Award No. 17154
Docket No. TE-17718
NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUINCATION EMPLOYEES UNION

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Illinois Central Railroad, that:

1. Carrier violated the Agreement between the parties by improperly dismissing from its service Miss Mildred Paripovich effective March 24, 1967.

2. Carrier shall restore Miss Paripovich to its service with all rights unimpaired and compensation for all time lost.

OPINION OF BOARD: Claimant, an employe of Carrier for twenty-three (23) years, was notified to "arrange to attend formal investigation in the Office of Superintendent Suburban Service at 1:15 P.M., Monday, March 20, 1967. Prepare to answer to the charge of improper conduct while working at Roosevelt Road Ticket Office." Further, the notice read that Claimant could bring witnesses and representation of her choice and that her "previous record would be reviewed."

The hearing was held on March 20, 1967, and Claimant was subsequently notified that it was found that she had failed to comply with Rules 3 and 4 of the General Rules for the Guidance of Suburban Station Employees and was therefore dismissed from service.

The Organization properly advanced the case to this Board claiming the notice of hearing was insufficient to prepare to meet the charges, that Claimant was not accorded a fair and impartial hearing, and that this Board should use judicial discretion to restore Claimant to her position with all due rights and back compensation.

The pertinent sections of Rule 22 of the Agreement in the instant case which the Organization alleges were violated read as follows:

"RULE 22

"DISCIPLINE

"A. Employes shall not be disciplined or dismissed until after a fair and impartial hearing. Employes shall be notified of the specific

charges in writing within ten (10) days from the date the employing officer has knowledge of the alleged offense.

* * * * *

"C. Employes and their representatives shall have the right to be present throughout the entire hearing. At the hearing or on appeal, employe may be represented by the Local or General Chairman, who shall be permitted to examine and cross-examine all witnesses. Employes shall have the right to have present at their expense such witnesses as they desire.

* * * * *

"H. Employes, suspended or dismissed and found not guilty, shall have their record cleared of the charge, be restored to the position from which removed and compensated in the amount they would have earned had there been no suspension or dismissal less any amount earned through any other service; provided those who do have earnings from other work may deduct from those earnings necessary expenses incurred in securing and performing the work."

Rules 3 and 4 of the General Rules for the Guidance of Suburban Station Employees, cited by Carrier, read as follows:

"Rule 3 Civil, gentlemanly deportment is required of all employees in their dealings with the public, their subordinates and each other. Boisterous, profane or vulgar language is forbidden. Courtesy and attention to patrons is demanded. Employees must not enter into alceration with any person, no matter what provocation may be given but will make note of the fact and report to their immediate supervisor.

"Rule 4 Employees who are insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who conducts themselves in such a manner, or handle their personal obligations in such a way that the railroad will be subjected to criticism or loss of good-will, will not be retained in the service."

First, the Organization claims that Carrier violated the Agreement by not giving Claimant sufficient notice of the charges she was to meet at the hearing. Claimant knew or should have known that an investigator had been on the premises asking questions concerning her conduct and that of her coworkers. Claimant had been reprimanded about her conduct. Although Claimant's representative raised the question of insuffucient notice, he thereafter remained silent as the Claimant was asked, and replied each time in the affirmative, if she had received the notice, if she were represented, and if she was ready to proceed with the investigation. Claimant was asked and again replied in the affirmative, if she were familiar with Rules 3 and 4 of the General Rules for the Guidance of Suburban Station Employees.

This Board has said that where the notice is not misleading (Award 3270), where the notice is sufficient for Claimant to understand what is to be investigated (Award 12898), and precise enough to understand the exact nature of the offense charged (Awards 11170 and 13684)—such notice will not be held to vitiate Claimant's rights under the Agreement for adequate notice. Here, Claimant knew exactly what "improper conduct" the notice referred to.

Second, the Organization alleges that Claimant was not accorded a fair and impartial hearing, basically due to the introduction of her past discipline record into the record. In the notice Claimant was advised that her previous records were to be reviewed. When these records were reviewed, everyone except the Claimant and her representatives were excluded from the room. Her representatives made no objection to the introduction of this record and can not be heard to complain now, as they waived their right to timely objection. (Awards 9435, 12985 and 16678).

Further, the Organization can not charge that the hearing was not fair and impartial when Claimant had two (2) representatives who preserved no objections to any points throughout the hearing and who never asked for an adjournment or a postponement for any reason. "The Claimant was represented at the hearing, but his representatives offered no witnesses or evidence and had no cross-examination." (Award 15532)

The Board feels that lacking a "valid reason for disturbing the discipline imposed, there being no showing that Carrier acted in an arbitrary or unjust manner . . .," we will not substitute our judgment for that of Carrier. (Award 15184). Further we have said: "Our function in dicipline cases is not . . . to 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 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 Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion." (Award 5032, and also 13481).

In the instant case, this Board finds that Carrier substantially proved its allegations, and then, within its proper discretion, used Claimant's past record only to ascertain the discipline it thought necessary.

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 19th day of May 1969.

DISSENT TO AWARD 17154, DOCKET TE-17718

This award is a shocking departure from well established principles governing the Board's functioning in such cases. It is so grossly erroneous in all its parts that specific criticism of each fault would require more time and space than is available. One or two points, however, must be mentioned.

First, the referee has attempted to shift the burden of proof. A carrier always has the burden of proving that a disciplinary charge is well founded, and that the charged employe is in fact guilty of the offense specified. This burden remains regardless of any lack of technical competence on the part of an employe or his representatives. And I challenge anyone to point out where the Carrier in this case met its burden of proof. It did not do so, and the claim should have been sustained for this reason alone.

Another glaring fault is the citation of irrelevant awards. For example, the referee cites Awards 9435, 12985 and 16678 as authority for his opinion that failure of the claimant's representatives to object at the time the employe's alleged past record was introduced into the hearing amounted to a waiver of the right to have the hearing confined to the current charge. But those awards carry no such authority. Award 9435 had nothing whatever to do with a discipline case. It dismissed a claimed scope rule violation on the ground that a prior dismissal of the same claim on procedural grounds disposed of the claim in its entirety to far as the Board's power was concerned. Citation of this award in the present case, and for the purpose indicated, is little short of adding insult to injury.

Award 12985 did involve a discipline case. But it did not apply any such theory as the present referee apparently ascribes to it. The point there, concerning "waiver," was that when the accused employe and his representative declined an offer to secure necessary witnesses they were estopped from subsequently asserting prejudice because of the absence of such necessary witnesses. And the propriety of considering the accused employe's past record "in measuring the degree of discipline to be imposed" certainly cannot be equated with introduction of such a past record into the hearing itself, as was done here.

In Award 16678 Referee Perelson emphasized his holding that an employe's past record may NOT be considered in determining guilt of a current charge. He did say—erroneously, we think—that failure of an employe or his representative to raise specific objections at the beginning of a hearing constitutes "a waiver." He did not say a waiver of what. But in the present case there was a fundamental objection to the charge as made—the very basis for a fair and impartial hearing. It follows that Award 16678 is not authority for finding "a waiver" in the present case.

For these and other equally obvious and glaring errors this award must be considered, and is, a plain failure of this Board to apply and follow its own principles. Therefore, I dissent.

C. E. Keif
Labor Member

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