

Award No. 16268
Docket No. TE-16785

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Tennessee Central Railway that:

1. Carrier acted improperly and without just cause when by letter dated March 4, 1966, it summarily dismissed Mrs. Mila J. Pride, Operator-Clerk, Shops, Tennessee, from the service of the Railway Company.

2. Carrier shall, because of the violation set out above, compensate Mrs. Mila J. Pride eight (8) hours' pay for each day, Monday through Friday, at the rate of the Operator-Clerk position Shops (Nashville), Tennessee (\$2.7828 per hour), commencing March 7, 1966, together with any overtime accruing to her position which she would have earned had she remained on her position, until she is restored thereto.

3. Carrier shall reinstate Mrs. Mila J. Pride to her position without loss of pay and without impairment of seniority or to any other position to which her seniority would entitle her under the rules of the Telegraphers' Agreement, with proper adjustment of salary.

OPINION OF BOARD: Claimant was an operator-clerk, and had a regularly assigned position at Shops, Nashville, Tennessee. Her assigned hours were from 6:00 A. M. to 3:00 P. M., Monday through Friday.

Under the date of March 4, 1966, there was personally delivered to the Claimant the following communication:

"Nashville, Tennessee
March 4, 1966

Mrs. Mila J. Pride
Operator-Clerk
Shops

Dear Mrs. Pride:

You will recall my letter of December 3, 1965 to you expressed the hope that you would be more diligent in performing your duties

and observe the rules in the future and advised that future unsatisfactory service might result in dismissal.

It has been brought to my attention that you have failed to properly perform your duties as Operator-Clerk at Shops by delivering an incomplete order (No. 624) to C&E No. 84 and C&E Extra 400 East on Friday, February 18, 1966, and failing to deliver Orders No. 2 and 3 to C&E Extra 257 East on Monday, February 28, 1966. I have also had complaints concerning your failure to comply with Operating Rule 872. You are hereby notified that you are dismissed from the service of the Railway Company effective at the end of your tour of duty this date (March 4, 1966).

You are entitled to a fair and impartial hearing in accordance with Rule 18(a) of the Agreement, provided written request is presented within five (5) days of the date of this letter.

Yours very truly,

/s/ F. Brooks Bearden
Gen. Superintendent"

The Claimant, under date of March 8, 1966, addressed a communication to the General Superintendent wherein she requested "a fair and impartial hearing in line with Rule 18 of the Transportation-Communication Employees Union. . . ." She also requested that she be advised of the date, time and place of the hearing in order that she might advise her witnesses and further that she desired General Chairman K. B. Lane and Assistant to General Chairman W. H. Wiggerman to be present and represent her at the hearing.

By letter dated March 9, 1966, Claimant was advised that the hearing would take place in the office of Mr. Pewitt, on Monday, March 14, 1966, at 2:00 P. M.

The hearing took place as scheduled with the Claimant and her representative, Mr. Wiggerman, being present.

Under date of March 21, 1966, the following communication was addressed to the Claimant by F. Brooks Bearden, the General Superintendent:

"Nashville, Tennessee
March 21, 1966

Mrs. Mila J. Pride
1908 Lebanon Road
Nashville, Tennessee

Dear Mrs. Pride:

I have carefully considered the evidence taken at the hearing held at your request in my office March 14, 1966.

The evidence confirmed that you delivered an incomplete order (No. 624) to C&E No. 84 and C&E Extra 400 East on Friday, February 18, 1966 and failed to deliver Orders No. 2 and 3 to C&E Extra 257 East on Monday, February 28, 1966. I do not con-

sider that it was proven beyond a reasonable doubt that you were guilty of violation of Operating Rule No. 872.

Due to the gravity of the offense, your dismissal for delivering an incomplete order (624) and failing to deliver Orders No. 2 and 3 as outlined above is confirmed.

Sincerely yours,

/s/ F. Brooks Bearden
Gen. Superintendent

cc: Mr. W. H. Wiggerman

Herewith four (4) copies of transcript as requested."

Appeal was taken to Mr. R. E. Carrier, Director of Personnel, the Carrier's highest designated officer, of the Carrier, who, after several conferences did, under date of October 11, 1966, confirm the findings of the Hearing Officer.

A copy of the transcript of the testimony of the evidence adduced at the hearing is made a part of the record.

The controlling rule of the Agreement between the parties, entitled "Discipline" Rule 18, is as follows:

"RULE NO. 18.

(a) An employe disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided written request is presented to his immediate superior within five (5) days of the date of the advice of the discipline, and the hearing shall be granted within five (5) days thereafter.

(b) A decision will be rendered within seven (7) days after the completion of the hearing. If an appeal is taken, it must be filed with the next higher official and a copy furnished the official whose decision is appealed within five (5) days after date of decision. The hearing and the decision on the appeal shall be governed by the time limits of the preceding section.

(c) At the hearing, or on the appeal, the employe may be assisted by a committee of employes, or by one or more duly accredited representatives.

(d) The right of appeal of employes or their representatives in regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the Company to whom appeals may be made is hereby established.

(e) An employe, on request, will be given a letter stating the cause of the discipline. A transcript of the evidence taken at the investigation or on the appeal will be furnished on request to the employe or his representative.

(f) If the final decision decrees that charges against the employee were not sustained, the record shall be cleared of the charges. If suspended or dismissed, the employee will be returned to former position and paid for all wages lost, less amount earned in any other service."

Claimant raises several issues to the effect that the dismissal of Claimant Pride was improper.

One of the issues raised was that it was improper for Superintendent Bearden to preside at the hearing, in view of the fact that he issued the order dismissing the Claimant from the Carrier's service in the first instance.

An examination of the record discloses that the provisions of Rule 18 (a) were substantially complied with, both by the Claimant and the Carrier. The mere fact that Superintendent Bearden issued the letter of March 4, 1966 and also acted as the hearing officer, in and of itself does not impute bias and prejudice on his part. There must be evidence that his conduct or actions were so prejudicial as to deprive Claimant of a fair and impartial trial or hearing. We find no such evidence in the record. He was not a witness; he did not testify against the Claimant, nor was his examination of the Claimant designed to entrap or confuse her in making any admissions against her interests.

Another issue raised by the Claimant is that she was denied due process in the manner in which the dispute was handled on the property. The record does not substantiate this contention. The record does disclose that during the handling of this claim, prior to and after its filing, that numerous letters were exchanged between the parties. At no time did the Claimant raise the question of the fact that she was denied "due process." It is raised for the first time in her Ex Parte Submission. This she cannot do.

The Claimant also contends that the evidence adduced at the hearing was insufficient to sustain the finding of the Hearing Officer.

We have carefully examined and reviewed all of the evidence of record, including the transcript of the investigation, and we find that there is substantial and relevant evidence, including the Claimant's own admissions, to establish her guilt as charged. During the course of the taking of testimony at the investigation, the Claimant testified as follows:

"Q. Mrs. Pride, I have here a copy of Train Order No. 624. I would like to ask if that isn't your handwriting?

A. Yes, sir, it is.

Q. That is an incomplete order, is it not?

A. Yes, and it has no Superintendent signature and dated 11-24-65 and previously copies by Operator Matheney at 4:16 P.M. and I go off duty at 3:00 P.M.

Q. Mrs. Pride, I am not sure that I get the connection between my question and your answer. You admit that this is your handwriting?

A. Yes, sir.

- Q. And this order along with five other orders and the clearance card was issued to Extra 400 East at Shops at 9:24 A. M., February 18, 1966. Mrs. Pride, I am at a loss as to know why you don't feel that this is your responsibility.
- A. Yes, sir, that is my responsibility had I seen it. I certainly don't remember seeing that the signature had been left off or I would have corrected it, as I correct many of them.
- Q. Mrs. Pride, not only is the signature left off of this order, but the wording of the order itself is incomplete."

At this point in the interrogation of Mrs. Pride by Mr. Bearden there was shown to the Claimant and her representative the incomplete order referred to which reads as follows:

"C&E All Trains East at Shops. Reduce speed to fifteen (15) miles per hour between N & K Jct."

There was also exhibited the complete order which reads as follows:

"C&E All Trains East at Shops. Reduce speed to fifteen (15) miles per hour between N&K Jct. and Bridge 3501."

The Claimant was questioned by Mr. Wiggerman as follows:

- "Q. Mrs. Pride, do you want to say anything now in line with conditions and work that might have caused this hearing. In other words, do you think that the confusion and uproar might have had some bearing on you?
- A. As I told you, I am surprised to find that I made the mistake and didn't dream that I had made the mistake, so how it happened I am at a loss. * * *

The gravamen of the charge against the Claimant was that she failed to perform her duties as Operator-Clerk by delivering incomplete orders, it being her responsibility to see that complete orders were delivered. This was proven.

We find that there was sufficient evidence of probative value to support the finding of guilt; that none of the Claimant's procedural or substantive rights were violated.

This Board has held in numerous prior awards that our function in discipline cases is not to substitute our judgment for that of the Carrier or decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is some substantial evidence in the record to sustain a finding of guilty. Once that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier, and we are not warranted in disturbing the penalty imposed unless we can say that it clearly appears from the record that the action of the Carrier with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion. See Award 5032.

Dismissal from the service of a Carrier is an extreme, drastic and severe penalty. Whether or not such a penalty is justified depends upon many factors and the circumstances in each case. We have been quick to modify such discipline where the evidence clearly shows an abuse of discretion by the Carrier. In order for us to modify, overrule, reverse and/or set aside the penalty, it is incumbent upon the Claimant, to show by affirmative proof, that the Carrier in assessing the penalty was vindictive, arbitrary or malicious. In determining the guilt or innocence of an employe, the employe's past work record may not and must not be considered in determining as to whether or not the employe is guilty of the charges brought against him or her. There can be no question but that the past working record of the employe may and should be considered in assessing the penalty.

The record discloses that the Claimant has been in the service of the Carrier for a great number of years. Years of service alone does not give an employe a right or a license to violate rules or orders. If he does, he does so at his peril.

In Award 10930 (Dolnick) we said:

" * * * The mere fact that he had sixteen years of service is, in itself, not sufficient grounds to ignore his serious offense and to entitle him to reinstatement. * * * The Board cannot permit its emotional desires to substitute for the judgment of the Carrier." See also Award 11769.

We hold that the Carrier's action in imposing the penalty of dismissal was justified in view of the evidence presented, and in view of the Claimant's past working record, which was none too favorable.

We are constrained to deny the claim.

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 Employe 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 Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1968.

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