

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

**Award Number 23253
Docket Number CL-23361**

Paul C. Carter, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8978) that:

1. Carrier acted in an arbitrary, capricious, discriminatory, biased manner when, without just cause, it dismissed Clerk J. G. Staylor from service of the Carrier on January 26, 1979.

2. In view of such arbitrary, capricious, discriminatory and biased action the Carrier shall now be required to:

- (a) Restore Clerk J. G. Staylor to service of the Carrier with all seniority, vacation and other rights unimpaired.
- (b) Pay Clerk J. G. Staylor for all time lost commencing with January 26, 1979, and continuing until Clerk Staylor is restored to service, less outside earnings.
- (c) Pay Clerk J. G. Staylor any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Company under Group Policy GA-23000 and, in the event of the death of Clerk J. G. Staylor pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of substitute health, welfare and life insurance.
- (d) Pay Clerk J. G. Staylor any amount he incurred for dental expenses for himself or dependents to the extent that such payments would have been paid by Aetna Life Insurance Company under provisions of Group Policy GP-12000. In addition reimburse him for premium payments he may have made in the purchase of substitute dental insurance.

- (a) Pay Clerk J. G. Staylor interest at the rate of 18%, compounded annually on the anniversary date of this claim for amounts due in Item 2 (b), supra.

OPINION OF BOARD: The claimant herein had been employed in a clerical capacity by the Carrier, with a seniority date of March 16, 1972.

The clerical employes of the Carrier went on strike beginning July 10, 1978. When negotiations between the parties did not result in a settlement, the President appointed an Emergency Board to consider and make recommendations on the issues, and requested the employes to return to work. On October 6, 1978, an injunction was issued by United States District Judge Aubrey E. Robinson, Jr., in proceedings brought to enforce the status quo required upon the appointment of the Presidential Emergency Board. Ordering Paragraph No. 4, of the injunction, which has been made a part of the record, reads:

"(4) That each carrier party to these cases shall not, during the period in which the status quo provisions of Section 10 of the Railway Labor Act is in effect, engage in any action or actions of reprisal, recrimination, or retaliation, of any kind against any of its employees for conduct of such an employee related to a strike or picketing of the carrier by defendant BRAC over or in connection with the labor dispute between BRAC and the N&W. During the period in which the status quo provision of Section 10 of the Railway Labor Act is in effect, no disciplinary action or actions shall be instituted, or progressed further if already instituted, nor shall any penalties be assessed or continued to be assessed if already imposed, for any act or actions occurring during and related to a workstoppage over or in connection with the labor dispute between defendant BRAC and the N&W; any otherwise applicable time limits upon the institution or progression of disciplinary proceedings based upon such conduct, including time limits established by collective bargaining agreements, shall be tolled during the period in which the status quo provision of Section 10 of the Railway Labor Act is in effect; and disciplinary proceedings based upon such conduct may be instituted and progressed, or if already instituted, further progressed, or disciplinary penalties already assessed may be enforced, after the expiration of the said status quo period within such time limits as so tolled."

On January 8, 1979, the parties concluded agreements, effective January 12, 1979, disposing of the issues precipitating the strike. Section 3 of Agreement dated January 8, 1979, provides:

"Section 3. There will be no disciplinary investigations, grievances, reprimands or any assessment of fines or penalties by either party against any employee represented by BRAC because of any action or non-action during the strike, excluding, however, disciplinary actions taken as a result of violence resulting in substantial injury and damage to person⁶ or property."

On January 17, 1979, the claimant was served with notice of investigation:

"You are hereby charged with disloyalty and unbecoming conduct by reason of your malicious participation in the vandalizing of NW track tamper machines (Nos. 11249 and 30952) located on the Hill Track, Mile Post N-132.9, Burkeville, Virginia, on the night of August 7, 1978, at approximately 11:00 P.M., which resulted in damage to such equipment estimated at \$4,918.00.

You are hereby instructed to report for an investigation in connection with the above charges to be held in the office of Assistant Superintendent, Division Office Building, Crewe, Virginia, Friday, January 19, 1979, commencing at 9:30 AM.

If you desire to have a representative or representatives and/or witnesses present at the investigation, you may arrange for their presence."

The investigation was conducted as scheduled and on January 26, 1979, claimant was notified of his dismissal from the service.

In its submission to the Board the Organization contends:

"...therefore, for all intents and purposes Claimant did not come within the purview of Carrier's rules and regulations during a long, drawn out strike."

The Board cannot agree with such contention. The relationship between an employe engaged in a legal strike and his employer continues to be employer-employe. See Award 13127.

The contention has also been made that claimant has been subjected to double jeopardy in that he was tried in Civil Court, made restitution by agreement with the Carrier, with the concurrence of the court, and also paid the supreme penalty of dismissal from the service of the Carrier involving the same alleged occurrence. The Board has frequently held that a Carrier's right to discipline an employe is unrelated to the actions of criminal or civil courts. See Awards 19929 and 13127.

The Organization has also complained, as it did on the property, as to the manner in which the investigation was conducted and the actions of the hearing officer.

While we subscribe to the general proposition that a hearing officer should be accorded considerable latitude in his development of the testimony in a disciplinary proceeding, we are disturbed with the actions of the hearing officer in this case wherein he came dangerously close to exceeding the limits of propriety by his manipulation of, and, in at least one instance, the total elimination of the testimony given at the hearing. Were it not for claimant's admission of involvement in the episode in question, we could reasonably find that a fair and impartial hearing was not accorded in this case.

However, when all the facts and circumstances are considered, it is our opinion that the ends of justice in this case are best served by returning claimant to service with seniority and other rights unimpaired, but without compensation for time lost. Claimant is cautioned that his admitted actions were extremely serious and badly misguided. Any repetition of this type of activity could and undoubtedly would result in his permanent termination as an employe.

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 Employes involved in this dispute are respectively Carrier and Employes 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 discipline was excessive.

- ' A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

Alv. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1981.