

Award No. 11911
Docket No. TE-13754

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago Great Western Railway, that:

1. Carrier violated the Agreement between the parties and the law governing relationship of employer and representatives of the employes, when it dismissed District Chairman R. W. Shockweiler from the service of the company, on charges that he violated company rules while acting in the capacity of a legally designated representative of the employes.

2. Carrier shall restore R. W. Shockweiler to his former position of Agent-Telegrapher at Fredericksburg, Iowa, with all rights unimpaired and with pay for all wages lost.

OPINION OF BOARD: The material facts are not in dispute. Claimant was employed by Carrier as an Agent at Fredericksburg, Iowa. He was also the District Chairman of the Organization representing Railroad Telegraphers on the property.

When Claimant learned that Carrier had petitioned the Minnesota Railroad and Warehouse Commission for authority to discontinue agency service at Hampton, Minnesota (which was within his jurisdiction), he, as District Chairman, wrote a letter to Agent Latimer at Hampton: (a) requesting information on gross revenue, payroll, cash, cars and express handled, major shippers and shipments, revenue, fluctuations, etc.; (b) cautioning Mr. Latimer not to divulge to anyone that he had furnished the information to Claimant.

After receiving the requested information, Claimant discussed it with the General Chairman of the Organization, apparently to decide whether or not to enter a formal protest against the proposed closing.

On January 25, 1962, Claimant and Agent Latimer were notified by Carrier to appear at a formal investigation to answer charges of misappropriation of Company information and statistics, to be held on February 3, 1962. Mr.

Latimer resigned from service February 2, 1962; hence was not subject to Carrier discipline.

On February 9, 1962, Claimant was notified of his dismissal from service as a result of the foregoing investigation. He was reinstated with seniority unimpaired on April 23, 1962. Thus final discipline imposed was 2½ months suspension without pay.

Pertinent excerpts from Carrier's Circular No. 11 and the operating rules which Claimant was found to have violated read as follows:

"Rules and Regulations of the Operating Department require that 'employees must be conversant with and obey the rules and special instructions' also, that 'to enter or remain in the service is an assurance of willingness to obey the rules.'

"All concerned are admonished to rigidly adhere to said rules and regulation, and are hereby cautioned that any future violation of Rules 704 and 750 (1) will be cause for summary dismissal from the service.

* * *

"Employees must not give information respecting the affairs of the railroad except to authorized officers or to persons authorized by law to receive it. . . .

* * *

"The Company's business affairs will not be divulged except to the proper officers of the Company."

The distinguishing feature of this case is that Claimant was at all times acting in a dual capacity. He was figuratively in the dilemma of a man with two heads—neither of which can be severed without mortal consequences to the other. Under the constitution of his Organization Claimant had to be an employee in order to serve as its employee representative, and the employee-employer relationship, perforce, had to be co-existent with his service as District Chairman. If the employee status was removed, Claimant's authority to act as District Chairman was terminated.

Occupying this dual status as he did, Claimant as an employee was chargeable with knowledge of the Carrier's operating rules and subject to their application. It follows that Claimant was also chargeable with the knowledge that he was inducing a fellow employee to commit an act which both knew or ought to have known was a clear violation of those rules. They acted in concert in the commission of the violation and thereby knowingly subjected themselves to a charge of rules violation which, if established, could only result in an assessment of discipline against both.

Claimant in his dual status could not avoid the consequences of his knowledge of the rules as an employee and his inducement of a breach thereof merely by invoking his alter ego as an employee representative. As the Fifth Circuit Court of Appeals said in *BRT v. Central of Georgia* (305 F. 2d 605):

"On the one hand, status as bargaining representative does not insulate Byington as an employee from lawful disciplinary action. Cf. *NLRB v. Birmingham Publishing Co.*, 1958, 5 Cir., 262 F.2d 2, 9. On the other hand, the Railroad may not use the disciplinary proceed-

ings as a guise for thwarting, or frustrating, or undermining the effectiveness of the Brotherhood, or Byington as its agent, in their statutory responsibilities as bargaining representatives."

Assuming, *arguendo*, Claimant could escape Carrier discipline by merely invoking his status as employe representative, would he then be free knowingly to induce other employes to engage in conduct prohibited by company rules? We think not.

The Act's proscriptions against Carrier interference with, or coercion and intimidation of, duly authorized bargaining representatives may not be expanded to provide immunity to such representatives where, as here, it is established that an employe representative knowingly induces a fellow employe to commit an act violative of company rules. Such conduct does not fall within the orbit of those protected statutory responsibilities of bargaining representatives under the Railway Labor Act.

In view of the foregoing, it is unnecessary to discuss the other contentions of the parties. It suffices to say that on the facts of record in this particular case, the final discipline assessed will not be modified or set aside.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of November 1963.

DISSENT TO AWARD 11911, DOCKET TE-13754

Conceding that neither the claimant nor his representatives exercised the clairvoyance necessary to foresee and forestall the Carrier's improper action, this award, nevertheless, is fundamentally unsound.

First of all, the rules alleged to have been violated do not prohibit the action taken by claimant. The award ignores this basic fact and proceeds on

the assumption that by inference they prohibit a conspiracy, although that term is studiously avoided.

But there was no conspiracy. The District Chairman, with perhaps a mistaken notion of his and the other employe's vulnerability to attack by the Carrier, merely sought information about the job it was his duty to protect if it were being improperly endangered. The information was used for no other purpose; it was never intended to be used for any other purpose; and the District Chairman had every right to secure and so use such information.

Furthermore, neither the Carrier nor its patrons were injured or inconvenienced by the District Chairman's action. On the basis of the information secured it was decided not to oppose the Carrier's request to abandon the station and discontinue the job.

Thus the Carrier punished an employe for an act taken by him solely within the scope of his position as employe representative, a role guaranteed by the Railway Labor Act to be outside the ambit of a Carrier's influence or coercion. The Carrier's act was contrary to law, and this award which approves the Carrier's action is, in my opinion, equally contrary to law and therefore a nullity so far as precedential value is concerned.

For the reasons stated I dissent.

LABOR MEMBER

J. W. Whitehouse