NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19744
Docket Number CL-19696

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7075) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on L. A. Pook, Clerk at Botsford Yard, Kalamazoo, Michigan.

(b) Claimant L. A. Pook's record be cleared of the charges brought against him on October 7, 1970.

(c) Claimant L. A. Pook be restored to service with seniority and all other rights unimpaired, and be compensated for wage loss sustained during the period out of service, plus interest at 6% per annum, compounded daily.

OPINION OF BOARD: Claimant, a clerk in Carrier's Botsford Yard in Kalamazoo, Michigan, had been working the midnight to 8 AM shift. He was dismissed by letter dated October 21, 1970 which stated that the transcript of the investigation "... reveals you did remove company property without proper authority and is in violation of stealing from the company, therefore you are being dismissed...."

It appears that Claimant's supervisors had heard that he was in the habit of leaving the office during the night and going down to his car or van and sleeping for a few hours and then coming back to the office and working until quitting time. Two of the supervisors, deciding to observe the operation and verify Claimant's habit, appeared at the Yard at about 1 AM on October 7th. These two officials, the Trainmaster and the Freight Agent, observed Claimant at about 2:50 AM leave the office, go to the storeroom and remove a large carton which he placed in the rear of his van parked in the company lot west of the office. Claimant then entered his truck and went to sleep until about 4:55 AM when he was awakened by the two officials. Later, in the presence of company representatives, Claimant opened the rear of his truck and a large carton of paper towels was removed. He was then advised by the Trainmaster that he was being withheld from service pending investigation of his taking paper towels from the Storeroom and putting them in his personal vehicle. These facts are not in dispute.

Claimant received a notice of investigation dated October 7th which read in part as follows:

"Arrange to be present for a formal investigation....to develop the facts and determine your particular responsibility, if any, in connection with the finding of company property in your private vehicle, consisting of a case of paper towels which you were observed removing from the company storeroom...."

Petitioner first raises a number of procedural points. It is urged that the charge contained in the letter above did not apprise Claimant of the exact nature of the offense. We have held in numerous cases that the notice of investigation does not have to have the technical language required in a criminal complaint. The language must be precise enough for Claimant to understand the nature of the offense charged and afford him a reasonable basis for preparing his defense (see Awards 16115 and 16637 among others). There seems to be no doubt in this case that Claimant was well aware of the exact nature of the circumstance which was to be investigated. Similarly, we reject the contention that Claimant was dismissed on charges not made in the notice of investigation.

Petitioner further urges that the principles of fairness and impartiality essential to an investigation were violated when the Transportation Superintendent acted as both accuser and judge. It was also urged that there were added violations in that the decision was rendered by an officer other than the Hearing Officer. There does not appear to be any support for these arguments in the Rules; further the transcript of the investigation does not reveal any evidence that Claimant was deprived of a fair and impartial investigation.

On the merits, we must determine whether there was substantial evidence to support Carrier's conclusion of guilt. Since there is no dispute on the essential facts described first above, they must be evaluated as to the charge. Claimant testified that he took the carton from the storeroom to make himself comfortable in his vehicle and that he intended to put the paper towels in the restroom in the morning. Evidence supports the contention that Claimant did not need any authority to remove the towels from the storeroom. The Carrier argued that the testimony of the two Carrier officials "raises the reasonable inference that Claimant intended to steal the box of paper towels". In a very similar case, Award 15186, we held that there was no competent evidence to indicate that the Claimant in that case intended to convert the company property to his own personal use away from Carrier's property. In this case, since Claimant did not remove the paper towels from the property, did have the authority to take them from the storeroom, it can only be conjectured as to what he might have done had he awakened alone. It should be noted that there is no charge against Claimant that he was sleeping on the job. Under all the circumstances in the case, we do not find that Carrier has adduced substantial evidence in support of the charge of stealing.

Carrier claims that Petitioner had an opportunity to mitigate damages, which he refused by not accepting Carrier's compromise proposal. The pertinent portion of the letter in question, from the Superintendent of Labor Relations to the Division Chairman, dated November 18, 1970 reads:

> "However, without prejudice to our position as set forth above, we are willing as a matter of leniency and in full, final, and complete settlement of this case, to restore the appellant to duty with time lost to apply as a period of suspension. Upon receipt of your concurrence, we will arrange to restore Mr. Pook to duty. If you do not concur, you may consider this appeal denied in its entirety."

Carrier cites Awards 5853 and 14225 in support of this argument. Award 5853 stated that Claimant was offered his job back "without prejudice to his claim for back pay" and he chose to reject that offer. Similarly, in Award No. 14225 Claimant was offered reinstatement while the claim was being submitted to this Board for determination, and refused. In this case, however, the offer of reinstatement was conditioned upon Claimant agreeing to a six weeks suspension in full settlement and hence cannot be considered as a bona fide offer resulting in a mitigation of damages.

Petitioner claims interest on the wage loss sustained by Claimant. We have ruled on this matter in many cases heretofore, and are not persuaded to change our thinking (Awards 18312, 18433, 15709, 19336 and many others). We find that Claimant shall be reinstated in accordance with the provisions of Rule 6-A-1 (h) and no interest shall be paid.

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; Claimant shall be reinstated in accordance with Rule 6-A-1 (h) and no interest shall be paid.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Tillman
Executive Secretary

Dated at Chicago, Illinois, this 11th day of day of May 1973.

Serial No. 276

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 19744

DOCKET NO. CL-19696

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Penn Central Transportation Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The request made for interpretation in this dispute involves the issue of back pay for Claimant. There are two matters apparently in dispute: (1) should Claimant be required to submit his income tax returns to Carrier upon request; and (2) did Claimant have any earnings during the period in question which should be offset from the amount he would have been compensated by Carrier prior to his reinstatement.

With respect to the income tax returns, Petitioner argues that since a joint income tax return was filed by Claimant and his wife the requirement that the returns be submitted to Carrier is "...tantamount to an invasion of privacy." Further, it is contended that Claimant is reluctant to make personal financial information "...indiscriminately available." Carrier insists that its request for the income tax returns was reasonable and that it was under no obligation to apply the monetary provisions of Award 19744 in the absence of the returns. In our view Carrier was within its rights in requiring the submission of the income tax returns in order to determine from the best available information what credit if any should be applied to the back pay. The fact that the particular returns were joint returns does not exempt the Claimant from complying with Carrier's request. In this dispute, however, the returns were supplied to Carrier together with Petitioner's letter to the Board dated August 8, 1974. In view of this circumstance we find that the Board's order should be complied with.

Rule 6-A-1 (h) of the Agreement provides that under circumstances such as those herein, the employe "...shall be reinstated and compensated for the difference between the amount he earned while out of service or while otherwise employed and the amount he would have earned had he not been suspended or dismissed." The income tax returns reveal that Claimant and/or his wife owned and operated a dry cleaning business both prior to and during

the period involved in this dispute from which income was derived. There is no indication that Claimant received any "wages" from that enterprise during the period he was out of work nor is there any indication that the business began to earn more money during this time. On the contrary, it appears that the enterprise did earn less during this period than it had earned prior to Claimant being discharged. There is evidence that Claimant's wife received wages from the business in addition to its profits, but Claimant received no taxable wages or "earnings" from the business whatsoever. We do not view income as synonomous with earnings, whether from a privately owned business (in this case pre-dating the discharge) or from other investments. Therefore, under the circumstances involved herein, we find that Claimant's income from the dry cleaning business should not be deducted from the back pay contemplated by the Award.

Referee Irwin M. Lieberman who sat with the Division as a neutral member when Award No. 19744 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1975.