

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20028
Docket Number CL-20182

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
((Formerly Transportation-Communication Divn. BRAC)
(
(Norfolk and Western Railway Company
((Involving employees on lines formerly operated by
the Wabash Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7315)
that:

(1) Claim of the General Committee that the Carrier violated the terms of the Telegraphers' Agreement, when on July 22, 1972, it dismissed J. A. Berrien without just reason or cause; and

(2) As a consequence Carrier shall:

(a) Clear service record of J. A. Berrien of the charge and any reference in connection therewith.

(b) Promptly restore J. A. Berrien to duty with seniority, vacation and other rights restored.

(c) Pay J. A. Berrien any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Co., under Group Policy GA-23000, and in the event of the death of J. A. Berrien, pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of premium payments he may have made for substitute health, welfare and life insurance.

(d) Pay J. A. Berrien the amount of wages he would have earned absent this violative act, plus expenses incurred by him.

(e) Pay interest at the statutory rate for the state of Illinois, for any amounts due and withheld as a result of the Carrier's action in dismissing claimant.

OPINION OF BOARD: Claimant, a regularly assigned relief telegrapher at Carrier's Landers Yard, Chicago, Illinois, was disciplined by dismissal from service, effective July 22, 1972, following three separate hearings and findings of guilt on the following charges: (1) not properly protecting assignment of position of Telegraph Operator, 7 am to 3 pm, July 3, 1972; (2) not properly protecting assignment of position of Telegraph Operator, 3 pm to 11 pm, July 4, 1972; and (3) not complying with instructions of a Carrier official to leave Carrier property between 3:30 pm and 3:45 pm on July 4, 1972.

The Employees protest the discipline on the grounds that: (1) the dismissal was without just cause, in that Claimant was singled out for discipline although a practice existed at Landers Yard wherein employees covered for one another in respect to tardy situations; (2) the charge of refusing to leave Carrier's property was unfounded; and (3) the discipline was arbitrary, because in light of the charges involved, dismissal from service was too extreme, drastic, and severe. The Carrier's position is that the discipline was fully warranted and that the claim should be denied. Carrier also notes that, during his three (3) years of service prior to the instant discipline, the claimant has been assessed discipline by suspension on two occasions, on August 18, 1970 for sleeping, and on August 5, 1971 for tardiness.

The hearings on the three charges were held sequentially on July 7, 10, and 11, 1972. The Carrier's July 22, 1972 letter of dismissal refers to the hearings on July 7 and 11, but not to the one on July 10; nonetheless, the record makes it clear that Carrier's disciplinary action resulted from its assessment of the sum total of the evidence adduced in the three hearings, collectively, and we shall therefore proceed to review the case on that same basis.

First hearing, July 7, 1972.

The evidence in this hearing showed that, at 7 am on July 3, 1972, the employee whom claimant was to relieve at 7 am phoned the claimant and was told he was not there; at 7:30 am another employee was called to cover the claimant's assignment and such employee arrived at 8:15 am; at 8 am the employee to be relieved received a phone call from a woman who said claimant had overslept and was enroute to work; at 8:15 to 8:17 am the claimant arrived on the property; at 8:20 am the Claimant met with Assistant Superintendent Hering who told Claimant he could not work that day and that future tardiness would not be tolerated. Claimant testified that the phone number listed with Carrier belonged to the occupant of a nearby apartment, that he had told his wife to call the duty-employee about his tardiness, and that his wife said she made the call at 8:00 am. In addition to these specifics on the events of July 3, 1972, Miss Gann, the employee whom Claimant was to relieve, testified as follows:

- "30. A. *** I put in a time slip for an hour and fifteen (15) minutes overtime.
31. Q. Is this a normal routine, if somebody comes late, you put in the extra time?
A. Lately we haven't been time slipping each other.
32. Q. In other words, if somebody was going to be late, normally, you just work over and more or less owe that person time?
A. Yes."

Second hearing, July 10, 1972

The evidence in this hearing showed that claimant was scheduled to report for duty at 3 pm on July 4, 1972. At 2:50 pm he phoned the duty-employee to say he would be about five (5) minutes late; at 3:00 pm the duty-employee, upon reporting to the Assistant Superintendent that claimant was late, was told to call the Assistant Superintendent when claimant did report; at 3:15 pm the claimant reported for duty. As directed, the duty-employee informed the Assistant Superintendent of Claimant's arrival, whereupon the Assistant Superintendent went to the Telegraph Office and gave claimant notice of investigation for being late the previous day. Subsequently, the Assistant Superintendent returned to the Telegraph Office and told Claimant he could not work that day due to his being fifteen (15) minutes late. For reasons not revealed by the evidence, a Carrier Patrolman accompanied the Assistant Superintendent when he went to the Telegraph Office to speak with Claimant. Also the evidence touched peripherally on two resignations which were submitted by Claimant during the foregoing episode. The Assistant Superintendent said Claimant submitted the resignations voluntarily, but Claimant said he was relieved of duty after his failure to sign a resignation effective immediately. This hearing provided further testimony similar to the Gann testimony in the first hearing; a Miss Potter testified that a late employee normally calls the duty-employee and that no report is made to supervision.

Third hearing, July 11, 1972

This hearing covers the latter part of the events which occurred on the afternoon of July 4, 1972, and relates to the charge that Claimant refused to leave Carrier property when instructed to do so. The Assistant Superintendent testified that, upon delivering to Claimant notice of investigation for the July 3, 1972 incident, the claimant voluntarily submitted a resignation in circumstances which the Assistant Superintendent described as follows:

"* * * he opened the drawer of his desk or table and pulled out a piece of paper with a carbon to it and he handed to me what was a resignation. It didn't have an effective date on it so I returned it to him and told him to put the effective date and to sign it, which he did and he told me when he put the effective date on it, he said, I am going to make this effective at 7:00 A.M., Friday. Now, this would have been Friday, July 7th. So, he put a date on it and he signed my receipt, receiving the notice of investigation and then Patrolman Jesse and I departed his office and I made a copy of his resignation. When looking over the resignation, he had put effective 7:00 A.M., July 28th so I went back into the Landers, Telegraph Office to tell him that he would not work that day account of being fifteen (15) minutes late, and, at this time, I said do you want to make this the 28th because with it being that far off, I am not going to accept it. He examined the calendar and he said, no, I mean that to be Friday the 7th, so, he tore up the resignation dated 7:00 A.M., Friday the 28th and he retyped another resignation, 7:00 A.M., July 7th. He made several comments about the investigation being set up, that was for him being late on the 3rd and I told Mr. Berrien, if he wanted to make his resignation effective July 4th, which was that day, that he wouldn't have to attend any investigations. This he said he wouldn't do, that he would make it effective 7:00 A.M., July 7th, which he did. At this time, I told Mr. Berrien, I wouldn't permit him to work account of being fifteen minutes late account of being instructed the previous day, by me, verbally, to be on time for his 3:00 P.M. assignment, July 4th. **"

- "23. Q. Mr. Hering, did you have reason for not accepting his resignation for July 28th?
A. Taking it under the assumption that it was on July 7th; I told him I would take it and I went out and made copies of it and, when I was making copies, I noticed it was dated the 28th.
24. Q. Mr. Hering, the question was, did you have reason for not accepting Mr. Berrien's resignation, effective July the 28th?
A. Yes, the man told me, verbally, that he wanted it effective Friday, meaning Friday the 7th.

- "25. Q. Is it possible Mr. Berrien could have meant Friday, July the 28th?
A. Based on what he told me, I assumed it was Friday, the 7th and this is why it was returned to him. Also, I might add, at this time, that Mr. Berrien tore up his resignation effective 7:00 A.M., July 28th, 1972 and then, he made out another resignation for effective July the 7th, 7:00 A.M. and was received in the office of Assistant Superintendent on July 5, 1972. Also, a withdrawal notice of resignation which was to be effective 7:00 A.M., Friday, July 7th.
26. Q. Mr. Hering, would you state your reason for wanting Mr. Berrien's resignation effective that day, July 4th?
A. Yes, it would have eliminated the investigations we have held concerning this matter."

The Assistant Superintendent also testified that at 3:40 pm he instructed claimant to leave the property, that claimant refused to do so and used coarse language in stating his refusal, and that Claimant was removed from the premises by Carrier's Patrolman at 3:42 pm. During the course of this ejection, the Assistant Superintendent informed Claimant not to report to work the following day, July 5. The Carrier's Patrolman described the ejection as follows:

- "50. Q. Mr. Jesse, during conversation with Mr. Berrien, or Mr. Hering's conversation with Mr. Berrien, was Mr. Berrien violent or did Mr. Berrien get violent?
A. In which conversation?
51. Q. Well, in any of them in the Telegraph Office?
A. In the Telegraph Office, no, in the Yard Office, Mr. Berrien said he would not leave and he was getting a little excited.
52. Q. Did he get violent?
A. I said he was excited.
53. Q. Did he threaten Mr. Herin, in any way?
A. He just told him he would not leave, to try and put him under arrest for trespassing.

.

54. Q. Did he threaten you?
A. No.

.

- "57. Q. Mr. Hering stated that, at approximately 3:42 P.M., you took Mr. Berrien by the arm and escorted him out of the rear door of the building, is that correct?
A. Mr. Hering told me to escort Mr. Berrien off the property. I told him to come along and he just stood there, so, I took his left arm and walked him outside the south door here, around the building, left go of him and he just walked along.
58. Q. At this time, did Mr. Berrien resist you, in any way?
A. No."

The Claimant admitted that he received a direct order to leave the property and that he did not do so. His stated reason was that he wanted to call his Local Chairman, but he did not mention this to anyone during the incident.

Discussion

Claimant's refusal to leave Carrier's premises on July 4th is the pivotal fact here, and we have no doubt that discipline was warranted. However, Carrier's case against Claimant was less than perfect and, indeed, if he had left the premises as directed and grieved later, his case here would be in a much stronger posture. The hearing evidence established that the telegraph operators covered for one another in respect to tardiness; they arranged for compensatory time to be owed to the covering employee and they did not normally report a late arrival to supervision. Carrier was justified, of course, in altering this practice and in requiring compliance with its reporting requirements. But in so doing Carrier was obliged to give reasonable notice of its insistence on compliance; such notice was not given in respect to the July 3 tardiness involved in the first hearing and, hence, the Carrier's action in finding guilt in this hearing was arbitrary and an abuse of discretion. However, in discussing his July 3 tardiness with the Assistant Superintendent, the Claimant was given clear notice that future tardiness would not be tolerated and, thus, he had adequate notice in respect to the July 4 tardiness which was involved in the second hearing. In this instance, though, the Claimant did phone in that he would be late and his tardiness on this occasion amounted to fifteen (15) minutes. If the matter had stopped there, it seems virtually certain that the discipline would not have amounted to permanent dismissal. But the matter did not stop. It escalated; the events that centered around the resignation affair on the afternoon of July 4th aroused emotions on both sides, and culminated in Claimant's wrongful refusal to leave Carrier's premises when instructed to do so. The Claimant was not justified in this action, but neither was the conduct of the Assistant Superintendent in the incident without blemish. Taking the Carrier's testimony in its most favorable light, the record shows that, while the Claimant's resignation was voluntarily given in the first instance, the Assistant Superintendent made his acceptance thereof contingent upon

the Claimant inserting an effective date earlier than July 28, 1972. Further, when the Assistant Superintendent thought he had in hand a resignation with a satisfactory effective date, he did not see fit to relieve Claimant from duty for the work shift of July 4th following the Claimant's 15-minute late arrival of that day; however, after discovering that the effective date was not satisfactory, the Assistant Superintendent returned to the telegraph office, accompanied again by the Patrolman, and relieved Claimant of duty. From these facts, we can but conclude that the Assistant Superintendent's conduct contributed to the charged atmosphere in which Claimant's refusal to leave the property occurred.

In light of the foregoing, and on the whole record, we believe that Carrier's action in finding guilt on the incident of July 3, 1972 was arbitrary and that the Carrier's Assistant Superintendent contributed to the creation of the conditions which engendered Claimant's wrongful refusal to leave Carrier's property on July 4th. We conclude therefore that the discipline of permanent dismissal was severe and excessive and we shall award that Claimant be restored to service without back pay.

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

The discipline of permanent dismissal was excessive.

A W A R D

The Claimant shall be restored to service without back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1973.