NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20590
THIRD DIVISION Docket Number CL-20721

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7625) that:

1. Carrier violated the current Rules Agreement effective May 15, 1972, particularly Rule No. 21, when it assessed discipline of dismissal on Mr. A. C. Alexander, Reconsigning Clerk, Ravenswood, under date of July 17, 1973, and;

2. Carrier will be required to restore Mr. A. C. Alexander to service with all rights unimpaired, his record cleared of all charges brought against him, and he be compensated for all wage losses sustained, including fringe benefits, until such time he is restored to service.

OPINION OF BOARD: On July 11, 1973, Claimant was charged as follows:

> "Your responsibility for conduct unbecoming an employee, in your making vulgar and uncouth remarks in the presence of your co-workers at approximately 11:30 A.M. on July 9, 1973 and for directing vulgar remarks to a fellow employee at approximately 12:55 P.M., 1:05 P.M., 1:35 P.M. and 2:45 P.M. on July 11, 1973."

After investigation, Carrier terminated Claimant's employment.

As a procedural matter, Claimant urges that his rights were prejudiced because the notice of dismissal was signed by an individual who did not conduct the hearing; and who, in fact, was not present at the hearing to observe the demeanor of the various witnesses. We have noted previously a conflict in Board Awards in this regard, and have expressed concern when serious credibility questions control the disposition of a dispute. However, as noted by Carrier, this question was not raised while the matter was being considered on the property. In accordance with the procedures of this Division, matter is not properly before us when raised for the first time in its Ex Parte Submission.

Claimant denies the charges against him. Claimant and a Supervisor (Nelson) had a discussion immediately prior to 11:30 A.M. on July 9, 1973. At that time (Nelson states) Claimant was quite upset.

Immediately thereafter, Claimant was overheard, by two employees, to make a remark which contained certain words not employed in the politest of circles, and which remark implied a threat of physical force. Claimant testified that he was talking to a fellow employee concerning "basketball", and that any off-colored words were solely confined to a private discussion. At a latter time, Claimant admitted to Nelson that he had made the remarks, but denied that they were directed towards Nelson.

Mrs. Tumas testified that at 12:55 P.M. on July 11, 1973, she was discussing a report with Aranza. At that time, Claimant (who was not involved in the discussion) made a comment to Mrs. Tumas which contained an off-colored word. When she stated, "who asked you?" Claimant replied in a rather earthly fashion. Mrs. Tumas immediately reported the incident. Thereafter, according to Tumas, Claimant repeated the earthly statement to her at 1:05 P.M., 1:35 P.M. and 2:45 P.M. She reported all statements.

Although Claimant denied making the remarks to Mrs. Tumas, he did admit that he did mutter a statement to himself.

Aranza confirmed that the remarks were directed to Mrs. Tumas at both 12:55 P.M. and at 1:05 P.M.

Testimony of other witnesses indicating that they did not hear the remarks, does not convince the Board that the remarks were not made.

We find that the Carrier has presented substantial evidence to support the charge.

The Organization urges that even if the remarks in question were directed to fellow employees and co-workers, under todays standards of language usage, there is no basis for dismissal. In this regard, Claimant has presented evidence that it is quite common for the male employees to "swear" in the office. However, there is no evidence to suggest that the employees swore directly at each other. Moreover, the record indicates that rather than Claimant being guilty of an unintended indiscretion, or making a statement in the heat of momentary anger or frustration; he deliberately and repeatedly directed totally unnecessary language toward a fellow employee. Thus, even if dismissal was not warranted, a severe disciplinary action was appropriate.

Finally we consider events which transpired after the investigation. Grievant was terminated on July 17, 1973. On that same date, he allegedly visited Carrier's office and assertedly threatened a fellow employee. The Organization argues that said allegation may not be considered, in any manner, inasmuch as it is solely unrelated to the charges, was not considered at the investigation and is not an official matter of record.

Carrier cites Awards which state that after a determination of guilt has been made, it is appropriate to consider an employee's record when assessing the quantum of discipline. While we do not dispute the cited Awards, we question that the July 17, 1973 incident is properly before us.

While the record is not clear as to whether the asserted incident of July 17, 1973 was considered by the Official who imposed the discipline of permanent discharge, the Carrier, in its initial denial letter stated:

> "...his conduct thereafter was even more reprehensible.... I desire that this information be made part of the record and can assure you that it will be considered in any future handling of this case." (underscoring supplied)

The Organization replied that the alleged incident of July 17, 1973 could not be considered when assessing discipline.

Carrier responded that while the matter could not be considered when assessing discipline, it is appropriate to a determination of return to service.

Thus, it is obvious that any concept of considering a reduction of the dismissal to a lesser penalty during the review process was completely obscured by the alleged incidents of July 17, 1973.

As we read Carrier's cited Awards, dealing with permissible review of prior records, we do not concur that they are authority for Carrier's action here. The alleged victim made a report of the incident, but decided not to press charges. There was no investigation of the matter, as far as we know, and no opportunity for the Claimant to face his accuser. Certainly, Carrier had the right to bring additional

charges against Claimant, if it so desired, but we question that a report of the alleged incident, with nothing further, was an appropriate basis for Carrier to deny Claimant a consideration for reduction in penalty during the Appellate process.

Accordingly, the Board has reviewed the matter without reference to the July 17, 1973 asserted incident. While we feel, as noted above, that Claimant's actions demand serious disciplinary action, we feel that discharge was excessive, especially when we note that use of common language was tolerated in the office.

We will restore Claimant to service with seniority and other rights unimpaired, but without compensation for time out of service.

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 imposed was excessive.

A W A R D

Claim sustained to the extent stated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulin
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.

CARRIER MEMBERS' DISSENT TO AWARD 20590, DOCKET CL-20721

(Referee Sickles)

In view of the seriousness of the offense committed by the Claimant, we dissent to that portion of the award which restores Claimant to Carrier's service.

J T Taylor

P C Carter