

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20967
Docket Number CL-20847

Dana E. Eischen, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and
{ Steamship Clerks, Freight Handlers,
{ Express and Station Employees
{ Robert W. Blanchette, Richard C. Bond, and
{ John H. McArthur, Trustees of the Property
{ of Penn Central Transportation Company,
{ Deftos

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7576) that:

(6) The Carrier violated the Rule 6 Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on Joseph Fuzy, Clerk in the Carrier's Livernois Office at Detroit, Michigan, Detroit Division of the Northern Region.

(b) Claimant Joseph Fuzy be restored to service with seniority and all other right 6 unimpaired, and be compensated for wage 1066 sustained.

OPINION OF BOARD: Claimant Joseph Fuzy was employed as a Car Control Clerk in Detroit, Michigan with service dating from June 26, 1967. While working job No. 142 on April 16, 1973 Claimant was observed by two supervisors at about 6:55 A.M. sitting with his arm 6 folded on his desk, his head lying on his arms, breathing slowly and rhythmically with his eyes closed. Both supervisors testified at a hearing held May 16-17, 1973 that they observed Claimant in this posture and Claimant admitted that he was sitting in this position. The supervisors each testified further that they called Claimant's name four times, each time progressively louder, until Claimant awoke from sleep. Claimant insisted that he was not sleeping but merely resting his eyes. Claimant was taken out of service by one of the supervisors on April 16, 1973 and on May 1, 1973 notified to attend an investigation of the following charge: "You were sleeping while working Job No. 142, April 16, 1973 at approximately 6:55 A.M." Following the hearing held May 16-17, 1973 Claimant was found guilty 66 charged and dismissed from all service with the Carrier.

Petitioner on behalf of Claimant alleges that the suspension and dismissal violated Rule 6-A-1 of the controlling Agreement in several respects to wit: 1) Carrier wrongly suspended Claimant pending hearing; 2) No fair and impartial investigation because the official issuing the Notice Of Investigation did not testify; 3) No substantial evidence to support the charges; 4) Arguendo, even if Claimant was asleep on the job dismissal is too severe and unreasonably harsh 86 discipline.

Carrier defend⁶ against the claim on the merits by positing that the hearing record shows clearly that Claimant x⁸⁶ sleeping on the job and any reasonable reviewer would ⁶⁰ conclude. Carrier asserts that discipline of dismissal ¹⁶ not uncommon in the railroad industry for sleeping on duty and cites numerous Awards to support the position. With respect to the procedural objection⁶ Carrier points out that all accusing witnesses were present, testified and were ably cross-examined at the hearing by Claimant's representative; and that the Officer issuing the Notice did ⁶⁰ ⁸⁶ 8 ministerial administrative duty only with no substantive personal knowledge to contribute ⁶⁶ ⁸ witness either for Carrier or Claimant.. Further, Carrier denies that Claimant was suspended between April 16, 1973 and the hearing one month later. Rather, Carrier states without contradiction that Claimant worked the clerical extra board during that time and was not in fact suspended at all.

Overriding Carrier's defense on the merits, however, ¹⁶ ⁶ jurisdictional objection that Claimant, on June 10, 1974, resigned from the service of Carrier and signed ⁸ release reading in pertinent part ⁶⁶ follows: "It is further understood that in resigning from service that I relinquish any and all rights to compensation that might be due me." (Emphasis added). Carrier maintains that the release render⁶ moot this claim which was then pending before our Board. Analogizing to several lead Constitutional Law cases interpreting the "case and controversy" requirement of Article III relative to federal courts, Carrier urge⁶ us to dismiss the claim for lack of ⁸ cognizable issue. Petitioner answers this argument by asserting that Carrier unfairly "pressured" Claimant into releasing hi⁶ contract claim in settling out of court ⁸ personal Injury claim against Carrier which pre-dated hi⁶ dismissal. Petitioner also maintains the right of the Organization qua Organization to protest and prosecute violation of the Agreement.

We have studied the entire record in this case with care and interest. On balance we are convinced that Claimant knowingly and voluntarily released his contract claim to compensation on June 10, 1974 ⁶⁶ part of the monetary settlement of hi⁶ injury claim. Accordingly, we are persuaded that part 2 of the claim is obviated and rendered moot. In this connection, we should point out that the Third Division awards interpreting Agreements and the Railway Labor Act cited by Carrier on the subject are much more persuasive than are the law cases construing jurisdictional parameters laid down in Article III of the Constitution regarding justiciability in federal courts. See Awards 19527, 20832 and Award No. 13 of Public Law Board No. 457.

Our study of the Awards on the question of claimant releases shows that these cases are highly individualistic and often turn on the peculiar facts of ⁸ particular case. Thus there is an apparent conflict of Awards on the question. We are of the considered opinion that this

divergence is less a matter of conflict than of emphasis in that some cases present more persuasive argument for elevating the right of the Organization to police the Agreement for all of the employees covered thereby over the undoubted right of the individual Claimant to settle his own claim with the Carrier. In this connection we find that Award 20237 succinctly suggests the proper line of demarcation for upholding the Organization's right to process claims notwithstanding individual employment settlements:

"It appears self-evident that this principle is most compelling in cases such as the instant one where not just a monetary claim is at stake but alleged violations of the negotiated procedural safeguards surrounding the imposition of employee discipline. Accordingly, we hold that notwithstanding the purported settlement on the property, this claim is properly presented for consideration by the Board. See Awards 3416, 4461, 5793, 5834, 5924, 6324, 6958."

Analyzing the instant case in light of the lessons of our previous Awards on the subject, therefore we are constrained to dismiss part 2 of the claim on jurisdictional grounds but we will not interdict Petitioner's case with respect to part 1 of the claim.

Upon careful consideration we are compelled to find no procedural unsoundness in the hearing and no unfairness or partiality in the conduct of the Hearing Officer. With respect to the alleged suspension Petitioner has offered nothing more than bare assertions on this subject which Carrier has effectively refuted. As we read the record there is no factual showing that Claimant was actually suspended and the allegation must fail on that ground. Therefore we need not reach and do not imply any disposition of the question of whether this might have been a proper case for suspension under Rule 6-A-1. In our judgment there is substantial probative evidence on this record from which a reasonable person would conclude that Claimant was sleeping on duty at 6:55 A.M. April 16, 1973. The discipline of dismissal is severe indeed but is not uncommonly the imposed penalty for proven instances of sleeping on duty. Nor have we been shown mitigating circumstances which would warrant substitution of our judgment for that of Carrier in this particular case. We cannot say with assurance that dismissal was arbitrary, unreasonable and capricious herein and accordingly we must deny the claim that Rule 6-A-1 was violated,

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

That the parties valued oral hearing;

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That the Carrier and the Employees involved in this dispute are respective⁴ 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 not violated.

A W A R D

Part 1 of the claim is denied.

Part 2 of the claim is dismissed for lack of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1976.