

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23086
Docket Number CL-22878

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Southern Railway Company
{ Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees

STATEMENT OF CLAIM: Carrier did not violate the agreement with the Brotherhood of Railway, Airline and Steamship Clerks as alleged, when it held Mr. J. H. Wiggins, Head Mail Clerk, Atlanta, Georgia, out of service from January 9 through January 20, 1978 following Mr. Wiggins' arrest for murder.

Since the agreement was not violated, Mr. Wiggins is not entitled to 10 days' pay at his daily straight time rate for the period January 9 through January 20, 1978, as claimed for and in behalf of Mr. Wiggins by the Clerks' Organization.

OPINION OF BOARD: Claimant Wiggins was assigned the position of Head Mail Clerk in Carrier's Atlanta, Georgia office building. On December 13, 1977, claimant was involved in a killing. He was arrested, charged with murder, and placed in jail. He was released on bail on December 15, 1977. He was exonerated of the charge on January 18, 1978.

Claimant's mother reported him off sick on December 14th and December 15th. Claimant later informed the Superintendent of his difficulties and admitted that he was not sick on December 14, 15 and 16, but was rather in jail. For marking off under false pretenses, claimant was suspended from service.

By letter dated December 19, 1977, claimant was informed that he would be suspended from December 19, 1977 to January 9, 1978. Claimant did not contest this discipline and he served the suspension. A second letter from Carrier, dated December 19, 1977, informed claimant that he would be held from service from the conclusion of his suspension until his status involving the charges was cleared up. Charges against claimant were dropped on January 18, 1978. Upon being informed of this, Carrier immediately authorized claimant to return to work on January 20, 1978. Claimant was held out of service for 10 work days as a result of this second action by Carrier.

Claimant grieved being held out of service. The grievance was denied at each level and is before this Board for resolution. At issue is payment for the 10 days claimant was held out of service. Carrier argues that because he did, in fact, kill a man, his presence on the property would present a threat to fellow employees and to the public. It, therefore, kept claimant away from the property as a protective safety measure, not as a disciplinary action. Carrier points to the fact that as soon as it was learned

that claimant was exonerated, he was welcomed back to work.

The Organization argues that claimant was found not guilty and that he at no time would have posed a threat to fellow workers or to the public who use Carrier's facilities. It further argues that Carrier held claimant out of service because it considered him guilty. By this action, Carrier has denied claimant his basic legal right of being considered innocent until proven guilty. By holding him out of service, it declared him guilty without an investigation or a hearing, as required by the Agreement.

The issue of whether Carrier has a right to discipline an employee who is charged with a crime has been before this Board on numerous occasions in the past. It has generally been this Board's position that simply because an employee is charged with a crime, it is not grounds for discipline by Carrier unless the crime in some way relates to Carrier's operation or involves the employer - employee relationship. It has also been the Board's position that Carrier has the responsibility to investigate allegations and follow the schedule procedures in charging an employee, holding a full and fair investigation and then deciding the level of discipline, if any.

It is the Opinion of the Board that Carrier in this case has attempted to sidestep that obligation. This Board has no quarrel with Carrier's notion that if an employee's presence on the property poses a danger to the mental and physical well-being of other employees or the general public, it has the right, and indeed the obligation, to keep that employee off the property. Carrier has the vehicle within the contract to accomplish such an end. It can suspend an employee, it can charge him, it can hold a hearing. If the employee's presence is found to be a threat to other employees, that employee can be held out of service until the threat is eliminated or the employee, under certain conditions, is discharged.

Carrier in this case has not gone through any such process. Without resorting to a hearing or an investigation, it decided to hold claimant out of service for an indefinite time. Carrier justifies this action with the argument that because claimant was charged with murder, his presence on the property would be harmful to other employees and the public. Carrier, however, has not documented these conclusions by any facts or by example. Carrier has not demonstrated by any reasonable example how claimant's presence on the property after the incident would have placed co-workers in danger, or how the incident would have affected claimant's ability to do his job. Neither were any persuasive arguments or examples put forward by Carrier to indicate that claimant's presence on the property after his suspension would have had a negative impact on Carrier's business.

Carrier's argument that it did not discipline claimant in this case is not persuasive. Neither is its argument that no rule authorizes payment of this claim if Carrier is found to have acted improperly. Carrier held claimant out of service for ten days. Claimant was denied an opportunity to earn wages during that time. This Board has concluded that Carrier acted in an arbitrary manner in this instance. Carrier had no authorization under the contract to hold claimant out of service. No rule permits such action without utilizing the disciplinary process.

If the Board were to accept Carrier's argument that no rule infraction was committed by Carrier and that the Board is powerless to grant claimant a remedy, it would be signaling Carrier that such administrative action, while inappropriate, carries no penalty with it. Carrier could, whether right or wrong, take an employee out of service for a variety of reasons and not be held liable for lost pay. That in effect would be to grant Carrier a free hand in such instances. This Board cannot subscribe to this philosophy and finds no support for such an approach in the schedule Agreement or in labor relations' principles in general in this industry or in any other.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 of the Organization sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1980.

CARRIER MEMBERS DISSENT
TO
AWARD NO. 23086, DOCKET NO. CL-22878
(Referee R. Dennis)

Dissent to this Award is necessary because during the 10-day period Mr. Wiggins was withheld from service his presence on the property posed a possible serious danger to the mental and physical well being of other employees, the general public, and indeed, to this employee as well.

On December 13, 1977, Mr. Wiggins did shoot and kill another man. For this act of violence he was charged with murder by civil authorities. This charge was of such a grave and violent nature that until the outcome of the criminal proceedings were resolved, this Carrier acting in good faith made a reasonable decision to withhold this employee from service.

It was not the intent of the Carrier to discipline Mr. Wiggins, as it was not the intent of the Carrier to determine his guilt or innocence, rather, the Carrier prudently determined that until Mr. Wiggins was cleared of the charges, his active employment presented a risk to the conduct of his employer's business, therefore, in an administrative action he was withheld from service pending resolution of the charges placed against him.

On January 18, 1978, Mr. Wiggins appeared in DeKalb County Magistrate Court, DeKalb County, Georgia for a hearing before Judge T. Moran. At this hearing it was determined Mr. Wiggins acted in self-defense and the charges placed against him were dismissed. Upon notification of dismissal of the charges, Mr. Wiggins was immediately authorized to return to service and by mutual agreement Mr. Wiggins returned to service on January 23, 1978.

The foregoing shows conclusively that only because of a most serious criminal charge lodged against Mr. Wiggins by police authorities, this Carrier acted in a reasonable and responsible manner by withholding Mr. Wiggins from service pending resolution of the charges. The Carrier did not cause the situation and should not be penalized because it was merely protecting itself from potential liability.

The Opinion of the Board states in part:

"If the Board were to accept Carrier's argument that no rule infraction was committed by Carrier and that the Board is powerless to grant Claimant a remedy, it would be signaling Carrier that such administrative action, while inappropriate, carries no penalty with it. Carrier could, whether right or wrong, take an employee out of service for a variety of reasons and not be held liable for lost pay. That in effect would be to grant Carrier a free hand in such instances. This Board cannot subscribe to this philosophy and finds no support for such an approach in the schedule Agreement or in labor relations' principles in general in this industry or in any other."

The philosophy of the Carrier did not enter into this case.

Carrier was faced with the facts presented to this Board. One of its employees had taken the life of another person for which he had been charged with murder by police authorities. This charge was most serious, therefore, Carrier justifiably and responsibly determined the best interests of all parties, including the accused, would be best served by withholding him from service pending the outcome of this serious criminal charge. Carrier, like this Board, was obligated to make a judgment based on the facts relevant to this case and not any other. Carrier, like this Board, was not faced with taking employees out of service for a variety of reasons. Carrier's decision was reached on the basis of facts only herein involved, not any others.

In this Award 23086, the Board opines that in this case, Carrier attempted to sidestep its obligation to follow schedule procedures of charging the employee, hold a fair investigation and then decide the level of discipline, if any.

In its presentation to the Board the Carrier states several times the withholding of Mr. Wiggins from service, January 9 through January 20, 1978 was not disciplining Mr. Wiggins, rather it was protecting itself from foreseeable liability.

Had Carrier intended to discipline Mr. Wiggins during the January 9th to 20th period, this could have been accomplished by Carrier with little or no effort. Because of the incident herein involved this grievant was incarcerated December 14-16. During that period he was reported as being off, due to illness. Grievant later admitted he was laid off under false pretenses since he was not sick. Because of this he was disciplined until January 9, 1978 for failing to protect his assignment and marking off under false pretense. Rules of Carrier relative to being found guilty of such charges provide that employees may be dismissed. Such did not occur here, rather, a minimal disciplinary assessment was administered to Mr. Wiggins. Obviously, Carrier did not sidestep its obligation to charge and investigate this employee in this case since Carrier was in a position to avoid this dispute had it so chosen simply by justifiably extending the amount of discipline previously assessed.

In this case Carrier merely acted to protect the interests of all including Mr. Wiggins and does not deserve the penalty assessed.

Hence this Dissent.

P. E. Lacosse
P. E. LACOSSE

W. F. Euker
W. F. EUKER

J. E. Mason
J. E. MASON

J. R. O'Connell
J. R. O'CONNELL

P. V. Varga
P. V. VARGA

