

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20853
Docket Number CL-20972

Joseph A. Sickles, 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-7743)
that:

1. Carrier violated the **terms** of the Current Agreement, particularly **Rule 21**, when under date of August 7, 1973 it dismissed Mr. E. P. Kloubec, Agent at **Wheaton**, Illinois from the service of the Carrier; and

2. Carrier shall be required to compensate Mr. E. P. Kloubec, from August 7, 1973 forward, for all time lost at the rate of his regular position at **Wheaton**, Illinois, to include premium and benefit entitlements accruing from Travelers Insurance Company Policy No. GA-23000.

OPINION OF BOARD: Claimant has raised a number of procedural objections to the conduct of the hearing, suggesting a predetermination of guilt and improper rulings concerning receipt of evidence. In most part, we feel that the objections are speculative and conjectural and do not materially effect the outcome of the dispute. We do **feel, however**, that the **refusal** to receive certain evidence **from** an employee in Carrier's Real Estate Department deserves **comment**, and will be discussed below.

A review of the entire record **clearly** establishes that a lingering feud between Claimant and Mr. Grace (concerning the parking of Grace's automobile at **the** station) **erupted** into a verbal (and possibly a physical) altercation during the **morning** of July 19, 1973.

While both Claimant and Grace contend that the other party **was** the aggressor; it was clear that the incident in question was precipitated by Claimant's act of writing "No parking" on the windshield and another piece of glass on Grace's car.

It has long been held by this Board that its function does not extend to disturbing resolutions of questions of credibility when witnesses offer varying accounts at an investigation. Both Claimant and Grace gave testimony at the hearing. Carrier chose to credit Grace's version of the incident - that Claimant was abusive by language and actions, and that Grace was assaulted and spat upon. Grace's version was, to some extent, confirmed by another witness. We cannot state, from a review of the record, that the credibility determination was arbitrary and/or capricious. Accordingly, we find that Carrier has presented substantive evidence, including Claimant's testimony, to establish that he engaged in conduct **un-**becoming an employee and entered into an altercation with Grace.

At the hearing, Claimant gave testimony concerning his continuing dispute with Grace and he referred to discussions with Carrier Officials and employees of the Real Estate Department. When Ricketts, an employee in that department, was called as a witness, Claimant's representative sought to question him about illegal parking, and discussions with Claimant in that regard. The Hearing Officer refused to receive such evidence, but rather, he limited testimony to the specific incident of 10:00 a.m. on July 19, 1973.

We feel that such a ruling constituted error. We cannot concur with Carrier's contention that testimony is properly limited solely to the precise incident which gives rise to a charge. To do so would preclude considerations at all levels of the proceedings - which could have significant bearing on motivation, condonation, intent and a variety of pertinent background information. While a Hearing Officer should not open the door to receipt of an endless series of immaterial testimony; at the same time, he should exercise a degree of leniency in allowing a Claimant fully to develop his case within the basic framework of materiality.

In this case at issue, we feel that the Hearing Officer was overly restrictive when he failed to allow Claimant the opportunity to question the witness. Although we feel that the ruling was erroneous, a full review of the entire record fails to show - in this particular case - that the error was prejudicial to Claimant's rights. Giving Claimant the full benefit of all doubts in this area, his testimony demonstrated that his specific instructions from the leasing department were received subsequent to the confrontation with Grace. The record fails to show that Claimant was precluded from establishing any evidence as to instructions, discussions, etc. prior to the incident which would have been reasonably pertinent to the dispute. If the record contained such a suggestion, the prejudicial nature of the error would have to be examined within that framework.

While we are mindful of Claimant's years of service, the record demonstrates that the incident in question was the fourth serious disciplinary action taken against Claimant in a period of less than three years.

We find no basis in the record for disturbing the Carrier's determination.

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;

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

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

LAEOR MEMBER'S DISSENT TO
AWARD 20853 (Docket CL-20972)
Referee Sickles

Award 20853 is in palpable error. Commencing with the concluding sentence of the fifth paragraph, the following observations are found in the "Opinion of Board":

"The Hearing Officer refused to receive such evidence, but rather, he limited testimony to the specific incident of 10:00 a.m. on July 19, 1973.


"We feel that such a ruling constituted error . . . While a Hearing Officer should not open the door to receipt of an endless series of immaterial testimony; at the same time, he should exercise a degree of leniency in allowing a Claimant fully to develop his case within the basic framework of materiality.

"In this case at issue, we feel that the Hearing Officer was overly restrictive when he failed to allow Claimant the opportunity to question the witness."

Despite the above-quoted language, the majority turned to infinitesimal issues and bland reasoning to reach an astonishing conclusion which leaves the minority no alternative but to dissent, to wit: "We find no basis in the record for disturbing the Carrier's determination."

The above quotations make clear that the majority of the Board recognize that Claimant was not given a fair and impartial hearing on several points: 1) obstruction of cross-examination by the conducting officer; 2) the hearing officer committed error in refusing to receive certain evidence, in not allowing Claimant to fully develop his case, and in being overly restrictive by failing to allow Claimant the opportunity to question the witness. In the face of these facts, and knowing full well that the paramount purpose of an investigation is to develop the facts in the dispute at issue, the majority nonetheless was able to arrive at a decision denying the claim! The result is a slap on the wrist for the conducting officer, which is quite unlikely to affect his future conduct of investigations, and total condemnation of the victimized employee.

Award 20853 is in palpable error and requires most vigorous dissent.


Gerald Toppen
Labor Member