

Award No. 16281
Docket No. CL-16925

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
JACKSONVILLE TERMINAL COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6220) that:

1. Carrier violated the agreement when it dismissed Johnnie King, Jr. from its service effective July 5, 1966.

2. Johnnie King, Jr. shall now be restored to Carrier's service with seniority and all other rights unimpaired and shall be compensated for all wage losses sustained as a result of his wrongful dismissal.

OPINION OF BOARD: The Claimant was an Extra Board Loader, and was shown on the Group 3 seniority roster of the Baggage and Mail Department of the Carrier.

Under date of June 16, 1966, the following communication was addressed to the Claimant:

"June 16th, 1966-s

PR-

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. Johnny King, Jr.
2403 W. Edgewood Avenue
Jacksonville, Florida

Dear Sir:

You are hereby instructed to be in my office at 10 o'clock A.M., Tuesday, June 21st, 1966, for formal investigation wherein you are charged with insubordination, upon the allegations that you failed to comply with the instructions of General Foreman W. B. Howard when he, at approximately 8:50 P.M., June 13, 1966, instructed you over the telephone to report for work at 12 o'clock

Midnight that night and you told him to go to hell, and you did not report for work.

If the charge should be sustained, you will be subject to discipline.

You may present witness or witnesses in this investigation, and you may have representation in accordance with your Work Agreement.

Yours very truly,

/s/ G. G. Jones
Gen. Baggage and
Mail Agent"

The Claimant and his organizational representative requested that the hearing be postponed, the request granted, and the hearing held on the adjourned date, June 27, 1966.

Under date of July 5, 1966, the following communication was addressed to the Claimant:

"July 5th, 1966-s

PR -

Mr. Johnny King, Jr.
2403 Edgewood Avenue
Jacksonville, Florida

Dear Sir:

Referring to the formal investigation which was held for you in my office at 1:45 P.M. Monday, June 27th, 1966, wherein you were charged with insubordination.

The investigation sustains the charge that you failed to report to work as instructed by General Foreman W. B. Howard, and you have been dismissed from the service of the Jacksonville Terminal Company effective this date, July 5th, 1966. Your name has been removed from seniority roster.

Yours very truly,

/s/ G. G. Jones
Gen. Baggage and
Mail Agent"

The dismissal of the Claimant from the service of the Carrier was appealed, by the Organization, up to and including Carrier's President and General Manager, the highest officer designated for the handling of such matters, who upheld the findings of the Hearing Officer.

A transcript of the testimony adduced at the investigation is made a part of the record.

An examination of the record before us discloses that the Claimant contends:

1. That Rule 31 of the Agreement between the parties was violated; that the charges preferred against the Claimant were not sustained by the testimony adduced at the investigation.
2. That the Claimant did not receive a fair and impartial hearing; that his substantive procedural rights were violated.
3. That the investigation was due to a misunderstanding of the telephone conversation had between the Claimant's wife and the foreman with whom she spoke with in an effort to have Claimant "marked off."

The Carrier contends that Rule 31 was not violated; that there was sufficient evidence adduced at the investigation to sustain the findings of the Hearing Officer; that the Claimant received a fair and impartial hearing; that none of his rights were violated; that the investigation was not due to any misunderstanding of the telephone conversation had between the Claimant's wife and the Carrier's foreman.

Rule 31 of the Agreement reads as follows:

"Rule 31. EXONERATION. If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for all time lost."

In Award 13179 (Dorsey) we said:

"In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether: (1) Claimant was afforded a fair and impartial hearing; (2) the finding of guilty as charged is supported by substantial evidence; and (3) the discipline imposed is reasonable.

We do not weigh the evidence *de novo*. If there is material and relevant evidence, **WHICH IF BELIEVED BY THE TRIER OF THE FACTS**, supports the finding of guilt, we must affirm the finding." (Emphasis ours.)

It is our opinion that the record discloses sufficient competent and relevant evidence to support the charges against the Claimant and that the Carrier was justified in so holding.

We have searched the record and fail to find any facts to sustain the contention of the Claimant that he did not have a fair and impartial hearing or that any of his substantive procedural rights were violated. The only reference to this contention may be found in the following colloquy that took place at the conclusion of the investigation:

"GGJ: Johnny, has this investigation been conducted in a fair and impartial manner? By that I mean — the question hinges on the

word 'conducted.' Have I given you every opportunity to ask questions of any of the witnesses?

A. by Johnny King, Jr. — Yes, sir, you gave me opportunity to ask the witnesses questions.

Q. Have I allowed you to present witnesses?

A. Yes, sir.

Q. In other words, I will ask you again: Has this investigation been conducted in a fair and impartial manner?

Mr. Wilson and Mr. King hold a muted conversation.

A. by Johnny King, Jr. — No.

By G. G. Jones: Do you wish to state any reason? In other words, the investigation is still open. The witnesses are still outside. Do you have any more questions you would like to ask any of them?

GGJ — after waiting — Have I permitted you to make any statements you wished to make?

A. — by Johnny King, Jr. — You have given me opportunity to ask questions, and I asked questions, all day long. They were all muddy by what was rubbed out.

GGJ — I will ask the question again: Has this investigation been conducted in a fair and impartial manner?

A. by Elijah Wilson: At this time I can't say, Mr. Jones. Right at this time I would say: No, it hasn't been, unless the charges is exonerated."

The answer of Mr. Wilson to the last question cited and more particularly that part that reads — "No, it hasn't been, unless the charges is exonerated" requires no elaboration. It speaks for itself.

We find that the Claimant was given and did have a fair and impartial hearing and that none of his substantive procedural rights were violated.

The Claimant is charged with insubordination, in that he failed to comply with the order and/or instructions of General Foreman Howard that he report for work on June 13, 1966. He is not charged with being "out of place" nor with being "A.W.O.L."

The Claimant does not deny that he was instructed by the General Foreman to report for work, although he does deny that he told Foreman Howard to "go to hell", but claims that as a result of a telephone conversation had between his wife and Foreman Schmoll, at or about the hour of 2:00 P.M. of June 13, 1966, he received permission to be off on June 13 and 14, 1966, and for that reason did not comply with the instructions of Foreman Howard.

An examination of the transcript of the testimony of the hearing discloses the following testimony given by Mr. G. E. Schmoll, as follows:

"Questions by G. G. Jones to G. E. Schmoll:

Q. Will you please state your name?

A. G. E. Schmoll.

Q. How long have you been a supervisor in the Baggage and Mail Department?

A. About 9 years.

Q. What is your present assignment?

A. Mail and Baggage Foreman, and Relief General Foreman.

Q. Were you on duty as second trick general foreman Monday, June 13, 1966?

A. Yes, sir.

GGJ. Foreman Schmoll, I have here a report addressed to me, bearing your name, dated June 13, 1966. Will you please examine it and state for the record whether or not it is your report to me?

By G. E. Schmoll — after examining paper — Yes, sir.

GGJ. It is your report to me?

A. Yes, sir.

GGJ. I am giving copies of Foreman Schmoll's report to Mr. King, and to his representative, Mr. Wilson, and I am going to read it into the record of this investigation.

GGJ.—reading—'The man-power situation was very tight today, due to so many being off on vacations and for other reasons. While I was calling men for the extra board, Johnny King's wife phoned and told me to mark Johnny off for today and tomorrow, the 13th and 14th. I told her I needed Johnny for 3:30 P.M. and I could not mark him off. She said she did not know where he was and that she could not get intouch with him.

I will tell 3rd trick general foreman when he comes on, and perhaps he can locate Johnny for a later call.'

Q. General Foreman Schmoll, is that your report as I have read it?

A. Yes, sir.

Q. Is it true and correct?

A. It is correct.

Q. Do you wish to change it in any way, or add anything to it at this time?

A. No, sir.

Mr. Wilson questions Mr. Schmoll:

Q. Mr. Schmoll, were you on duty Monday, June 13, 1966?

A. I was.

Q. What position and shift were you assigned to that particular date?

A. General Foreman, second shift.

Q. Did you receive a telephone call around 1:30 P.M. that day, from a lady?

A. I received a call about 2 P.M. It was about 2 P.M.

Q. Did she identify herself to you?

A. That's right.

Q. Whom did she identify herself as?

A. Johnny King's wife.

Q. Johnny King's wife. What was the purpose of her call?

A. She told me she called to report Johnny off for Monday and Tuesday, the 13th and 14th.

Q. The 13th and 14th?

A. That's right.

Q. What was your reply?

A. I told her I needed Johnny at 3:30."

* * * * *

The following testimony was given by Mr. W. B. Howard:

"Questions to Foreman W. B. Howard by G. G. Jones:

Q. Will you please state your name?

A. W. B. Howard.

Q. How long have you been employed by the Jacksonville Terminal Company?

A. Approximately 24 years.

Q. What is your present assignment?

A. General Foreman — Foreman relief.

Q. Were you the third trick general foreman on June 13, 1966?

A. Yes, sir.

GGJ. General Foreman Howard, I have here a report dated June 13, 1966, bearing your name. Please examine it, and state for the record whether or not this is your report to me.

By W. B. Howard, after examining report: Yes, sir.

Q. This is your report to me?

A. Yes, sir.

GGJ — I am now giving copies of General Foreman Howard's report to Mr. King, and to his representative, Mr. Wilson, and I am going to read it into the record of this investigation.

GGJ — reading — 'When I came to work this evening at 8:30 the 2nd trick general foreman, George Schmoll, in making his turn-over informed me we were short of men. He told me that Johnny King, Jr.'s wife had called in at 2 o'clock and tried to mark him off for today and tomorrow, and that he had told her he could not mark him off because he was needed and for her to tell Johnny to come in for work at 3:30. Mr. Schmoll said Johnny's wife stated she did not know where Johnny was and she did not know how to get in touch with him.

At about 8:35 P.M., I called Johnny's home in an effort to contact him for a 12 o'clock midnight job. Johnny's wife answered the phone and I said to her this is Jacksonville Terminal Company calling Johnny King, Jr. She replied to me she did not know where he was, also that at Johnny's request she had called in earlier that afternoon to mark Johnny off for Monday and Tuesday. I told her that Johnny had not been given permission to be off and that unless I could contact him and get him in for work at 12 o'clock midnight, he would have to see Mr. Jones before he could return to work.

A few minutes later, at about 8:50 P.M., Johnny King, Jr. called me at the mail shed and asked if it was I who had just talked with his wife, and I replied yes. Johnny then said to me not to ever talk to his wife as I had. My reply to him was that if he would answer his calls it would not be necessary for me to talk with her, and that I was instructing him to come in to work at 12 o'clock midnight that night. Johnny then said: 'You go to hell', and he hung up the phone. He did not report for work as I instructed him to do."

* * * * *

The following testimony was given by Juanita King, the wife of the Claimant:

"By EW — Before asking any questions, I would like to ask Mrs. King what does she have to say concerning this whole matter. From the beginning to the end. Actually what happened on the 13th?

A. By Mrs. Johnny King, Jr.: Well, on the 13th I called the mail shed, and someone answered, but did not say who it was. So I asked if this was the mail shed, and he said, yes. So I told him I was Johnny King's wife and wanted to report him off today, Monday and Tuesday. So he said: 'Wait a minute, I want to check.' He went somewhere and checked, and came back and said 'O.K.' So at 8:30 that night I was home and the phone rang again. I answered it and they said for Johnny King to come to work. I said I reported him off at 1:30. He said I don't see anything here concerning it. I said, 'Well, the man said O.K.' He talked real nasty, and he said when he called he wanted him to come now. He said he can't come to work just when he wants to, he has to work when I tell him to. He talked real nasty. So when Johnny come he called him."

While it is true that there is a conflict in the testimony, this Board is unable to resolve it. We have no way of judging the credibility of the various witnesses who testified. We did not have the opportunity of observing their conduct and demeanor while testifying. The hearing officer did, and in consideration of that fact and on the basis of the testimony adduced before him, made his decision. We are unable to find that the Hearing Officer, in making his determination, acted in bad faith or was arbitrary, capricious or discriminatory.

The Claimant further contends that the order to report to work by Foreman Howard was in violation of the terms of Paragraph 3 of the Memorandum of Understanding between the parties dated February 11, 1963, which reads as follows:

"3. Furloughed men who are in the A. M. group will be subject to call between 3:30 A. M. and 6 A. M.; and furloughed men in the P. M. group will be subject to calls between 2 P. M. and 5 P. M."

In Award 14067 (Rohman) we said:

"The rule is well established that an employee is required to carry out his assigned duties even where he feels aggrieved. He is forbidden to resort to self-help, but is free to process his grievance via the established grievance machinery. He cannot refrain from performing his assignment with impunity * * *"

In Award 12985 (Coburn) we said:

"From the uncontroverted evidence in this case, it is clear, and the Board so finds, the Claimant's refusal to complete his assigned tour of duty amounted to insubordinate conduct. It may well be that he believed he was being required to perform work contrary to local practice and customs or in violation of the rules of the Agreement. If so, his remedy lay in the grievance machinery of the Agreement; i.e., by filing a claim or grievance under Rule 26, after complying with instructions given." (Emphasis ours.) See also Awards 8512, 10003, 8712.

Dismissal from service is an extreme and severe penalty. Whether or not such a penalty is justified depends upon many factors and the circumstances in each case. In order for this Board to overrule, reverse and/or set aside or modify the penalty, it is incumbent upon the Claimant to show that the Carrier, in assessing the penalty, was vindictive, arbitrary and malicious.

This Board has held on any number of occasions that a Claimant's previous work record cannot and must not have any bearing or be considered in the determination of his guilt of the charges brought against him, but it may and can be considered by the Carrier in assessing the penalty. See Awards 12126, 13308, 15184.

In the instant case, the Claimant's work record discloses that in the period from January 1, 1961 to July 6, 1966, he was removed from the Extra Board for failing to properly protect extra work on four different occasions. In each instance, on his promise to properly protect extra work, he was reprimanded and replaced on the Extra Board. The last instance in July of 1965. The copy of his prior work record, consisting of seven and one-half pages, shows any number of prior instances of failure on the part of the Claimant to protect the service after being instructed to do so. It is evident from an examination of the Claimant's work record that the Carrier was lenient and patient with the Claimant. There does come a time, however, when patience ceases to be a virtue.

On the record before us, we fail to find any evidence that the Carrier was vindictive, arbitrary or malicious in assessing the penalty of dismissal.

We will deny the claim.

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 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of May 1968.

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