NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19522
THIRD DIVISION Docket Number CL-19618

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7027) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on Rocco Timpano, Clerk, Operations Center, Conway, Pa., Pittsburgh Division, Central Region.

(b) Rocco Timpano's record be cleared of the charges brought against him on June 24, 1970.

(c) Claimant Rocco Timpano be restored to service with seniority and all other rights unimpaired, and be compensated for wage loss sustained during the period out of service, beginning July 10, 1970, plus interest at 6% annum compounded daily.

OPINION OF BOARD: This is a disciplinary case arising under Agreement between the parties, effective February 1, 1968.

FACTS

On June 3, 1970, claimant brought a civil action against Carrier account personal injuries alleged to have been sustained while working on Carrier's property. The complaint read in part: "Rocco Timpano, Employe, injured Conway, Pa., January 12, 1968....The injuries are given as severe strain and aggravation of the lumbo-sacral area, involving nerve roots and muscles of the low back, hip, and right leg ....This suit is brought to recover a sum in excess of $10,000".

On June 24, 1970, claimant received notice informing him of investigation to be held on June 30, 1970, on the following four charges:

"1. Fraudulent claims of Personal Injury allegedly sustained by you on or about January 12, 1968, while on duty as clerk in the Operations Center at Conway, Pa.

2. Your failure to report an alleged personal injury sustained by you, promptly to your immediate Supervisor, on or about January

"12, 1968, while working as a Clerk in the Operations Center at Conway, Pa., in violation of Safety Rule 1000 of the S-7-A Safety Rule Book, effective September 1, 1961.

3. Your failure to obtain immediate first aid or medical attention for an alleged personal injury sustained by you while working as a Clerk in the Operations Center on or about January 12, 1968, Conway, Pa., in violation of Safety Rule 1001 of the S-7-A Safety Rule Book, effective September 1, 1961.

4. Your failure to exercise care to avoid an alleged personal injury while on duty as Clerk in the Operations Center at Conway, Pa., on or about January 12, 1968, in violation of Rule M of the CT-400, Rules for Conducting Transportation, effective January 28, 1956."

The hearing was held on June 30 and July 2, 1970. On July 10, 1970, claimant received Carrier's Notice of Discipline of dismissal based on findings of guilt on all four charges.

At the hearing claimant testified that in the early morning of January 12, 1968, while lifting a thirty pound box of paper for an IBM machine, he backed up and stumbled over an electrical plug or outlet; this caused him to fall backwards and injure his back. He said he reported the injury to his supervisor, Mr. Savanovich, who arranged for Clerk Nancy Parks to relieve him. After Clerk Parks arrived, claimant was helped downstairs to his car by Car Inspector Carroll and Mr. Clyde Hauger, an employee in Carrier's Police Department.

In the afternoon of the same day, claimant consulted his family physician, Dr. Tom Jones, who advised hospitalization, x-rays, and traction. Claimant stated various commitments prevented this course. Later, on January 15, 1968, claimant was x-rayed and treated by Dr. James Whittle, Jr., Chiropractor. Claimant said he thereafter received further chiropractic treatment at the rate of once or twice weekly which phased down to once or twice monthly.

Claimant also testified that supervisors in the IBM room privately switched shifts with one another.

Clerk Nancy Parks testified that she was called "to come to work and relieve an IBM operator" between 2:00 and 3:00 A.M., by either Mr. Savanovich or Mr. Angelo Lazito, and that she arrived at work about forty-five minutes later. She did not recall whether she saw claimant at work, but did recall that she "heard he had to be helped to the car, he hurt his back." She did not recall the date, but said it "was winter time, cold outside."

Car Inspector Carroll testified that, while working in the IBM room as clearance man in January 1968, claimant "come to me and Clyde Hauger and asked us to take him down the steps". Claimant stated that "He had hurt himself....He said he couldn't walk. We took him down the steps.". Mr. Carroll did not recall the time, date, the name of the supervisor on duty, or whether he saw Clerk Parks on the premises. However, he did recall that he and Mr. Clyde Hauger assisted claimant from the IBM room and down the steps to the ground floor or outside the building.

Mr. Savanovich testified he was not on duty at the subject time and had no knowledge of claimant's injury. Mr. Shivler testified he was the Supervisor on duty in the IBM room January 11, 11:00 P.M. to January 12, 1968, 7:00 A.M. and that nothing was reported to him. Also that, although January 11 was normally his day off, he worked the IBM room position because "I was a supervisor and it is normally filled by a regular supervisor....The regular supervisors all have an opportunity to work that Thursday night, because it is a time and one-half night. It goes on a rotation basis."

Mr. Victor Terziu testified that he was on duty as the Assistant Train Master at the subject time and that no injury was reported to him, although Mr. Shivler was under personal instructions to report anything out of the ordinary. In responding to questions by claimant's representative concerning who was the supervisor on duty, Mr. Terziu stated:

> "At that time Thursday, third trick, was a vacant position and as a rule Mr. Shivler did work on Thursday nights to fill this vacancy. To the best of my knowledge Mr. Shivler was working at that time".

Mr. Gaudio, Office Manager, testified that his payroll records showed Mr. Shivler as the supervisor on duty, that it would not have been a switch since it was a time and one-half night, and "I think" Mr. Shivler's handwriting "is...on the sheet for January 11, 1968." The records also indicated that Clerk Parks performed no service on January 11 or 12, 1968 and, further, that claimant was not relieved early on January 12, 1968. Mr. Gaudio confirmed that supervisors privately switched shifts on occasion and that, in such instances, the record would show the name of the supervisor assigned to work rather than the one who actually worked.

Petitioner challenged the integrity of Carrier's records in respect to who worked on the pertinent dates and in respect to the entry of sickness and vacation data on claimant's record.

In its rebuttal brief Carrier makes the following statement:

"It is certainly within the realm of probability that Claimant did not sustain a personal injury as the result of a fall. He could have aggravated an old back injury while lifting the box of paper for the IBM machine. The Board will note that Claimant has a history of back trouble and had received a settlement from the Carrier for a back injury that had occurred in 1956. Carrier believes he aggravated the old injury while lifting the box of paper; that he quietly slipped out of the building with the assistance of Car Inspector Carroll without informing his supervisor so he would not lose any pay. The payroll records indicate that Claimant was paid for working a full tour of duty that day.

That Claimant was not injured as the result of a fall also finds support in the Employees 'Exhibit C', which is a copy of the Travelers Insurance Company record of payment to Dr. Whittle, who treated Claimant. Particular attention is directed to the date of 1-10-68 appearing under 'date of loss.' This indicated Claimant was treated for something that occurred on January 10, 1968--not January 12, 1968, the date Claimant said he fell and was injured. In any event, treatment by a Chiropractor does not establish that Claimant was injured in a fall. Here again, the treatment could have been and probably was in connection with the injury Claimant sustained to his back in 1956."

CONTENTIONS OF PARTIES

Petitioner contends that Carrier failed to produce conclusive or substantial evidence that claimant was guilty of Charge No. 1, or of Charges No. 2, 3, and 4, and, in addition, that the rules mentioned in Charges No. 2, 3, and 4 were not agreed to by Organization and, hence, are inapplicable to claimant.

Carrier contends the findings of guilt are supported by substantial evidence, that the discipline imposed is reasonable, and that Rule 6-A-1 (h), which speaks of the method of compensating a reinstated employee, does not provide for assessment of interest in such cases. In its rebuttal brief Carrier concedes that the rules mentioned in Charges No. 2, 3, and 4 apply only to operating employees, but Carrier asserts that comparable provisions are implied in any contract of employment.

RESOLUTION

The controlling principle here is that Carrier has the burden of proving disciplinary charges initiated by it by a preponderance of the evidence. and, if there is substantial evidence of record to support Carrier's findings of guilt and measure of discipline, this Board will not disturb Carrier's disciplinary action.

The finding of fact, underlying Carrier's finding of guilt on Charge No. 1, is that claimant did not sustain a personal injury in Carrier's IBM room "on or about January 12, 1968". The finding of fact, underlying the other charges, No. 2, 3, and 4, is that claimant did in fact sustain a personal injury and, moreover, was guilty of violating company rules in connection therewith. These inconsistent and mutually exclusive findings of fact, made concurrently in a single disciplinary action cannot be sound; consequently, we have carefully examined whether the record sustains one or the other of these mutually exclusive findings. We find that the record does not.

We first consider Charges No. 2, 3, and 4. Since Carrier concedes that the rules mentioned in these charges apply only to operating employees, we shall sustain Petitioner's contentions as to these charges without further discussion.

Viewed from the most favorable light, Carrier's evidence on Charge No. 1 established the following pertinent facts:

1. Claimant erred in asserting that Mr. Savanovich was the supervisor on duty on the 11:00 P.M. to 7:00 A.M. shift, January 11 and 12, 1968.

2. Claimant did not turn in a short-day pay slip for such shift despite his claim that he left before completing the shift.

3. Claimant did not report an injury to his supervisor on such shift.

4. Claimant did not use the medical treatment facilities provided by Carrier, although it would have been convenient and perhaps prudent for him to have done so.

5. Clerk Nancy Parks did not work on the subject shift.

None of these facts goes to the central fact which Carrier was obliged to prove in order to sustain Charge No. 1, namely, that claimant did not sustain a personal injury in the IBM room "on or about January 12, 1968." And even though the facts, collectively, amount to circumstantial evidence from which the inference of non-injury might be drawn, we believe the inference is much too weak to constitute substantial evidence when considered in the context of the record as a whole.

Claimant testified that he was injured and received x-rays and treatment therefor from Dr. James Whittle, Chiropractor. **Carrier did not offer evidence to show this treatment was not for an injury sustained in the IBM room. Clerk Nancy Parks testified that, after arriving at work, she heard that claimant had hurt his back and had to go home.** Mr. Carroll testified **that claimant told him he had hurt his back and could not walk down the stairs**

and, further, that he, Carroll, and Mr. Hauger helped claimant down the stairs. These reports came to Parks and Carroll on dates they did not recall, but the reports, which came to them separately and from different sources, did have the common subject that claimant had been hurt while at work. Carrier's evidence did not purport to contradict or explain the testimony of Clerk Parks and Mr. Carroll, although this testimony constituted probative evidence which tended to corroborate claimant's testimony that he was injured in the IBM room.

We note also that Dr. Whittle's insurance payment form showed he treated claimant for an injury which occurred on January 10, 1968, a date within the time frame of "on or about January 12, 1968" set forth in Carrier's statement of Charge No. 1. However, Carrier did not offer its records for January 10, 1968 to show the name of the supervisor or whether claimant turned in a full-day or a short-day pay slip in respect to such date. Carrier argued in its brief that the Whittle treatment "could have been and probably was in connection with" a 1956 injury of claimant, but argument is not evidence. Carrier also stated in its brief that "Carrier believes he aggravated the old injury while lifting the box of paper; that he quietly slipped out of the building with the assistance of Car Inspector Carroll without informing his supervisor so he would not lose any pay."

Inasmuch as aggravating an old injury while lifting a thirty pound box of paper constitutes an injury for which, in appropriate circumstances, one may seek legal redress, we believe Carrier's statement must be read as a concession which reinforces our appraisal of the record. Carrier's statement to the effect that claimant defrauded Carrier of wages, for which he did not work, could of course be the subject of discipline; however, this is not the charge Carrier made against claimant.

In view of the foregoing we find that Carrier's dismissal of claimant is not supported by substantial evidence of record, and that Carrier's dismissal of claimant was so arbitrary as to amount to an abuse of its discretion to assess discipline in a reasonable manner. Awards 5467 (Ives); 18551 (O'Brien); 18594 (Edgett); 18618 (Franden); and 19181 (Edgett).

We agree with Carrier's contention that Rule 6-A-1 (h) precludes the assessment of interest and otherwise controls a reinstatement situation. The rule reads as follows:

> "If the final decision decrees that the charges against the employe are not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and compensated for the difference between the amount he earned while out of service or while otherwise employed and the amount he would have earned had he not been suspended or dismissed."

It is therefore the award of this Board that claimant be restored to service with seniority and all other rights unimpaired, that the record be cleared of the charge, and that he be compensated, beginning July 10, 1970, for the difference between the amount he earned while out of service and the amount he would have earned had he not been dismissed. Interest is not allowed.

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 the Agreement was violated.

A W A R D

Claim sustained, but interest is not allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1972.