

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20836  
Docket Number CL-20876

Dana E. Eischen, Referee

(Brotherhood of Railway, Airline and Steamship  
( 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-7691) that:

1. The Carrier acted in an arbitrary and capricious **manner** when it assessed as discipline the dismissal of Paul C. Holmes, File Clerk in the Rates and Divisions Department, Chicago, Illinois, and **that;**

2. The Carrier restore to service Mr. Paul C. Holmes and compensate him for each day beginning May 24, 1973 and continuing until such time that he is returned to service.

OPINION OF BOARD: Claimant herein was charged with insubordination and discharged from all service following a hearing on May 25, 1973. **The** notice of hearing date May 23, 1973 sets forth the charge over the signature of Carrier's Vice President - Sales & Marketing **Department, Mr. W. E. Braun**, as follows:

"Insubordination - **your** responsibility for refusal to obey a direct order issued by Mr. A. M. **Handwerker**, Director-Cost and Budget Administration, at or about **3:57** P.M., Friday, May 18.

You are held out of service immediately pending the investigation."

Mr. C. F. Biron, representing Mr. W. E. **Braun**, conducted the hearing on May 25, 1973 and, by letter dated May 31, 1973, Mr. **Braun** dismissed Claimant. By letter dated July 4, 1973 the Organization appealed the decision to Mr. **Braun** **contending** in the hearing that Claimant was not afforded a fair and impartial investigation and alleging a violation of Rule 21 of the controlling Agreement in connection with specificity of the charge and handling of witnesses. By letter dated August 31, 1973 Mr. **Braun** replied inter alia.

"I believe the record will show that in no manner was Mr. Holmes prejudiced or placed at an unfair advantage in the manner in which the investigation was conducted. It was in my opinion conducted in an extremely fair and impartial manner."

The claim was appealed through all proper channels on the property without settlement and **comes** to our Board for resolution.

We note at the outset that the Organization relied in the main upon procedural objections to the handling of the matter by Carrier. Moreover, it is not denied that Claimant refused to obey a direct order but it is asserted that he was "provoked" into his misconduct by a supervisory official other than the supervisor whose order he did not follow. Carrier flatly denies that any prejudicial procedural irregularity prevented Claimant from receiving a fair and impartial investigation and asserts that an **unmitigated** act of insubordination occurred which clearly warrants dismissal.

We have reviewed with care the record, positions, Agreement language and Awards cited by the parties. In so doing we are cognizant of the threefold function of the Board in discipline cases to review whether:

1) A fair and impartial investigation was afforded Claimant;  
2) Substantial evidence on the record supports a finding of culpability;  
**and, 3) The quantum of discipline assessed is reasonable in all of the circumstances.** It is too well established to require citation that upon an affirmative finding on each of the foregoing areas of inquiry this Board will not substitute its judgement for that of Carrier in discipline cases. On the other hand, if the facts and circumstances of a particular case do not measure up with respect to each of these benchmarks then we **may** either modify or **reverse** the discipline assessed. In this connection it should be noted that notwithstanding, the development of record evidence of misconduct for which discipline is warranted; if such is obtained by procedures and in circumstances fatally prejudicial to a fair and impartial investigation then the fruit of that investigation is tainted and loses **its validity**.

The Organization raises a procedural objection to the specificity of the notice of investigation **supra**. The notice apprises Claimant of the nature of the charge sufficiently to enable him to prepare a defense and is not violative of Rule 21. See Awards 12898, 13969, 17154 et al. The other procedural objection of the Organization, however, stands on more firm footing and is in our considered **judgement** sufficiently supported by the record to persuade us that Claimant was

substantially deprived of the fair and impartial investigation to which he was entitled by Rule 21. In particular, the record shows that arrangements were made for the sequestration of witnesses at the hearing. Notwithstanding sequestration, however, the chief Carrier witness presented to each of the other two Carrier witnesses outside of the hearing room a typewritten copy of his testimony. Both of these witnesses studied this statement before presenting their own testimony, took ~~their~~ copies into the hearing room with them and one of them used it while giving his testimony regarding the incidents of May 18, 1973. The net effect of such cross-referencing of testimony ~~was~~ to **render** sequestration a nullity and **an** idle gesture. Worse than this however, is that the bogus sequestration lent an aura of validity to apparently corroborating testimony which was in fact little more than a parroting of the typed prepared statement of the chief witness.

Carrier cites numerous Awards and decisions of Federal courts for the proposition that a railroad employee questioning the propriety of the initial hearing on the property must look to the collective bargaining agreement for his procedural and substantive rights of due process. See Thomas X. NYC & ST. L., 185 F. 2d 614, 616, 617; Edwards V. St. Louis - San Fran. R. Co. 361 F. 2d 946 (1966). Rule 21 of the controlling Agreement herein provides inter alia that "...**an** employee... shall not be disciplined or dismissed without a fair and impartial investigation..." We need not engage in Constitutional abstractions to hold that the mock sequestration in the instant case substantially detracted from Claimant's contractual right to a fair and impartial investigation. To uphold the discipline imposed by Carrier in these **circumstances** would be to condone such practices and this we shall not do.

On the other hand, the record excluding the tainted testimony shows that Claimant was not blameless. Absent a reasonable belief of injury or danger to health and safety, an employee is under an obligation to obey the orders and directions of supervisors. If he believes contractual rights are transgressed thereby he must "obey now and grieve later."

In the peculiar facts and circumstances of this case we shall sustain the claim to the extent of returning Claimant to service with seniority unimpaired but without back pay.

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 Agreement **was** violated.

A W A R D

Part 1 of the claim is sustained.

Part 2 of the claim is sustained to the extent of restoring Claimant to service **with** seniority unimpaired but without back pay.

**NATIONAL RAILROAD ADJUSTMENT BOARD**

By Order of Third Division

ATTEST:

A. W. Paulson  
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October 1975.