

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25132

Docket Number MW-25255

M. David Vaughn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(Consolidated Rail Corporation
(Former Lehigh Valley Railroad Company)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) The dismissal of **B&B** Foreman G. C. **Muso** for **"Alleged"** violation of Rule **'D'** was without just and sufficient cause and unwarranted (System Docket **664**).

(2) The claimant shall be reinstated **with** seniority and all other rights **unimpaired**, the charge leveled against him shall be cleared from his record and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Claimant G. C. **Musow** was employed by the Carrier as a Foreman in its Bridges and Buildings (**B&B**) Department. Claimant entered service with the Carrier's predecessor company on September 9, 1974. On November 10, 1980, Claimant was found by his supervisor, Assistant Division Engineer (**"A.D.E."**) Palish, in Claimant's office approximately one hour prior to the end of his shift. Although the **employees** under Claimant's supervision were still working, Claimant **was not supervising** them and was, in fact, in the process of changing out of his work clothes when found.

When A.D.E. Palish confronted Claimant and asked why he was in the office in street clothes rather than supervising his men, Claimant offered no satisfactory explanation but became **sarcastic** and defiant. A.D.E. Palish then informed Claimant that he was clocked out effective immediately because he was not performing useful work. **Claimant thereupon** became abusive to his supervisor and asserted that, because he had been taken off the clock, he was not restricted in what he could say to his supervisor.

After notice to Claimant, the Carrier conducted an investigatory hearing concerning the incident and, based on the results of that hearing, dismissed Claimant for violation of Rule D of the Carrier's Transportation **Department**, which states in relevant part:

*Paragraph 2. To remain in the service, employees must refrain from conduct which adversely affects the performance of their **duties**, **other** employees, or the public. • **

"Paragraph 3. Any act of insubordination, hostility or willful disregard of the **Company's** interest will not be condoned.=

The appeals from Claimant's dismissal were denied and the claim **was** brought before the Board.

The Organization argues initially that Claimant was denied a fair and impartial hearing because his prior disciplinary **record** was made a part of **the** investigatory hearing. It is correct that an employee's record of prior discipline cannot form the basis of proof that the employee committed the offense at issue in the hearing. There was, however, no attempt in the case here to use Claimant's prior record for such a purpose. There is no general prohibition on use of an employee's employment record to assess the penalty which might be appropriate for a particular offense. A review of the **record** reveals no violation of Claimant's right to a fair hearing based on the inclusion of his disciplinary history in the record. The Organization's argument in this regard must be rejected.

The Organization concedes that Claimant used abusive language toward his supervisor, but asserts that such language was commonly used on the job and that Claimant was, in any event, provoked by A.D.E. **Palish's** initial use of profanity toward him. The Board cannot accept the Organization's arguments. The fact that profanity might commonly be used in casual conversation in the work environment does not create any right for an employee to use such language in a personal and disrespectful manner against his supervisor.

It is true that an employee's insubordinate conduct may be mitigated in some extreme cases when it is triggered by a supervisor's provocation or improper order. There is, however, no indication in the record here that Claimant's supervisor engaged in such extreme conduct. Indeed, there is considerable evidence in the record that Claimant, not his supervisor, initiated the use of profane and disrespectful language. It further appears that the confrontation grew out of a legitimate question raised by A.D.E. Palish as to why Claimant **was** in the office, changing into street clothes, an hour before the end of his shift, rather than supervising his men. **Claimant's supervisor** had legitimate reason, under the circumstances, to have challenged Claimant.

Even if Claimant's supervisor first used profanity against Claimant, the record is clear that Claimant escalated the argument and that he asserted and acted on the premise that, since he had been taken off the clock, he had no obligation to be respectful to his supervisor. Claimant was clearly in error. An employee's duty of obedience to legitimate orders does not terminate merely because an employee is no longer on duty, at least while the employee is still on the Carrier's property; and his duty of respect and courtesy exists at all times.

Claimant was himself a supervisor. As such, he was a representative of **the Carrier** and served as an example to the **employees** he supervised. It was, therefore, incumbent on Claimant to conduct himself in an exemplary manner and to understand and act in a manner fully consistent with the Carrier's Rules. It was quite proper for the Carrier to hold Claimant to a standard of performance and conduct even higher than that to which rank-and-file craftsmen might be expected to adhere. See, e.g., Third **Division Award** 24319 upholding dismissal of a foreman for a first absentee offense, based, in part, on the Claimant's position as a foreman:

- . . .the Board notes that under ordinary circumstances discharge **would** be excessive for the first offense of absenteeism. **However**, the circumstances in this case are unique. The Claimant is a foreman who is presumed to be more exemplary in his conduct:

It is clear from the record that claimant failed to meet the standards of **performance** and conduct to which he could properly be held that the Carrier's action in removing Claimant from his position as **B&B** Foreman was justified.

It is, however, also clear from Board precedent that dismissal of an employe is appropriate when the offense, **taking into account the employe's** prior record, indicates that it is unlikely that the employe is salvageable. See, e.g., Third Division Awards 5372, 14113, and 19037. While the Board **agrees** that Claimant's conduct warranted **removal** from his **supervisory position**, **it** cannot conclude from this single incident, although serious, that Claimant cannot be a satisfactory employe.

The Board's conclusion should not be taken to minimize the **seriousness** of Claimant's offense or to imply that rank-and-file employes are to be held to a low standard of compliance with the Carrier's Rules. Rather, the Board believes that Claimant's temper got the better of him on the occasion in question and concludes that Claimant should receive another chance to demonstrate that he can be a satisfactory employe. Claimant should understand that further Rule D violations would probably support dismissal.

Accordingly, the Board sustains the Carrier's action removing Claimant from his position as **B&B** Foreman, but directs that Claimant be restored to **service** in the mechanic **craft**, with seniority and all other rights in that **craft** **unimpaired**, but without back pay.

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

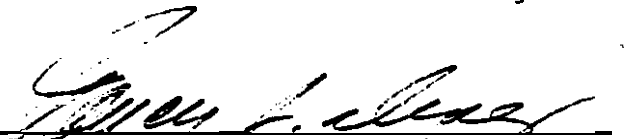
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. D&r - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.