

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **20590**  
Docket Number **CL-20721**

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steam-  
( ship Clerks, Freight Handlers, Express  
( and Station **Employees**

PARTIES TO DISPUTE: (

(Chicago and North **Western** Transportation Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood  
(GL-7625) that:

1. Carrier violated the current Rules Agreement effective May 15, 1972, particularly Rule No. 21, when it assessed discipline of dismissal on Mr. A. C. Alexander, Reconsigning Clerk, **Ravenswood**, under date of July 17, 1973, and;

2. Carrier will be required **to** restore Mr. A. C. Alexander to service with all rights **unimpaired**, his record cleared of all charges brought against him, and he be compensated for all wage losses sustained, including fringe benefits, until such time he is restored to service.

OPINION OF BOARD: On July 11, 1973, Claimant was charged as follows:

"Your responsibility for conduct unbecoming an employee, in your making vulgar and uncouth remarks **in** the presence of your co-workers at approximately **11:30 A.M.** on July 9, 1973 and for directing vulgar **remarks** to a fellow employee at approximately **12:55 P.M.**, **1:05 P.M.**, **1:35 P.M.** and **2:45 P.M.** on July 11, 1973."

After investigation, Carrier terminated Claimant's employment.

As a procedural matter, Claimant urges that his rights were prejudiced because the notice of dismissal was signed by **an** individual who did not conduct the hearing; and who, in fact, was not present at the hearing to observe the demeanor of the **various** witnesses. We have noted **previously** a conflict in Board Awards in this regard, and have expressed concern when serious credibility questions control the disposition of a dispute. However, as noted by Carrier, this question was not raised while the matter was being considered on the property. In accordance with the procedures of this Division, matter is not properly before us when raised for the first **time** in its Ex Parte Submission.

**Claimant** denies the charges against him. Claimant and a Supervisor (Nelson) had a discussion **immediately** prior to 11:30 A.M. on July 9, 1973. At that **time** (Nelson states) Claimant was quite upset.

**Immediately** thereafter, **Claimant** was overheard, by two **employees**, to make a remark which contained certain words not employed in the politest of circles, and which remark implied a threat of physical force. Claimant testified that he was talking to a **fellow** employee concerning "basketball", and that any **off-colored** words were solely confined to a private discussion. At a latter **time**, Claimant admitted to Nelson that he had made the remarks, but denied that they **were** directed towards Nelson.

**Mrs. Tumas** testified that at 12:55 P.M. on July 11, 1973, she was discussing a report with **Aranza**. At that time, Claimant (who was **not** involved in the discussion) made a **comment** to **Mrs. Tumas** which contained an off-colored word. When she stated, "who asked you?" Claimant replied in a rather earthly fashion. **Mrs. Tumas** immediately reported the incident. Thereafter, according to **Tumas**, Claimant **repeated** the earthly statement to her at 1:05 P.M., 1:35 P.M. and 2:45 P.M. She reported all statements.

Although Claimant denied making the remarks to **Mrs. Tumas**, he did admit that he did mutter a statement to himself.

**Aranza** confirmed that the remarks were directed to **Mrs. Tumas** at both 12:55 P.M. and at 1:05 P.M.

**Testimony** of other witnesses indicating that they did not hear the remarks, does not convince the Board that the remarks were not made.

We find that the Carrier has presented substantial evidence to support the charge.

The Organization urges that even if the remarks in question were directed to fellow employees and co-workers, under today's standards of language usage, there is no basis for dismissal. In this regard, Claimant has presented evidence that it is quite **common** for the male employees to "swear" **in** the office. However, there is no evidence to suggest that the employees swore directly **at** each other. Moreover, the record indicates that rather than **Claimant** being guilty of **an** unintended indiscretion, or making a statement in the heat of **momentary** anger or **frustration**; he deliberately and repeatedly directed totally unnecessary language toward a fellow employee. Thus, even if dismissal was not warranted, a severe disciplinary **action** was appropriate.

Finally we consider events which transpired after the investigation. Grievant **was** terminated on July 17, 1973. **On** that same date, he allegedly visited Carrier's office and assertedly threatened a fellow employee. The Organization **argues** that said **allegation** may not be considered, in any manner, inasmuch as it **is** solely unrelated to the charges, was not considered at the investigation and is not an official matter of record.

Carrier cites Awards which state that after a determination of guilt has been made, it is appropriate to consider an employee's record **when** assessing the quantum of discipline. While we do not dispute the cited Awards, we question that the July 17, 1973 incident is properly before us.

While the record is not clear as to whether the asserted incident of July 17, 1973 was considered by the Official who imposed the **discipline** of **permanent** discharge, the Carrier, in its initial denial letter stated:

"...**his** conduct thereafter  
was even more reprehensible....  
I desire that this information  
be made part of the record  
and can assure YOU that  
it will be considered in **any**  
future handling of this **case.**"  
(underscoring supplied)

The **Organization** replied that the alleged incident of July 17, 1973 **could** not be considered when assessing discipline.

Carrier responded that while the matter could not be considered when assessing discipline, it is appropriate to a determination of return to service.

**Thus, it** is obvious that any concept of considering a reduction of the dismissal to a lesser penalty during the review process was completely obscured by the alleged incidents of July 17, 1973.

As we read Carrier's cited Awards, dealing with permissible review of prior records, we do not concur that they are authority for Carrier's action here. The alleged victim made a report of the incident, but decided not to press charges. There was no investigation of the matter, as far as we know, and no opportunity for the Claimant to face his accuser. Certainly, Carrier had the right to bring additional

**charges** against Claimant, if it so desired, but we question that a report of the alleged incident, with nothing further, was an appropriate basis for Carrier to deny Claimant a consideration for reduction in penalty during the Appellate process.

Accordingly, the Board has reviewed the matter without reference to the July 17, 1973 asserted incident. While **we** feel, as noted above, that Claimant's actions demand serious **disciplinary** action, we feel that discharge was excessive, especially when we note that use of **common** language was tolerated in the office.

We will restore **Claimant** to service with seniority and other rights unimpaired, but without compensation for **time** out of service.

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 **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 **discipline** imposed was excessive.

AWARD

**Claim** sustained to the extent stated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.

CARRIER MEMBERS' DISSENT TO AWARD 20590, DOCKET CL-20721

(Referee Sickles)

In view of the seriousness of the offense committed by the Claimant, we dissent to that **portion** of the award which restores Claimant to Carrier's service.

J. J. Maylor

W. J. W. P. Sickles

G. M. Youder

P. C. Carter

W. J. Carter