from a reading of the record that the Claimant did not follow the orders of his Superior.

We now consider the matter of the discipline imposed by the Carrier.

We have held on numerous occasions that our function in a discipline case is not to substitute our judgment for that of the Carrier or to decide the

matter in accord with what we might or might not have done had it been ours to determine but to pass upon the question whether, without weighing it, there is some substantial evidence in the record to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier and we are not warranted in disturbing the penalty imposed unless we can say that it clearly appears from the record that the action of the Carrier in respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion. See Award 5032. (Emphasis ours.)

Dismissal from service is an extreme and severe penalty and whether or not such a penalty is justified depends upon the many factors and circumstances in each case.

The prerogative of the Carrier in assessing discipline is not absolute. While this Board is not warranted in disturbing the penalty imposed merely because it might have imposed or assessed a different penalty, this Board does have the right and will not hesitate to reduce or remove discipline which it regards as excessive or unreasonable in a given case.

Without going into great detail, it is evident from a reading of the evidence adduced at the hearing that the denials by Mr. Patterson and Mr. Shankland were, in a large measure, due to the fact that their superior, Mr. Maher, had denied the Claimant's request in the first instance.

Mr. Patterson, in answer to a question directed to him by Mr. Apple, testified as follows:

"Q. Mr. Patterson, you have heard me read the caption of this investigation. Would you please tell us in your own words, all the facts to which you have personal knowledge in regards to the incident now under investigation?

A. Mr. Shankland, the clerk in the Coach Yard, called me at about 7:30 P. M., or approximately that time, and told me Mr. Enyart had called him, requesting that he be marked off. I asked Mr. Shankland what reason he had given him and he said he didn't give him any, so I called Mr. Maher and asked him if he knew of any extenuating circumstances why Mr. Enyart should be off, and he said no, that unless something of an emergency nature should arise, Mr. Enyart was to work. A short time later, between 8:30 P. M. and 9:00 P. M., Mr. Enyart called me and told me he would like to be off from the 11:00 P. M. Train Director's job that evening. I asked him what the reason was, and he said he wanted to take care of a sick horse, or something of that nature. I told him that under the circumstances, I would not change Mr. Maher's instructions earlier that day for him to report as assigned at 11:00 P. M."

Mr. Shankland, in answer to questions directed to him by Mr. Lunsford, testified as follows:

"Q. Mr. Shankland, when Mr. Enyart contacted you in regards to laying off, isn't it a fact that you was agreeable to start with?

A. Yes.

Q. Mr. Shankland, in that conversation that you had with Mr. Enyart when you was agreeable to letting him off, didn't he then tell you of the conversation between he and Mr. Maher and advise you that probably you should contact Mr. Maher?

A. No sir.

Q. In other words, you just stated, Mr. Shankland, that you were agreeable to letting him off, so how did it happen that you contacted Mr. Maher?

A. Because at the time Mr. Enyart called for authority to be off that evening, he also told me Mr. Maher had instructed him to be at Tower 5 at 11:00 P. M. without fail, and because of this information voluntarily on Mr. Enyart's part, it is my job as Coach Yard Clerk to find out the facts from my immediate supervisor, who is Mr. Maher, and therefore, Mr. Enyart left me with no recourse but to contact Mr. Maher and find out the facts pertinent to this situation.

* * * * *

Q. Mr. Shankland, isn't it a fact that you had qualified men on the extra board who was also available to work the vacancy at Tower 5 at 11:00 P. M.?

A. Yes sir.

* * * * *

Q. Mr. Shankland, do you make it a practice of asking a towerman who is wanting to lay off, what his reason is?

A. Your question is a complex one, the answer to which would be . . . Normally if I have sufficient extra men to let the man off without instructions from the Trainmaster's office, I don't particularly have to have a reason from a towerman for his being off on any particular day. However, if I have no available men on the extra board, there are only one or possibly two reasons why a man could get off. I think this should answer your question."

* * * * *

A witness, Mr. Wm. Grogan, in answer to a question directed to him by Mr. Apple, testified as follows:

"Q. Mr. Grogan, I would like for you to please tell us in your own words, all the facts to which you have personal knowledge of the incident under investigation here today.

A. My testimony is to verify to a telephone call to the clerk at the Coach Yard to the fact that the clerk has said as far as he was concerned, Mr. Enyart could be off, but under the circumstances, he would not let him off until he had talked to Mr. Maher. I believe that is all." (Emphasis ours.)

From a careful examination of the record and the evidence adduced at the hearing we are of the opinion that there is sufficient mitigating circumstances in this dispute which warrants us to interfere with the penalty imposed by the Carrier in this matter, to wit, dismissal from its service.

Under all of the circumstances in this case, we hold that the discipline assessed is excessive, unreasonable and an abuse of discretion on the part of the Carrier. We do not, however, condone the Claimant's failure to observe the rules of the Carrier and his failure to comply with the orders of his superiors. We do agree, however, that some discipline was justified and warranted. It is our judgment that a suspension of NINETY (90) DAYS would have been the maximum discipline justified for the violation involved.

Claimant will, therefore, be restored to service of the Carrier, as an extra employe, as of May 23rd, 1964, with seniority rights unimpaired. Claim for monetary loss from May 23rd, 1964 up to March 15, 1965, the date Claimant was reinstated, is sustained, with the right of the Carrier to deduct any and all monies earned by the Claimant in other employment.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 disciplinary action was warranted but that dismissal from service was excessive under the circumstances of this case.

AWARD

Claim sustained to the extent indicated in opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November, 1968.