Award No. 15027
Docket No. CL-16051

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5961) that:

1. Dismissal of Clerk Giannino on August 30, 1965 was improper, unjustifable, unreasonable and unwarranted.

2. The Carrier acted unfairly when an Officer of the Carrier acted in a tripartite capacity of Judge, Prosecuting Attorney and Complaining Witness when he conducted the Trial.

3. Clerk Giannino shall be returned to work with seniority rights unimpaired and he shall be paid for all time lost including all fringe benefits beginning July 19, 1965 and each day thereafter until such time as the violations are corrected and claimant is restored to work.

OPINION OF BOARD: Claimant entered the service of the Carrier on October 8, 1942 and has worked various clerical positions in the New York area. He held regular position of Freight Clerk at the time of his arrest, January 20, 1965 by the New York City Police, for participating in the making of pornographic films. Subsequently, the original charge of indecency, a misdemeanor, was reduced to the offense of disorderly conduct, to which Claimant entered a plea of guilty on April 29, 1965, and on June 11, 1965, was sentenced to sixty days in the work house.

By registered mail, Carrier sent Claimant a "10-day letter" dated June 14, 1965 to which Claimant allegedly did not respond. The letter was received and signed for by his mother. Claimant was held out of service for failure to return to duty on June 29, 1965 or furnish a satisfactory reason for remaining absent. On July 29, 1965 Claimant requested a hearing or trial under the Discipline rule. August 3, 1965, after inquiring as to the reason he was being held out of service, Carrier advised Claimant that the reason was stated in the June 14 letter. Claimant the nreiterated his request for a trial based upon the charges contained in Carrier's letter of June 14.

Notice of trial was sent to Claimant on August 6, 1965, advising trial to be held in connection with the following charge or charges:

> "Failure to Respond to 10 Day Letter
> Dated June 14, 1965, and
> Conduct unbecoming an employe."

Claimant's trial originally scheduled for August 17 was, at his request held on August 24, 1965. Claimant was advised he was dismissed from service.

The Employes contend that Carrier acted in a capricious and unjust manner and violated Rules 6—Discipline and 7—Appeals, when it subjected Claimant to discipline arbitrary and unfairly, and did not follo wa procedure for handling matters of what constitutes a fair and impartial trial. Primarily the Employes questio nthe additional charge of "conduct unbecoming an employe." Alleging that said charge was not timely made, being some eight months after the original incident and some fourth months after Claimant pled guilty to a lesser charge in a civil court.

Carrier asserts that the Organization has failed to sustain its burden of proving that Carrier's action was arbitrary, capricious, or unjust, nor did Carrier abuse its discretion in assessing discipline, based upon a fair and impartial trial accorded Claimant on August 24, 1965.

The question raised by the Organization that Carrier waited an unreasonable length of time to charge Claimant with misconduct is well taken, however we must look to the language of the Agreement to determine if an employe must be charged within a specific time limit—once he is charged by civil authorities for a criminal offense, or in violation of an operating rule. Rule No. 6 has no such time limit restriction. Rule 6-A-1(b) relates ot major offenses; that once having committed an offense, an employe suspected by the Management to be guilty thereof, "may", after the occurrence of the offense, be held out of service pending trial and decision. From this we find that Carrier has the election or discretion and "may" or may not withold an employe from service or specifically charge him with an offense after the occurrence. It is not disputed that Claimant worked in the interim when first charged by police authorities until sentenced on June 11, 1965. Carrier elected, after final disposition of the civil charges, to initiate specific charges with a "10-day letter" and "conduct unbecoming an employe." It could be argued conversely, that if Claimant had been charged by Carrier prior to final disposition of the criminal charges, that Claimant would be pre-judged, as to guilt or innocence which determination was within the confines of a court of law and not that of the Carrier. Therefore, the question of "when" a charge should be filed or what constitutes a "reasonable time" that Carrier should act, must be left to the parties to determine through collective bargaining. The Board cannot rewrite the Agreement as to time limits.

We do find that once Claimant was accused under Rule 6-C-1(a) and is directed to report for trial, he must be given reasonable advance notice in writing of the exact charge for which he is to be tried and the time and place of trial. No restriction is present in the rule as to the number of charges that Carrier may file against an employe, therefore, we find no violation of the Agreement, as alleged by the Organization, when Claimant was also charged with "Conduct unbecoming an employe". It is suffice to state that Carrier, regardless of the number of charges, must make a prima facie case to support the allegations.

As stated many times, the Board may not weigh the evidence, appraise the credibility of witnesses nor substitute its judgment for that of the Carrier, but we do have the responsibility to determine if substantial or competent evidence, if believed, supports the charges. As to the charge of "Failure to respond to the 10-day letter", we find that Carrier did not sustain its burden of proof. Claimant was held out of service and asked for a trial on the basis of Carrier's June 14, 1965 letter which charged in part:

"You are requested to return to duty not later than June 29, 1965 **or furnish a satisfactory reason for remaining absent . . . "** (Emphasis ours.)

From the record it is obvious that Carrier knew of Claimant's reason for remaining absent, and that Carrier in effect, when Claimant's brother met with Carrier's officials, within the 10-day period, was furnished a satisfactory reason for remaining absent. Carrier did not advance any argument on the property of being absent without leave, therefore, Carrier did not present substantial evidence to support this charge.

We do find substantial probative evidence to sustain the charge of "Conduct unbecoming an employe." Claimant appeared at the trial with his representative and witness and made no objection to said charge. The transcript of the trial is clear. Claimant was advised of his rights and acknowledged with what he was charged and for what he was being tried. He proceeded to defend himself on said charge. He was not misled in any way but he and his representative elected to proceed, thereby he waived any technical or procedural defects. Failure to raise or objct to said defects constitutes a waiver.

At the conclusion of the trial, Claimant agreed that he had been afforded a fair and impartial trial and allowed to answer all questions in words of his own choosing. Claimant cannot now be heard to complain that Carrier's officer vitiated the fairness or impartiality of his trial.

The Record shows that Claimant has been in the service of the Carrier for over twenty-three years, but this in itself is not sufficient to ignore the gravity of the offense. We find that an offense o this nature involving moral turpitude is much more than bringing discredit upon the Carrier, or being harmful or detrimental to it. Such deplorable conduct goes to the very integrity of the individual. The harm has been done. The printed word was circulated widely on several occasions and remains lasting and permanent in the eyes and minds of patrons. "The Board cannot permit its emotional desires to substitute for the judgement of the Carrier." Quoted from Award 10930. We cannot say that the Carrier, under such circumstances, was unreasonable and arbitrary in dismissing Claimant from its service.

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 8th day of December, 1966.

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