NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20272
Docket Number CL-20248

Frederick R. Blackwell, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7321) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on V. V. Stachowski, IBM Clerk at EA Yard, East Buffalo, N.Y., Buffalo Division, Northeast Region.

(b) Claimant V. V. Stachowski's record be cleared of the charges brought against him on February 1, 1972.

(c) Claimant V. V. Stachowski 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: This is a discipline case in which the Claimant, while serving as the regular incumbent of Position 211, IBM Clerk, East Buffalo, N.Y. was charged with "sleeping on duty" at about 4:45 A.M., February 1, 1972. The Claimant was withheld from service pending investigation; following a February 7, 1972 investigation and hearing, he was found guilty as charged and dismissed from the Carrier's service.

The Employes attack the discipline on the grounds, inter alia, that: (1) the Claimant was improperly held out of service pending investigation; (2) the Claimant's due process rights were violated in that (a) the hearing officer improperly refused to call as a witness the Carrier official who preferred the charges, (b) a Carrier official other than the one who conducted the hearing resolved the conflicts in testimony and rendered the decision, and in that (c) the Carrier improperly introduced the Claimant's past record into the hearing transcript; (3) the Carrier's hearing evidence does not prove the charge, in that the Claimant was not "sleeping on duty", but rather was resting during his normally allotted 20-minute lunch break; and (4) the discipline imposed was not reasonably related to the offense involved.

We concur with the Employes' point (1). We do not concur with the Employes' points (2), (3), and (4).

The Agreement of the parties (Rule 6-A-1(a)) provides that an employee may be held out of service pending investigation - "only if his retention in service could be detrimental to himself, another person, or the Company."

The record is barren of any evidence tending to show the existence of circumstances which, under the quoted text of the rule, justify a withholding from service pending investigation. Indeed, the Trainmaster stated that the Claimant was taken out of service "because of his past discipline record." This reason is obviously not covered by the plain wording of the rule and, consequently, we shall award compensation to Claimant for the period of his pre-hearing suspension from service.

The due process issues raised by the Employes have been before this Board in prior disputes and, as is well known, there is now a great number of Board Awards on this general subject. Many of the Awards (e.g., Nos. 12090, 14031, 19935, 17901, and 13240) appear to be primarily based on the notion that the due process requirements in a disciplinary proceeding in the railroad industry are more or less parallel to the due process requirements in a court of law. Other Awards (e.g., 14069, 10571, 14021, 18109, 17532, and 16347) appear to be primarily based on the contra notion that such legal due process has no place at all in industrial due process, and that due process in this industry flows exclusively from the parties' agreement, either expressly or impliedly, and from custom and practice. Each of these notions has something to recommend it. However, neither notion seems entirely suitable to the appellate review function which this Board carries out in considering a disciplinary action. Consequently, we are not disposed to embrace one of the notions over the other, or to select parts of each notion in an attempt to have the best combination of the two. It suffices here to say that the term "fair and impartial investigation," which is commonly found in disciplinary rules in this industry, means that the affected employe is entitled to a "fair" investigation (hearing) as such term is understood by reasonable minds and applied in the full context of the particular investigation under review. Thus where reasonable minds are likely to agree that either actual or potential prejudice has occurred in a particular case, and that such prejudice materially affects the finding of guilt or the quantum of discipline, then the Carrier's disciplinary action should be appropriately modified. Under this approach, some matters that would amount to a due process violation in a court of law would not necessarily constitute a due process violation in a disciplinary action in this industry. And vice versa, for as was well stated by this Board in Award No. 9517 (Elkouri):

> "...it must be remembered that probably no two discipline cases are identical in all respects, and that in discipline cases probably more than in any other type, each case must be decided largely on its own."

In applying the indicated criteria to the facts of the instant dispute, we note that the witness that Carrier refused to call signed the notice of charges, but he did not have any first hand knowledge of the incident under investigation; the testimony does not contain complexities or other elements which suggest that only the person who took the testimony could make proper determinations thereon; and the Claimant's prior record, though introduced at the hearing, does not appear to have formed part of the basis for the Carrier's finding of guilt. We therefore conclude that these facts, and the record as a whole, do not reflect a due process violation which warrants modification of the Carrier's action.

With regard to the merits of the charge, the Trainmaster testified that the Claimant was sleeping on duty while the Claimant asserted that he was resting during his lunch break. No other witnesses had direct knowledge of the incident. In pertinent part the Trainmaster testified as follows:

> "A. I arrived at EA Yard office at approximately 4:35 A.M., Feb. 1st, 1972. I observed everyone in the office working. I then noticed only two people in the IBM Room. I asked the Chief Clerk who the third person was and where he was. The Chief Clerk said that it was Valentine Stachowski and that he thought that he was in the Diccs Room. I went into the Diccs Room and found no one. I then told the Chief Clerk to look in the Men's Room. He did this and Stachowski was not in there. I then went downstairs and found Stachowski sleeping on a bench with his head resting on an IBM Card Box in the rear of the cellar. I stood next to Stachowski for five minutes and listened to him snoring heavily. I then shined my flashlight on him and told him to wake up. At first he did not respond. I called to him again to wake up and he then woke up and got up off the bench and almost fell to the floor because he was not quite awake. When he came to his senses I asked him what he was doing. He said he was taking a little lunch break. I said an employee on duty has no right to sleep at any time. He said he had a headache. I said 'If he was sick he should have gone home because I do not condone anyone sleeping while on duty.' I then informed Stachowski that he was out of service for sleeping while on duty and he would be notified as to the time and place of the investigation. He argued that he had a right to

"sleep while he was into lunch. I then told him again that he was out of service and would be notified as to the time and place of the investigation and that he was to leave the Penn Central property immediately. We went upstairs and he went back into the IBM Room. He stayed in there about five minutes. I then went into the IBM Room and told him to leave the Penn Central property. He said I have been working all night. See my last transmission was made at 4:25 AM and I was into dinner. I said I didn't care if he was into dinner or not, no one has a right to sleep while on duty. He then walked over to the chief clerk and said 'Don't forget I told you I was going to lunch'. Stachowski then left. I then ordered the Chief Clerk to mark Valentine Stachowski off at 4:50 AM on the timeslip because of being out of service."

The following version of the incident was given by the Claimant:

"Q. Were you sleeping in the cellar of EA Yard Office at approximately 4:45 A.M. Feb. 1, 1972?

A. No, I was not. I was resting and that was my lunch period. It is not a cellar, it is our locker room and lunch room.

Q. At about this time were you lying on a bench with your head resting on an IBM Card Box with your eyes closed and snoring?

A. I had my head on something, I don't know what it was and if I was sleeping I couldn't very well tell that I was snoring, however, I was resting and I was disturbed on my lunch period.

Q. You said if you were sleeping you wouldn't know if you were snoring or not. Do you know if you were snoring?

A. No, I wasn't snoring because I wasn't sleeping.

Q. Did Mr. Forcione wake you up?

A. No, Mr. Forcione shone the light in my face, which disturbed me because it blinded me.

Q. Did Mr. Forcione call to you?

"A. Yes, he called me by name, Stachowski.

Q. How many times did he call you before you got off the bench?

A. Once.

Q. What took place after you got off the bench?

A. We walked over to the lit part area of the lunch room and Mr. Forcione turned around and said you know what out of service means and I said yes, I do. He said, Well, you are out of service. He said follow me upstairs. Nothing more was said downstairs until we got upstairs and Mr. Forcione talked to Chief Clerk Mr. Bill Rieman.

Q. Did you inquire as to why Mr. Forcione was taking you out of service?

A. Yes, I did inquire and I objected to his reasons.

Q. What were Mr. Forcione's reasons?

A. Mr. Forcione said 'Nobody lays down while they are on duty'.

Q. Was the word sleep ever mentioned in your conversation with Mr. Forcione?

A. Yes, Mr. Forcione did mention the word sleep to which I objected.

Q. In what concept did he use the word sleep that you objected to?

A. When we were upstairs he said 'You were sleeping'. That is when I objected to the word sleep.

Q. What was your reply to Mr. Forcione's statement?

A. I wasn't sleeping, I am into lunch."

We conclude that the above testimony, and the whole record, provides substantial evidence in support of Carrier's action. In a comprehensive, detailed description of what he had observed and heard, the Carrier witness testified that the Claimant was lying on a bench, with head resting on a box, asleep in an unlit part of the lunch room. The Claimant admitted that he was lying down in an unlit part of the room. He said he "had his head on something" and "was resting" and, since this describes a position which gives the appearance of being asleep, the Claimant has only himself to blame when the appearance is taken to be the fact. But even if we assume that the Claimant was not asleep, but rather resting on his lunch break, discipline would still be warranted because prior Awards involving this same property have held that the 20-minute paid lunch break is for "the specified purpose of eating rather than the general purpose of relaxation or rest." Award No. 46, Special Board of Adjustment No. 589; also Fourth Division Award No. 2882. We also note that we have considered, but find not apropos, the Employes' argument and Awards concerning the questionable character of a disciplinary action which is based upon the testimony of a single witness. Similarly, since the Claimant's record shows two prior instances of sleeping on duty within the two years preceding this incident, we conclude that there is no basis for saying the discipline was excessive. We shall deny the claim, except that compensation for the suspension period is allowed without interest.

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

The Agreement was violated by an improper withholding from service pending investigation.

A W A R D

Compensation for the pre-hearing suspension period is allowed without interest, but otherwise the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.