

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26053
Docket Number MW-26174

Peter R. Meyers, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Consolidated Rail Corporation

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

(1) The dismissal of Trackman J. A. Shimley, Jr., for alleged 'misuse of Company facilities, in that you incurred expense to Consolidated Rail Corp. through third party billing to Conrail telephone when not authorized nor conducting railroad business' on December 4, 5, 6, 9, 12, 15, 16, 20, 21, 26, 1982 and January 5, 1983, was excessive, unreasonable and unwarranted (System Docket CR-366-D).

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

OPINION OF BOARD: Claimant J.A. Shimley, Jr., was employed as a Trackman by the Carrier, Consolidated Rail Corporation. Claimant has seniority dating from May 1, 1974. On July 27, 1983, Claimant was notified to attend a hearing in connection with the following charge:

"Your alleged misuse of Company facilities, in that you incurred expense to Consolidated Rail Corp. through third party billing to Conrail telephone when not authorized nor conducting railroad business. These incidents occurred on the following dates: December 4, 5, 6, 9, 12, 15, 16, 20, 21, 26, 1982 and January 5, 1983".

After two postponements, the hearing was held on September 12, 1983. On September 16, 1983, Claimant was dismissed. The Organization thereafter filed a Claim on Claimant's behalf, challenging his dismissal.

The Organization contends that the record establishes that Claimant fully cooperated with Carrier in resolving and reconciling all alleged discrepancies due to the erroneous billing of phone calls to Carrier's telephone. The Organization asserts that Claimant placed telephone calls to correct problems with his sickness benefits; Claimant billed these calls to Carrier based on his understanding that the calls were railroad-related business. The Organization points out that Claimant was willing to and did make full restitution to Carrier for the erroneously billed calls.

The Organization further asserts that prior to notice of the charges, Claimant was not aware that other individuals had used his home phone to bill telephone calls to the Carrier. Moreover, Claimant did not give Carrier's phone number to his wife for the purpose of having her bill phone calls to Carrier, but gave it to her so that she could reach him at work. Claimant's wife billed calls to Carrier without Claimant's knowledge.

The Organization asserts that a review and analysis of the record will establish that the testimony introduced at the investigation does not justify the discipline assessed against the Claimant. The Organization maintains that this Board consistently has held that if discipline is excessive, capricious, improper, and unwarranted, then the discipline cannot stand. The Organization therefore contends that the Claim should be sustained; Claimant should be reinstated with seniority and all other rights unimpaired; the charges should be removed from his record; and he should be compensated for all lost wages.

The Carrier initially contends that the Claim is procedurally defective and should be dismissed because this Board lacks jurisdiction. The Carrier argues that Claimant admitted his guilt at the hearing; this Claim, therefore, is a request for leniency. The Carrier asserts that it is axiomatic that where a request for leniency is made, the Board may not disturb the finding of guilt or the measure of any sanctions; the remission of an appropriate sanction on the basis of leniency is solely a matter of managerial discretion. Carrier chose not to grant Claimant's request for leniency; this Board therefore cannot properly consider the merits of the Claim.

The Carrier further argues, without waiving the procedural objection, that the Claim is without merit. The Carrier points out that Claimant admitted his guilt and was disciplined accordingly. Moreover, the testimony of the investigators establishes that Claimant was guilty as charged. The Carrier further contends that the testimony of Claimant's wife is irrelevant: she has a personal stake in her husband's employment and Claimant is guilty of the charges. Carrier therefore asserts that it met its burden of proof; the sole remaining issue is whether the assessed discipline is justified.

The Carrier argues that Claimant's offense is not minor, but constitutes the major offense of theft. The Carrier asserts that discharge of an employee who steals from an employer is a proper and inevitable response. The Carrier points out that dismissals in such cases consistently have been upheld, even where the employee's prior record is clear. The Carrier therefore contends that the assessed discipline was fully justified.

The Carrier also contends that if this Board should sustain the Claim, then Claimant's recovery would be limited by Rule 27, Section 4 of the Agreement, which provides:

"If a disciplined employee is exonerated on appeal, the discipline shall be stricken from his record. If an employee has lost time due to such discipline, he shall

be paid the difference between the amount he would have earned had he not been disciplined and the amount he earned or received during the discipline period".

The Carrier ultimately contends, however, that the Claim is without merit and should be denied in its entirety.

This Board has reviewed the evidence and testimony in this case, and it finds that the Carrier has offered sufficient evidence to prove the Claimant guilty of the charges that he misused the Carrier's facilities by billing telephone calls to the Carrier's telephone when he was not authorized to do so and when he was not conducting railroad business. Most of the evidence is undisputed, and the Claimant even admitted to the wrongdoing and has reimbursed the Carrier for those telephone calls.

Once this Board finds that there was sufficient evidence in the record to find the Claimant guilty of the wrongdoing, this Board next turns its attention to the discipline imposed by the Carrier. Generally, this Board will not set aside a Carrier's imposition of a particular type of discipline unless the Carrier's action is unreasonable, arbitrary, or capricious. In this case, at the time of the incident in question, the Claimant had accumulated over eight and one-half years of seniority and had only been disciplined one time in 1981 for excessive absenteeism. In the case at hand, the Claimant admitted his wrongdoing, offered some explanation for it, and repaid the monies to the Carrier. This was not the type of case where the ultimate discipline--termination--was appropriate or even reasonable. This Board finds that the Carrier's action in discharging the Claimant for the wrongdoing for which he was found guilty was unreasonable and arbitrary, and the Claimant's discharge is hereby set aside and reduced to a lengthy suspension. Termination is just not appropriate based upon the facts before this Board. Therefore, Claimant is reinstated to service with seniority rights unimpaired, but without pay for time lost.

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 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. Dever - Executive Secretary

Dated at Chicago, Illinois this 11th day of June 1986.