

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24846
Docket Number CL-24890

Robert Silagi, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9704)
that:

(a) Carrier violated the Clerks' Agreement at Argentine, Kansas when it improperly removed Jese L. Seamster from service, and

(b) Carrier shall now restore Jesse L. Seamster to service with all seniority rights and other rights accruing thereto unimpaired, and

(c) Claimant Seamster shall be allowed eight (8) hours' pay for each work day (forty (40) hours per week), commencing January 22, 1982 up to and including date of return to service of the Carrier at the rate of Chauffeur I position at Argentine, plus any subsequent wage adjustments, and

(d) Claimant's record shall be cleared of all charges that now appear in the transcript of the investigation held January 29, 1982, and

(e) In addition to the monies claimed, Jesse L. Seamster shall now receive fifteen (15%) per cent interest on monies claimed, such interest to be compounded on each and every pay period from date of removal from service forward for the period of time Claimant is held out of service (40 hours per week).

OPINION OF BOARD: In this case we are called upon to decide under what circumstances, if any, an employer may discipline an employee for conduct committed on his own time and off company premises.

Claimant was a chauffeur with four years of seniority. On January 11, 1982, in the Jackson County Circuit Court of Missouri, claimant pleaded guilty to a reduced charge of "passing bad check under \$150, a misdemeanor." The court placed claimant on probation and ordered him to make restitution. The person defrauded had no relationship to the Carrier. The crime was committed in a different state from where claimant was employed.

By letter dated January 22, 1982, Carrier served claimant with a notice of investigation alleging a possible violation of Rule 2 and the second paragraph of Rule 16 of the General Rules for the Guidance of Employees. Said letter advised claimant that he was being held out of service pending a formal investigation "concerning an alleged incident arising in Jackson County Circuit Court to which you pleaded guilty and were found guilty on January 11, 1982." After a formal hearing claimant was found guilty of violating Rules 2 and 16 and dismissed from service.

The salient parts of Rules 2 and 16 are reproduced below:

"Rule 2. Employees must be conversant with and obey the Company's rules and special instructions.

"Rule 16. Employes must not be indifferent to duty, insubordinate, dishonest, immoral, quarrelsome or vicious."

The Carrier's ex parte submission makes it clear that claimant's admitted dishonesty was the subject matter of the investigation and the basis for his discharge. Dishonesty, argues the Carrier, is a dismissable offense, whether or not Carrier's property was involved. That claimant's action did or did not reflect negatively on Carrier makes no difference. Carrier has the right to expect honest employees and has no obligation to keep those who by their own admission are not. (Award 21334-Zumas). It makes no difference that Claimant was off duty when the violation occurred. (Award 19263-O'Brien).

The Organization challenges the right of the Carrier to impose discipline for acts committed off duty, off premises and not involving the Company. A rational reading of Rule 16 shows that it is intended to cover employees during working hours on Company premises. This is manifested by the words "duty" and "insubordinate" which can only be performed while on active service of the Carrier. Since duty and insubordination cannot possibly refer to the private life of an employee, the words "dishonest, immoral, quarrelsome and vicious" in the same sentence are modified by and must be interpreted in the same manner as "duty" and "insubordinate". To hold otherwise would produce the absurd result of sanctioning the Carrier to assume the role of "Big Brother" to monitor the daily life of an employee in matters both trivial and serious which have nothing to do with the operation of a railroad. In support of its position the Organization cites the following awards:

"(Award 21109-McBrearty)

The term 'dishonesty' means misconduct that involves either money or property. It goes beyond misappropriation or theft in that it includes any conduct which tends to perpetuate a fraud on a carrier resulting in financial loss." (Emphasis supplied).

In Award 21109 this Board interpreted a rule which is virtually identical to Rule 16 in a dispute involving the very parties to the instant proceeding.

"What an employe does when off duty and not on the property of the Carrier would not justify discipline so long as his conduct does not interfere with his work. (Award 3411-Tipton)

"What an employe does when off duty and not on the property of his employer is no concern of an employer and will not warrant disciplinary action unless such acts impair his ability or render him unfit to perform his duties after reporting for duty... (Award 6332-Livingston Smith). "

The rationale of the Organization's argument was aptly summed up in Award 20874-Eischen and Award 22314-Marx, both of which interpreted a rule very similar to Rule 16. Award 22314 involved this Carrier.

"The correct standard is that an employee's off duty misconduct may be the subject of employer discipline where that conduct was found to be related to his employment or was found to have an actual or reasonably foreseeable adverse effect upon the business. The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. In this latter connection mere speculation as to adverse effect upon the business will not suffice."

This Board is convinced that the principles enunciated in Awards 20874 and 22314 are correct and must be applied in this case. The facts clearly show that there was no link between claimant's crime and his employment, nor was there any adverse effect upon the Carrier. Because claimant was arrested on its property, the Carrier alleged that it lost time, wages of employees and productivity. The Carrier neglected, however to support its bare allegation with any probative evidence, consequently said allegation must be rejected.

After careful consideration of the entire record we find that "dishonesty", as used in Rule 16, pertains only to matters which directly affect the Carrier. Needless to say this Board does not condone claimant's misconduct, nevertheless it will direct the reinstatement of the claimant because the Carrier exceeded its authority by charging claimant with the violation of an irrelevant rule; in short, the investigation was void ab initio because it had no jurisdiction over the offense charged. 1/

We now turn to a consideration of claim (e) that claimant receive interest compounded at the rate of 15% on each pay period. The Organization cites Award 16632-Heskett in support of its claim. The Carrier argues that there is no rule or agreement to permit payment of interest and that an overwhelming majority of Awards on the Third Division have denied such claims. In any event those awards which do grant interest are distinguishable on their facts.

It is our opinion that this dispute is not the appropriate one to create new law or settle an old disputed issue. We shall therefore deny claim (e). Moreover, claimant's back pay shall be reduced by his earnings in other employment during the period of his suspension and discharge. Such offset is required pursuant to Rule 24-F which reads:

"If the final decision decrees that charges against the employee were not sustained, the record shall be cleared of the charge. If the employee is dismissed or suspended from service for cause and subsequently it is found that such discipline was unwarranted, the employee will be restored to service with pay for time lost. It is proper that any earnings in other employment will be used to offset the loss of earnings."

1/ It is unnecessary to rule on charges leveled against the Hearing Officer that he prejudged the hearing and the countercharges that the Organization's representative was argumentative and obstructive. A disciplinary hearing need not observe the strict rules of evidence, yet it is expected that both parties adhere to standards of fairness and conduct which will insure that the Carrier develops a full and impartial investigation and that the claimant has his day in court. Such standards should be respected even if it is later determined that the hearing itself is invalid.

Claims (a)(b)(c) and (d) are sustained. Claim (e) is denied. Claimant shall receive back pay computed pursuant to the formula specified in Rule 24-F.

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 here; and

That the Agreement was violated.

A W A R D

Claim is sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 8th day of June, 1984