

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24999
Docket Number MS-25209

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Yvonne Sanders
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(Illinois Central Gulf Railroad Company

STATEMENT OF CLAIM: "This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of our intention to file an ex parte submission on May 6, 1983, covering an unadjusted dispute between a former employee, Yvonne Sanders, and the Illinois Central Gulf Railroad involving the question of whether termination of Ms. Sanders was the proper disciplinary action taken for her alleged violation of ICG Operating Rules E and H, and Train Dispatcher's Rule 3. Specifically, Ms. Sanders was charged with failing to report information concerning the derailment of an ICG train on September 28, 1982."

OPINION OF BOARD: The facts and the issues in this docket are practically the same as those involved in Award 24998, however, as separate Petitioners (Claimants) are involved and separate submissions have been filed by the parties, we think it only proper that separate and complete awards be issued.

In the early morning of September 28, 1982, Illinois Central Gulf dispatch freight train GS-2 was moving northbound from Geismar, Louisiana, via Baton Rouge, to St. Louis, Missouri. While moving through the town of Livingston, Louisiana, at about 40 miles per hour, the 16th through 58th cars derailed at about 5:05 A.M. 27 of the derailed cars contained hazardous commodities. Fires broke out among the derailed cars, and, shortly, explosions took place. 14 homes were destroyed or made uninhabitable by the explosions and fires, and about 3,000 residents were evacuated from their homes. The derailment and damage received wide media coverage.

Numerous Federal and State agencies, in addition to the railroad, were involved in containing the fires, explosions and contamination, and investigating the cause of the accident. While devoting all necessary resources to dealing with the derailment, Carrier began its own investigation of the cause of the accident. Members of the train crew were questioned by Company officials and other agencies, as were numerous other persons, company employees and non-employees. Eventually the direct cause of the derailment was found to be a broken center pin on an empty gondola car which permitted the rear truck and wheel assembly to come out from under the car and derail over a recently broken joint in the track. A following tank car ran over the truck and wheel assembly, and numerous following cars derailed and turned over. Other aspects, such as alleged alcohol consumption by crew members, the presence of unauthorized personnel on the locomotive, alleged excessive speed and a worn air hose connection, were thoroughly investigated.

On October 11, 1982, railroad clerk Janet Byrd, apparently from the Baton Rouge area, admitted to railroad officers that she was on the locomotive from Baton Rouge to Livingston, and at the controls when the derailment occurred. Shortly thereafter the company received information that clerk Byrd had telephoned certain train dispatchers in Chicago shortly after the derailment and told them about her presence on the locomotive when the derailment occurred.

Claimant was an extra train dispatcher at Chicago. On October 15, 1982, Carrier's Director of Police and Special Services held an interview with Claimant. In the statement given to the Director of Police and Special Services, Claimant, who was accompanied by an attorney, stated that she had received a telephone call from Janet Byrd on September 28, 1982, approximately 8:30 to 8:45 A.M., while at home after getting off from work, and during the conversation Byrd admitted being present on the locomotive and handling the controls when the train derailed at Livingston. Claimant also admitted subsequent conversations with Byrd and with other dispatchers about Byrd's conversation.

Claimant was suspended from service on October 15, 1982, and on October 18, 1982, was given a joint notice with another train dispatcher to attend formal investigation on October 22, 1982:

"... for the purpose of determining the facts and your responsibility, if any, in connection with information each of you had concerning the circumstances involving derailment of Train GS-2 at or near Livingston, Louisiana, at approximately 5:05 a.m., September 28, 1982; also to determine if the facts known by you that were under investigation were reported promptly; in addition, to determine if each of you concealed these facts concerning this incident."

Claimant appeared for the formal investigation, with an outside attorney as her representative. The hearing officer informed Claimant that she would not be permitted to have an attorney as her representative. Over the strenuous objections of Claimant and the attorney, the attorney was barred from the hearing room. On October 29, 1982, Claimant was dismissed from service for violation of Train Dispatcher Rule 3 and Operating Rules E and H, which rules provide:

"Rules for Train Dispatchers:

Rule 3. They must be familiar with all rules, special instructions, bulletin orders, bulletin notices and general orders governing the portion of the railroad they are dispatching and promptly report any violations thereof.

They must also promptly report any irregularities, neglect of duty, disobedience, or apparent incompetence of which they have knowledge, defects in engines, cars, track, signal and related equipment or failure of trains to move at usual speed and other unusual occurrences must be recorded and promptly reported."

"Operating Rules:

Rule E. Employees must assist each other in complying with the rules and special instructions. Any violation of rules or special instructions must be reported to their immediate supervisor."

"Rule H. Dishonesty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral character or serious violation of the law are prohibited.

Employees are forbidden to make unauthorized charges for service performed in line of duty."

As to the representation in the on-property disciplinary investigation, it is well settled that a Claimant's right to representation in an on-property disciplinary hearing arises only from the provisions of the collective bargaining agreement. See *Carle vs. Conrail*, U.S.D.C., Southern District of New York (February 9, 1977) 94 LRRM 2719; *Edwards vs. St. Louis-San Francisco R.R.*, 361 F. 2d 946, 954 62 LRRM 2300, 2305-2306 (7th Cir. 1966); and *Broadly vs. Illinois Central R. Co.* 191 F. 2d 73 (7th Circuit 1951) cert. denied 342 U.S. 897, 72 S.Ct. 231 96 L.Ed. 672, 1951. See also Third Division Awards Nos. 15676, 21228, 18352, Fourth Division Award No. 3134.

The collective bargaining agreement here involved is silent concerning the right of representation in on-property disciplinary hearings. It has been stated repeatedly by awards of all Divisions of the National Railroad Adjustment Board that Carrier's managerial rights are restricted only to the extent that they are limited or surrendered by the collective bargaining agreement. In Third Division Award No. 10950, it was held:

"We thus proceed to a consideration of the claim on its merits. At the outset the Employees advance the novel argument that Carrier has not pointed to any rule or group of rules which permit the action taken by the Carrier in this case. It is sufficient answer to say that the burden is not on the Carrier to show that its action is authorized by some provision of the Agreement. Rather the burden is upon the complaining employees to show that the action taken violates some part of the Agreement. ****"

In Fourth Division Award 733 it was held:

"... Consequently, in all matters that have not been limited by agreement, the Carrier's authority remains unrestricted ..."

In Second Division Award 3630:

"It is a fundamental principle of the employer-employee relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law. Contractual surrender in whole or in part of such basic attribute of the managerial function should appear in clear and unmistakable language."

In Second Division Award 8352:

"... The terms of a collective bargaining agreement do not establish an employer's rights, they limit them."

In the absence of a contractual provision permitting outside representatives to attend an on-property disciplinary hearing, the Carrier was free to restrict the representation as was done here. In the absence of an agreement on the subject, the Board cannot find a violation of the Agreement. The Carrier states that under its policy, Claimant had three options: to be represented by an officer of the union, to be represented by a fellow employee, or to represent himself or herself.

In the investigation, Claimant's statement that she had given to Carrier's Director of Police and Special Services on December 15, 1982, was read into the record without protest. In that statement Claimant stated that Janet Byrd had called her at home about 8:30 or 8:45 A.M., September 28, 1982; had told her about being on the train at the time of the derailment, and that she was handling the controls; that the engineer and head brakeman had been drinking. She also stated that she spoke to other train dispatchers about what Byrd had told her. She also stated in the investigation that she had made no report to her supervisors prior to the statement to the Director of Police and Special Services of her conversation with Byrd, as to Byrd being in control of the locomotives, and the possible use of intoxicants by members of the crew; that in conjunction with another train dispatcher, they decided that they did not believe Byrd's statement, because of Byrd's reputation as a liar, and decided not to report the incident. She also indicated that she had subsequent conversations with Byrd prior to her statement to the Director of Police.

Following the investigation, Claimant was notified on October 29, 1982, of her dismissal from service because of violation of Train Dispatcher Rule 3, and Operating Rules E and H, heretofore quoted. There was substantial evidence in support of the charge and to justify dismissal. The Claimant most certainly should have passed on to her supervisors any information that she received involving the serious derailment. Whether she believed the information is immaterial. As it eventually turned out, the information that Claimant received was correct. In fact, the Claimant's actions in not reporting the information to her supervisors amounted to disloyalty to the Carrier. Any case involving disloyalty has always been considered extremely serious, justifying dismissal. See *N.R.L.B. vs. Local Union No. 1229, I.B.E.W.* (364 U.S. 464), and also Third Division Awards Nos. 18363, 19811, 10930, 15932, 24761 and 24766.

The argument raised on behalf of Claimant that the rules involved provide no penalty for violation, simply is not persuasive. The Carrier has the right to issue such rules as it sees fit for the government of its employees, except to the extent limited by agreement, and has the right to expect such rules to be complied with. The complaint is also made that Rule H is ambiguous in defining what constitutes "information" and what "concealing" means. We think that anyone qualified for the responsible position of train dispatcher knows, or at least should know, the meaning of "information" and "concealing" as used in the rule.

There is no proper basis for the Board to interfere with the discipline imposed by the Carrier, and the claim will be denied.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1984.

