NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19566
THIRD DIVISION Docket Number MW-19805

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Akron, Canton & Youngstown Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of B&B Laborer D. Pahl for allegedly violating Rules 400, 404, 425, 427 and 448 was improper, without just and sufficient cause and in violation of the Agreement.

(2) B&B Laborer D. Pahl be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered in accordance with Rule 21.

OPINION OF BOARD: This is a dismissal case which arises under Agreement between the parties effective July 1, 1969. Claimant, D. Pahl, a bridge and building laborer, was removed from service on April 13, 1971 and dismissed from service on May 10, 1971. His employment with Carrier began on August 7, 1970.

FACTS

Prior to this case the following letters were exchanged between Messrs. James L. D'Annibalie, General Chairman, and H. L. Bullock, Assistant to General Manager of Carrier.

"October 9, 1970

Mr. H. L. Bullock, Asst. to General Mgr.
Akron Canton & Youngstown Railroad Company
Akron, Ohio 44308

Dear Sir:

During our conference held at Akron, Ohio on October 8, 1970, I informed you that we did not receive a copy of the investigation notice sent L. D. Hall on September 11, 1970, and I requested that same be furnished to our office. You advised that same would be complied with if we requested said notice formally.

"Therefore, I am requesting that all copies of the investigation notice sent to employes covered under the scope of our agreement dated July 1, 1969, be sent to our office also.

I shall appreciate an acknowledgement indicating whether or not you will comply with our request.

Very truly yours,

James L. D'Anniballe
General Chairman."

"October 14, 1970

File: E-24

Mr. J. L. D'Anniballe, General Chairman
Brotherhood of Maintenance of Way Employees
Room 307, Toledo Terminal Railroad Building
1214 Cherry Street
Toledo, Ohio 43608

Dear Mr. D'Anniballe:

In reply to requests contained in your letter of October 9, 1970 I wish to advise that Mr. W. A. Wagner has been instructed to furnish you copy of investigation notice sent L. D. Hall on September 11, 1970.

Also, I am addressing a memo to Mr. Lester to the effect that, in the future, a copy of all such notices shall be furnished your office. I am instructing Mr. Lester to advise the proper parties in his department of my memo of instructions.

Yours truly,

H. L. Bullock
Assistant to the General Manager"

On April 13, 1971, claimant reported late for duty. He was permitted to work that day but was told he would be taken out of service and would be receiving letters of charges to that effect. On April 16, 1971 he received a letter removing him from service and charging him with violations of "General Regulations for Employes 400, 404, 425, 427 and 448". In a letter dated April 20, 1971, the claimant was notified of formal investigation and hearing scheduled for September 26, 1971. This letter reads as follows:

> "Arrange to report to Office of Superintendent of Transportation, The Akron, Canton and Youngstown Railroad Company at Brittain Yard, Akron, Ohio at 1:00 p.m. Eastern Daylight Saving Time, Monday April 26, 1971 to determine your responsibility, if any, in violation of Rules 400, 404, 425, 427 and 448, as charged on Removal from Service of The Akron, Canton & Youngstown Railroad Company on April 16, 1971. You may be represented in accordance with provisions of your contract agreement schedule and you should so arrange if you desire representative or witnesses present. ..."

The Carrier did not provide the Organization with copies of either the April 16, 1971 letter or the April 20, 1971 letter of charges to claimant.

The April 26, 1971 hearing was rescheduled for and held on April 30, 1971. Under date of May 10, 1971, the Carrier issued the following letter of dismissal.

> "Reference to formal investigation held April 30, 1971, wherein you were charged with continued violation of the Operating Rules of this Railroad Company.
>
> Evidence adduced at this investigation revealed that you again did violate Rule 425 on April 13, 1971 as charged; and also revealed that during your employment you did continue to violate Rules 400, 404, 427 and 448 as charged after continually being instructed as to the rules of the Railroad Company as well as your obligation to comply in order to remain in the service of the Railroad Company. Evidence adduced clearly indicates you had no intention nor desire to fulfill your employment obligation - to enter or remain in the service is an assurrance or willingness to obey the rules - or - the service demands the faithful, intelligent and courteous discharge of duty.

"In view of the above, you are hereby dismissed from the service of The Akron, Canton and Youngstown Railroad Company.

Yours truly

H. E. Adamson
Assistant Engineer"

The rules enumerated in the previous letters and in the above letter of dismissal read as follows:

"400 - Employees must not, while on duty, engage in any activity which will interfere with or distract their attention from their work.

404 - Employees must not absent themselves from duty, or change off with another for a trip or part of a trip, or day, without obtaining permission from their superior.

425 - Employees must report for duty at the appointed time, and crew members of a train or engine will, when necessary, assist in making up their trains.

427 - Negligence in handling Company business, sleeping on duty, wilful neglect of duty, viciousness, dishonesty, insubordination, disloyalty, giving false statements or concealing facts concerning matters under investigation are sufficient cause for dismissal.

448 - All employees must comply with instructions from proper authority and must perform all of their duties efficiently and safely."

At the beginning of the hearing the claimant's representative, Vice Chairman C.L. Mulford, made the following objection:

"Let the record show at this time that we are protesting carrier's refusal to comply with letter of understanding of forwarding copies of all letters of charge of investigation to our office."

The colloquy which then occurred between Mr. Mulford and Mr. B. H. Lester, Engineer-Maintenance of Way, is illustrated by the following excerpt from the transcript of hearing.

Mulford "The letter is a letter of understanding of applied principles and practice of Rule 19 of the agreement and as standard procedure in labor relations."

Lester "Then you do not have in your contract, or a signed memorandum supplementing agreement to the contract, that you or your office will be given a copy of charges against the employee. Is this correct?"

CONTENTIONS OF PARTIES

Petitioner contends that claimant was dismissed without just and sufficient cause and in violation of the Agreement. Petitioner specifically asserts a violation of Rule 19 (a) which requires that an employee with more than thirty (30) days service shall not be disciplined or dismissed without a fair and impartial investigation.

Carrier contends the charges were sustained at the investigation and that it did not act in an arbitrary or capricious manner in determining dismissa

RESOLUTION

We shall deal first with the October 9 and 14, 1970 letters of understanding in resolving this dispute. It is appropriate therefore to note that, except for the statements of Mr. B. H. Lester, Engineer-Maintenance of Way, in the hearing record, nowhere throughout the record does the Carrier address the question of the meaning of, or the validity or non-validity of, the letters of understanding. Carrier neither explains its failure to comply with the letters, nor contends that its failure to so comply caused no prejudice to the fairness of the hearing on the charges against claimant. Carrier's rebuttal brief points out that claimant notified his organization of the receipt of the letter of charges and that the Organization knew what the specific charges were. However, Carrier makes no contention that the Organization's receipt of knowledge of the charge from claimant is the equivalent of the Organization's receipt of a copy of the charge from Carrier. Neither does Carrier offer any reason in excuse and exoneration of its failure to provide the Organization with a copy of the charge

We have quoted an example of Mr. Lester's statements in response to th Organization's protest at the hearing that Carrier had failed to provide the Organization with a copy of the April 20, 1971 letter of charges in accordance wit the October 9 and 14, 1970 letters between Organization and Carrier. From the statements of Mr. Lester it is not possible to determine what position, if any, he took in respect to the letters of understanding. However, in view of the

clarity with which the Organization advanced its position, and in view of Mr. Lester's non-acceptance of the validity of the Organization's protest concerning the letters, we can but presume that Mr. Lester's position was that the letters were not binding upon the Carrier because their substance had not been reduced to or set forth in a formal supplementing agreement. With this we cannot agree.

In Award 10421 (Dolnick), this Board stated:

> "It is an acceptable rule of contract interpretation that the meaning and intent of the parties must be gleaned from the entire Agreement. All of the applicable Rules need to be considered to give meaning and intent to Rule 25. Also, any valid ancillary Agreements entered into by the parties must be given equal consideration. The letters of September 15 and September 22, 1954, are valid and must be so considered as part of the entire Agreement between the parties. There is nothing in the record to challenge the authority of the representatives of the Carrier or the Organization to reach such an Agreement. See Awards 3198 (Carter), 6867 (Parker), 6903 (Coffey), 7061 (Carter) and 10239 (Gray)."

On the basis of this Award, and our scrutiny of the letters themselves, we find that the October 9 and 14, 1970 letters constituted valid letters of understanding or letters of agreement between the parties and, hence, constituted part of the entire Agreement between the parties. The letters are couched in simple language, which obligated Carrier to furnish the Organization with a copy of the April 20, 1970 letter of charges against claimant. This the Carrier did not do, so we further find that this failure by Carrier violated the letters of understanding.

In determining the effect of the violation we have been impressed by the sufficiency of the evidence in support of Carrier's findings of guilt on the charges and by the apparent lack of prejudice to claimant's defense by the violation. These are important factors in support of Carrier's action. But there are countervailing factors also. We must take into account that we are dealing with a procedural right which must be fulfilled before a hearing is commenced, and which inures to the benefit of the entire class of employees covered by the letters and who are subject to possible discipline proceedings in the future. In weighing all of these factors and other matters in the record, we conclude that Carrier's violation is not of such magnitude as to warrant a full reversal of the disciplinary action; however, neither is it a de minimus violation to be lightly dismissed. Therefore we believe it is appropriate to reduce the measure of discipline. Accordingly, we shall sustain the claim for reinstatement of claimant with seniority, vacation and all other rights unimpaired, but we shall deny the claim for compensation for wage loss.

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 violated.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1973.