

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25590

Docket Number MS-25736

Paul C. Carter, Referee

(Thorns J. Malone, Jr.

PARTIES TO DISPUTE: {

(Illinois Central Gulf Railroad

STATEMENT OF CLAIM:

\*Petitioner seeks an award setting aside his suspension and termination, and reinstating him to the suspended days and to his job; and presents the following **questions**, which if resolved in his favor would justify **the** award sought:

(1) Whether there is just and sufficient cause to sustain Thomas J. **Malone's** suspension of January 19, 1983 (Claim 6405, declined **on** May 13, 1983; and

(2) Whether there is just and sufficient cause to sustain **Thomas J. Malone's** discharge of February 1, 1983 (Claim 6406, declined May 2, 1983) and

(3) Whether race discrimination was a factor in Thomas J. **Malone's** suspension of January 19, 1983 and discharge of February 1, 1983; and

(4) Whether **Thomas J. Malone** was granted a fair and impartial investigation in his suspension case upon the grounds that his union representative was not allowed to make timely objections; and

(5) Whether during the suspension grievance, Thomas J. **Malone was** denied his contractual right to have a union representative present during a discussion with his supervisor, which was a direct result of **the** insubordination charges; and

(6) Whether Thomas J. Malone was denied contractual rights, a **fair** investigation and due process of law by **being** denied by the company the presence of a union representative in a conference from which discipline was likely to result; and

(7) Whether the suspension was too severe a punishment under all of the circumstances; and

(8) Whether the **suspension** imposed was contrary to the authority of Award 22152; and

(9) Whether the termination of Thomas J. Malone was too severe a penalty; and

(10) Whether the termination of **Thomas J. Malone** of February 1, 1983 is supported and justified by the **adequate** quantum of proof **required** in these kinds of cases."

OPINION OF BOARD: The record indicates that Claimant (Petitioner herein) was formerly employed **by** the Carrier as an IBM Clerk. The Carrier states that on January 12, 1983, Claimant was discussing with the Manager Terminal **Procedures**, M. E. Hedrick, errors **allegedly** made by Claimant on January 11, 1983, while working Position No. 339; that during the discussion Claimant **became** agitated, decided he wanted to call his Union Representative, jumped out of the chair and left the office, ignoring the Officer's repeated requests to sit down and finish the discussion, returned to his desk and apparently began rummaging through a telephone book. The **Manager** Terminal Procedures again asked the Claimant to **return** to his office, and after giving him ample time for a response, which he did not make, Claimant was relieved of his **&ties**. On January 13, 1983, Claimant was instructed to attend formal investigation on January 19, 1983, on the charge:

"Please arrange to attend a formal investigation to be held in Room 711, Central Station, 545 South Main Street, Memphis, Tennessee, at 10:00 AM Wednesday, January 19, 1983, for the purpose of determining the facts and your responsibility, if any, of whether you refused to **comply** with instructions given to **you** by Manager Terminal Procedures M. E. Hedrick, at approximately 5:00 PM, Wednesday, January 12, 1983, when he instructed you to return to his office to finish reviewing errors made on Position No. 339, Tuesday, January 11, 1983."

\* \* \*

"Your personal work record will be **reviewed** at this investigation. "

The investigation was conducted by Carrier's Terminal **Superintendent** as scheduled. Claimant was present throughout the investigation and was represented by the Local Chairman of the Brotherhood of Railway, Airline and Steamship Clerks (**BRAC**). A copy of the transcript of the investigation has been made a part of the record. Following the investigation, Claimant, on January 24, 1983, was assessed discipline of thirty days suspension.

Upon review, we find that the investigation of January 19, 1983, was conducted in a fair and impartial manner. There was objection by Claimant's **Union** Representative that Claimant was entitled to have a Union **Representative** present in his discussion with the **Manager** Terminal Procedures. We have been referred to no rule providing that **employees** are entitled to Union representation in all discussions with Supervisors about **work** performance, and we cannot agree that such was the intent of the applicable Collective Bargaining Agreement. See Third Division Awards **Nos.** 22152 and 22890. Further, the record shows that the discussion with the Manager Terminal Procedures was at the instigation of the Claimant **who**, after being given the list of **errors**, appeared at the office of the Manager Terminal Procedures and asked to discuss the errors. The other objections raised by Claimant's representative **were without** merit.

The investigation contains substantial evidence by the *Manages* Terminal Procedures, **corroborated** by testimony of the Relief Chief Clerk, that Claimant did not return to the office of *Manager* Terminal Procedures, as instructed, which instructions **were** given in a courteous and businesslike manner. There were conflicts **between** the **testimony** of Claimant and others in the investigation; **however**, it is well settled that this Board does not weigh evidence, attempt to resolve **conflicts** therein, **or** pass upon the credibility of witnesses. Such functions **are** reserved to the Carrier. Further, conflicts in testimony do not warrant reversing a Carrier's action.

Carrier's Division Manager's Bulletin No. 30, issued on January 1, 1983, which was read into the investigation, provides in part:

- '1. Employees are expected to work safely, obey all rules, and **be** faithful, alert and courteous in the discharge of duty.
- "2. Civil, **gentlemenly** deportment is required of all employees in their dealings with the public, their subordinates **and** each other. Boisterous, profane or vulgar language is forbidden. Courtesy and attention to **patrons** is demanded. Employees must not enter into altercation with any **person**, no matter what **provocation** may be given, but will make note of of the facts **and** report to their immediate supervisors.
- "3. Dishonesty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral character or serious violations of the law, are prohibited.

• • \*"

Claimant was guilty of insubordination by his **refusal** to comply with the instructions of the *Manager* Terminal Procedures on January 12, 1983. **Employees** must comply with instructions of superiors, unless a proven safety hazard is involved, and handle through the grievance **procedure** if they consider that their rights have been violated. The rule is stated concisely "Comply and then complain."

There is no proper basis for disturbing the thirty-day suspension issued to Claimant.

On January 21, 1983, another notice was sent to Claimant:

"Please arrange to attend a formal investigation to be held in Room 711, Central Station, 545 South Main Street. Memphis, Tennessee, at 10:00 AM, Wednesday, January 26, 1983, for the purpose of determining the facts and your responsibility, if any, and **whether** or not on Wednesday, January 19, 1983, you **removed** Company property in the form of **your** personal file from Company premises and whether or not, **when** file was returned to **Company** premises by you, on Thursday, January 20, 1983, information contained in **that** file was missing from that file.

• • •

"Your personal work record will be reviewed at this investigation."

Investigation of the January 21, 1983 charge was conducted, as scheduled, on January 26, 1983, and a copy of the transcript has been made a part of the record. Following the investigation, Claimant was dismissed from Carrier's service by letter dated February 1, 1983.

In the investigation of January 26, 1983, there was substantial evidence that near the close of the investigation conducted on January 19, 1983, Claimant's personal record file was reviewed by Claimant's **representative** and Claimant. The representative stated:

"...for the records, I believe that the file was given to me as his representative and that I; thereafter, handed the file to Mr. Malone, it was reviewed by **us**."

A stenographer testified that he did bring Claimant's personal file to the investigation on January 19, 1983; that he was the last person to leave the room at the close of the investigation on January 19; that he made a search for Claimant's personal file but was unable to find it; that he made further inquiries concerning the whereabouts of the file, including the Conducting Officer of the January 19, 1983, investigation, but without success. **He** also testified that the contents of an **employee's** personal work record were matters between the Carrier and **the** Employee, which information was confidential. He stated that the file was returned to him by Clerk A. M. Young on January 21, 1983, but numerous items were missing fmm the file that he received on January 21, 1983.

Clerk A. M. Young testified that she was aware of the search being made for the file, and that Claimant gave the file to her when he was in the office on another matter on January 20, 1983.

In the January 26 investigation Claimant denied having reviewed his personal work file at the **January** 19, 1983, investigation; denied having the file in his possession after the conclusion of the **previous** investigation; denied having removed any documents from **the** file, and denied having returned the file to Clerk Young on January 20, 1983.

We point out that railroad disciplinary proceedings are not court proceedings; that strict rules of evidence do not apply, nor is the burden of proof the same. There is no requirement that the Carrier **prove** the charge beyond "**a shadow of doubt.**" Many Awards of all Divisions of the **National** Railroad Adjustment Board have upheld the dismissal of **employees** when there was produced substantial evidence in support of the Carrier's action. In Second Division Award No. 6419 it was held:

"The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

'Substantial evidence is more than a mere scintilla. It means such relevant **evidence** as a reasonable mind might accept as adequate to support a conclusion.' (**Consol. Ed. Co. vs. Labor Board** 305 U.S. 197, 229)."

See also recent Third Division Awards **Nos.** 25414 and 24989

From our review of the transcript of the investigation of January 26, 1983, we conclude that there was substantial evidence to support the action of the Carrier in dismissing Claimant from the service. We recognize there were conflicts between the testimony of Claimant and others; however, we have previously commented **on** that subject.

The claim arising from the dismissal of Claimant will also be denied.

Any **question** concerning alleged racial discrimination does not address itself to this Board.

We point out that this dispute was scheduled for hearing before the Board, with the Referee present, the hearing to begin at 1:00 P.M., June 21, 1984. The Claimant was represented at the hearing by Attorney A. B. Chambers. The Carrier was also represented.

**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;

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

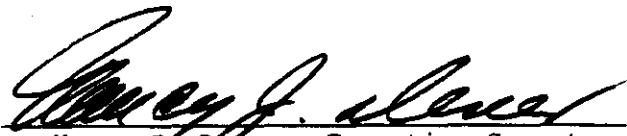
That the Agreement was not violated.

A W A R D

The issues raised are disposed of in **accordance** with the Opinion and the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22<sup>nd</sup> day of August 1985.

