

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21763
Docket Number CL-21754

James F. Searce, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and
{ Steamship Clerks, Freight Handlers,
{ Express and Station Employees
{ Consolidated Rail Corporation (former Lehigh
{ Valley Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-8181, that:

(a) The Carrier violated the Rules Agreement as revised, May 1, 1955, Rule 35, and the Railway Labor Act, when, on December 21, 1974, it dismissed from the service of the Carrier, Elise Wynne, who had been taken out of service on December 9, 1974, while representing another employee, in Ms. Wynne's capacity as Local Chairman of Lodge 64, BRAC. The suspension and subsequent dismissal of Local Chairman Wynne was arbitrary, capricious, discriminatory and without just cause.

(b) The Carrier will reinstate Claimant Elise Wynne to the service of the Carrier with seniority and all other rights unimpaired.

(c) The Carrier will compensate Claimant Elise Wynne for all wages lost, commencing December 9, 1974, when she was taken out of service, until such time as she is returned to the service of the Carrier.

OPINION OF BOARD: On December 9, 1974, at approximately 2:00 p.m., J. Wortolek was preparing to carry out his duties as messenger at the Carrier's Metropolitan Freight Agency (MFA) in Newark, New Jersey. He was to deliver packages of mail to two separate locations some distance apart from the MFA. On his morning rounds, Wortolek had been transported by J. Krolik, General Agent at the MFA, using his own car. Wortolek expected the same arrangement for the afternoon. He located Krolik in the general office area of the MFA, who advised him that he would be unable to transport him and that Wortolek should, therefore, plan to make the deliveries using public transportation. Wortolek complained that the bundles were too large and too numerous to handle, especially considering the necessity of using public transportation.

Krolik, who had senior supervisory responsibility at the MFA, left the conversation to consult with R. Morey, the Carrier's Supervisor of Stations, whose official duty station was Bethlehem, Pennsylvania, but who had the MFA, as well as other Carrier facilities under his overall supervision, and who was visiting the MFA at the time. Morey was physically situated in Krolik's office, which was adjacent to the general office area. Concurrent with Krolik's departure from the general office

area, Wortolek, on advise of a fellow employee, sought out the Claimant Elise Wynne for assistance. Wynne was a Rate Clerk - Bill Clerk at the MFA and also Chairman of the Local Protective Committee of Local Lodge No. 64 of the Union. In this capacity, she represented the interests of Union members in grievance matters, among other things. At Wortolek's behest, Claimant left her office and followed him back to the general office area, arriving about the same time Krolik did from his consultation with Morey. A discussion ensued as to the propriety of Wortolek's hating to dispatch all of the mail at one time. Krolik again consulted with Morey and upon returning to the general office area further discussion with the Claimant centered around the apparent agreement that Wortolek was to deliver two bundles to one location and return to the MFA. The discussion was joined by Morey, who directed the Claimant to return to her duties as a clerk, that the matter was resolved. The Claimant thereupon asserted that she was functioning as Local Chairman and was handling a grievance. Morey, who had taken charge at this point, advised that there was no grievance, the matter had been settled, and that she would not handle Union business on company time. Morey repeated his directive to her several times, to which her response was either "I hear you" (Carrier's version) or "I hear you, but I am representing this man" (Union's version). The Claimant also asserts that she instructed the acting payroll clerk, E. Gietter, to mark her off the payroll in order that she could perform Union business; carrier representatives deny hearing such a remark. After making the directive several times, Morey sought out M. Bonner, Freight Agent from Wilkes Barre, Pa., who happened to be in the MFA on other business, and requested that he join him and witness further discussion with the Claimant. He did so. Morey thereupon repeated his directive to the Claimant that she return to her office, adding that if she did not do so, she would be taken out of service. (The Claimant had continued in discussion with Krolik during Morey's search for Bonner.) Upon the Claimant's failure to comply, Morey instructed Krolik to prepare a letter removing the Claimant from service, which he did as follows:

"You are hereby notified effective December 9, 1974, 2:20 p.m., you are hereby held out of service pending hearing.

You are charged with failure to follow a direct order from a supervisor.

You will be notified of time and date of bearing."

The Claimant endeavored to discuss this matter with Morey relative to returning to work following Krolik's disciplinary action, but was advised that she was out of service.

The entire incident transpired in about fifteen minutes.

The hearing was held on Tuesday, December 17, 1974, before Hearing Officer W. J. Nocitra in Newark, N. J.

As a result of this investigative hearing, the Claimant was advised by letter dated December 21, 1974, that she was dismissed from service for her actions of December 9, 1974.

The Carrier's dismissal decision was not altered by the appeals by the Union that followed the December 21, letter.

The rule cited in this case is Rule 35 - Committee Work, as follows:

"Employees elected as Duly Accredited Representatives employed exclusively by the organization, party hereto, shall be considered on leave of absence and in the service of the railroad, and shall retain their seniority rank and rights if asserted within thirty (30) days after the release from excepted employment.

Other Duly Accredited Representatives of the employees will be granted necessary leave of absence to properly represent the interest of employees covered by this agreement."

The Carrier's primary rationale as to appropriateness of action against the Claimant is that she refused a direct order from a supervisor, not once but a total of five times; that she was without authority to mark herself off the payroll; that she did not request permission from her supervisor for time off for Union activities; that no grievances existed - only a minor work dispute; that, if the Claimant felt Wortolek had a grievance, she should have processed it by the provisions of Rule 33 (which sets out procedures for preparing grievances in writing); that even if a minor work dispute had existed, it was settled by the time Morey interceded and thus the Claimant had no further business as Local Chairman; that the Claimant was afforded a fair and impartial investigation; and that, considering her past record, the dismissal was for just cause.

The Union's objection to the Carrier's dismissal actions are based on **contentions** that: the notification of charge was insufficient, imprecise and indefinite; the Claimant's rights to function as a duly appointed union representative was denied her; and, the Hearing Officer was prejudiced and biased.

Certain of the events of December 9, 1974, are in dispute, and their identification is worthy of mention: the Carrier says the Claimant encouraged Wortolek to carry but one bundle of mail, she denies this; the Claimant avers that she advanced the idea of Wortolek carrying two bundles to one of the two destinations with a return to the MFA before performing the other, the Carrier officials imply they did so instead; witnesses for the Claimant testified at the investigation that (1) they understood the Claimant to say, "I hear you, but I am representing this man" (Wortolek), (2) they heard the Claimant advise the acting payroll clerk that she was off the payroll on Union business, (3) one of the Union's witnesses testified that Krolik was making work difficult for Wortolek and that that was his reason for suggesting that Wortolek seek out his Local Chairman; when Morey returned to the general office area with Mr. Bonner the Claimant was overheard to say (of Mr. Bonner), "Now I see you have your own witness."

We are reminded at the outset that this Board is not to substitute its authority for that of the Carrier where there is substantial evidence in support of the charge. The Carrier would argue that this is a case primarily of an employee refusing to follow a direct order from appropriate management. We find it not that simple. We find that the Claimant was in the process of carrying out her responsibility as a duly authorized Union representative. It should be remembered that Wortolek sought her out for his own reasons and asked her assistance. The Carrier suggests no grievance existed - merely a minor work dispute. That is not for the Carrier to decide. If an employee feels an action or impending one affects his wages, hours or working conditions, he has a right to raise it within the scope of the collective bargaining agreement. Wortolek did precisely this. At his behest, the Claimant represented his interest. Her communication was with the proper person - his immediate supervisor. Whether the issue was resolved or not would clearly rest with the two individuals who were dealing with the matter firsthand. A relationship in collective bargaining depends upon the ability of individuals who must deal with problems having the opportunity to do so. It ill-serves collective bargaining to put a stop watch on such activities. The line of demarcation between when an employee is performing Union business and when not is not so easily defined. In this case, perhaps another minute or so would have resolved the matter.

The Carrier argues that if the Claimant wished to leave her duty post to represent Wortolek, then she should have gained permission to do so. This contention flies in the face of the essence of 3 Union's first responsibility to its members- to represent their interest under the collective bargaining agreement. Additionally, it surely cannot be argued that by leaving her post the Claimant placed the operation in jeopardy.

We are not unaware of the probable dispute in personalities that existed here. It is possible that the Claimant, as a newly elected or selected Union Chairman, may have been exuberant to an excess in this matter. It can also be adduced from a reading of the record that a negative action in the first instance by Morey was probably met by a similar reaction from the Claimant and this built into a situation from which neither the Claimant nor Morey could extricate themselves. While we note that Union witnesses to the exchange between the Claimant and Morey unanimously asserted that her responses to him were not disrespectful, it is possible that her attitude in doing so might have been more constructive, and the statement attributed to her upon Morey's return with Bonner ("Now I see you have your own witness") might well have been provocative. These attitudinal shortcomings on the Claimant's part might have warranted a reprimand or other similar disciplinary issuance compatible with such an offense. The Carrier, having stood on its record for almost three years, apparently has not seen fit to consider that alternative,

Insofar as the question of whether or not the Claimant received an impartial and fair hearing, it is our understanding that such a tribunal is established for the purpose of permitting both parties to fully develop their positions before a neutral. We are satisfied that there was more than one issue, position or point of view in this dispute. A reading of the report of the investigative hearing leaves the clear impression that it was convened to accomplish only and precisely what was set out as its purpose on the cover sheet:

"In connection With
Determining Mrs. Wynne's responsibility, if any, in failing
to comply with direct order given to her by the Supervisor
of Stations on December 9, 1974." (Emphasis added in part)

We find that the record does not show just cause for **dis-**
missal of the Claimant. We find that the **Claimant** was properly
engaged in carrying out Union activities.

The Claimant is to be reinstated with full back pay, less
any and all earnings, compensation and other remuneration she has
received from other sources over the period of her separation from the
Carrier.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois this 14th day of October 1977.