Award Number 17797

Docket Number CL-18451

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis X. Quinn, Referee

PARTIES TO DISPUTE:

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

PORT TERMINAL RAILROAD ASSOCIATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6683) that:

(a) The Carrier violated the current Clerks' Agreement when on December 24, 1968, it arbitrarily and capriciously discharged Clerk M. R. Peacock from the service of the Port Terminal Railroad Association effective December 21, 1968.

(b) Clerk Peacock be paid a day's pay for December 21, 1968 and each subsequent date that he could have worked had he not been arbitrarily and capriciously discharged from the service of the Port Terminal Railroad Association.

OPINION OF BOARD: Upon consideration of the testimony presented, exhibits introduced and the Agreement between Port Terminal Railroad Association and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, it is clear that the Carrier has sound warrant to expect accurate job performance. The Carriers have a duty to the public and other employes to employ only those who are careful, competent and obedient to rules regarding the performance of work. This obligation, running both to the public and to other employes, cannot be avoided or delegated. The Railway Labor Act does not interfere with the normal exercise by Carrier of its right to select and properly discharge employes.

However, it is also clear that members of this Board are not free to apply their own brand of industrial justice. They cannot legally disregard evidence properly before them and cannot legally assume facts that are not validly established by the record before them.

Article 7 spells out Discipline and Grievance procedure as follows:

"Rule 26

(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 discipline and the hearing shall be granted within ten (10) days thereafter.

* * * * *

(f) If the final decision decrees that charge against employe was not sustained, the record shall be cleared of the charge; if suspended or dismissed, employe will be returned to former position and compensated for the wage loss, if any is suffered."

Another pertinent contract provision is found in Article 3—Rule 8 (Meal Period).

"(a) The time and length of the lunch period shall be subject to mutual agreement.

(b) When a meal period is allowed, it will be between the ending of the fourth hour and beginning of the seventh hour after starting work, unless otherwise agreed upon by employes and the employer.

(c) If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro rata rate and twenty (2) minutes, with pay, in which to eat shall be afforded at the first opportunity.

(d) For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a days work, in which case not to exceed twenty (20) minutes shall be allowed in which to eat, without deduction in pay, when the nature of the work permits."

While we agree that unauthorized absences from duty, if proven, are serious offenses and often result in dismissal from service; that an employe who sleeps on his job is derelict in the performance of his duties; that a clear violation of the provisions of an operating rule such as Rule G constitutes sufficient basis for dismissal, we find lack of substantial evidence that the Claimant was under the influence of an intoxicant; that he absented himself from his duties for a period of an hour; that he was asleep during the tour of duty.

The record submitted by the Carrier indicates that Mr. M. R. Peacock may be faulted for a too casual attention to the accuracy demanded by his assignment. Hindsight makes Mr. Peacock vulnerable. The charge that he was involved in conduct prohibited by Rule "G"—indulging in intoxicating liquor while on duty has not been established. Neither was the length of absence from his post been established. His claim of sickness and post-nausea dreariness did not remove his obligation to see that proper crews were alerted. Lack of substantial evidence of prolonged absence and intoxication does have an arbitrary if not capricious ring to it.

Although the record supports Carrier's contention that Claimant left his assigned position as Assistant Crew Clerk without specific authorization, it appears that Claimant had done so in the past without any previous warnings from his supervisor.

Although the Carrier properly found that Claimant's pattern of conduct warranted disciplinary action, we find the extreme penalty of discharge to be unduly harsh and excessive under the peculiar circumstances involved in this case. On the basis of all the evidence of record, a suspension of thirty (30) days would have been the maximum penalty justified. Therefore, Claimant will be restored to service as of January 21, 1969, with seniority rights unimpaired and the monetary loss suffered be paid less amounts earned in other employment.

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 discipline was too harsh and excessive.

AWARD

Claim sustained as modified by the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1970.

LABOR MEMBER'S SPECIAL CONCURRING OPINION TO AWARD 17797 (DOCKET CL-18451)

The Award properly holds that dismissal was excessive and orders the Carrier to restore Claimant to service "as of January 21, 1969, with seniority rights unimpaired and the monetary loss suffered be paid" which, in effect, reduced the disciplinary action to a 30-day suspension—had the Referee stopped there.

However, the Referee added to his Opinion the words:

"less amounts earned in other employment"

thereby exceeding his authority, clearly evidenced by acknowledging earlier in his Opinion that:

> "However, it is also clear that members of this Board are not free to apply their own brand of industrial justice. They cannot legally disregard evidence properly before them and cannot legally assume facts that are not validly established by the record before them."

The issue of "amounts earned in other employment" was not before the Board. It was not a matter of record in correspondence between the parties; it was not discussed by the Carrier Member in panel discussion before the Referee; it was not raised by the Carrier Member in the reargument he requested and was granted.

Contrary to his statement, therefore, the Referee did, as a member of this Board, "assume facts that are not validly established by the record" for which I register this dissent.

/s/ C. E. KEIF
C. E. Keif,
Labor Member
4-13-70

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S SPECIAL CONCURRING OPINION TO AWARD 17797, DOCKET CL-18451

Referee Quinn

We respectfully submit that the Labor Member is wrong on every point he asserts in his special concurring opinion.

In the first place, he is wrong in stating that the award is correct in holding that dismissal was excessive punishment. We believe that Claimant's own admissions and the other evidence of record furnished a reasonable basis for Carrier's decision to dismiss Claimant from the service.

After conceding that it was entirely proper and within jurisdictional bounds for the award to deny all pay for the first thirty days after Claimant was taken out of service, the Labor Member asserts the novel and inconsistent point that the Referee has no jurisdiction to limit Claimant's recovery for the remaining period to the extent expressly provided for in the very rule of the agreement on which the claim was based.

The Labor Member could not be more wrong in stating that "the issue of 'amounts earned in other employment' was not before the Board." Rule 26 (f) which is cited in the award was quoted and relied upon in Position of Employes, and it provides that an employe found to have been improperly held out of service shall be allowed "wage loss, if any". Certainly, when the Employes asked the Board to sustain the claim on the premise that Rule 26 was controlling they precluded themselves from taking the position that the Board was without jurisdiction to limit compensation to the extent explicitly provided for in that rule.

Both Carrier and the Carrier Members took the position that under Rule 26 and the facts of this case no payment whatever was properly allowable to the Claimant. Any allowance of any kind was opposed, hence all of the monetary claim was in issue. The award would have exceeded the Board's jurisdiction had it allowed more than that provided for in the controlling rule, namely, "wage loss, if any"—which is necessarily the difference between the amount he would have earned in Carrier's service and the amount that he actually earned in other employment during the period that he was found to have been improperly withheld from service.

/s/ G. L. NAYLOR

/s/ G. C. WHITE

/s/ R. E. BLACK

/s/ P. C. CARTER

/s/ W. B. JONES

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