NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20602
Docket Number MW-20652

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Northwestern Pacific Railroad Company

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

(1) The dismissal of Magin Beltran from service for alleged violation of Rule 801 was capricious, arbitrary, without just and sufficient cause and on the basis of unproven charges /System File 011-181 (B)/

(2) Mr. Magin Beltran be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered in accordance with Rule 25.

OPINION OF BOARD: Claimant was dismissed from service on September 20, 1973 after an altercation with his foreman. He was dismissed by a letter dated September 20, 1973 which specifically charged him with being indifferent to his duty as instructed by his foreman, with acting in a quarrelsome or other vicious manner towards his foreman and with threatening his foreman and using profane language. This conduct was alleged to be in violation of Rule (M) 801 of Carrier's Rules and Regulations, which reads in pertinent part:

> "Employes will not be retained in the service who are careless of the safety of themselves or others, indifferent to duty, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in a manner which would subject the railroad to criticism.
>
> Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other. Boisterous, profane or vulgar language is forbidden."

In accordance with Rule 25 of the schedule Agreement, Claimant requested a hearing; the hearing was held on October 9, 1973 and by letter of October 11, 1973, the dismissal was affirmed. It is noted that in the letter setting the date for the hearing, Claimant was also charged with additional misconduct directed at his foreman and a roadmaster which allegedly took place when the two officials were attempting to dismiss Claimant on the afternoon of September 20th.

Petitioner makes a series of arguments which must be evaluated. Principally, the point is made that the testimony presented at the investigation neither justifies the dismissal nor supports the charges placed against Claimant. Petitioner argues vigorously that a substantial portion of the testimony at the investigation was directed towards events subsequent to the dismissal (after 1:40 P.M. on September 20, 1973) and should not be considered. It is also contended that the profanity which might have been used by Claimant at Laughlin (and it was denied) was not per se justification for discipline much less discharge; it was merely "shop talk". It is also argued that an individual should not be found guilty of a charge of misconduct based on the testimony of one witness and further that the Superintendent who rendered the decision after the hearing was not present at the hearing and therefore was not qualified to make the critical findings with respect to credibility. In its able brief and arguments, the Organization argued that the entire dispute had been magnified out of all reasonable proportions: it started with Claimant eating a sandwich and ended with the Roadmaster accusing him of being a thief.

Carrier, arguing in support of the discipline accorded Claimant, first states that Claimant was paid for the entire day of September 20th, that is until 3:30 P.M., and his misconduct while being dismissed occurred while he was still an employee and was directly associated with his prior misconduct that morning: it constituted a continuing violation. Carrier argues that there is nothing deficient in the testimony of only one witness as the determining factor, particularly in altercation cases. With respect to the credibility finding argument raised by the Organization, Carrier states that not only was this issue improperly raised for the first time in Petitioner's submission but that it was a well accepted practice on this property for hearing officers to make a final report and recommendation after hearing which is then reviewed by the Superintendent who renders the decision. Carrier concludes that Claimant was found guilty of multiple offenses, including insubordination, indifference, use of profanity and violence toward his supervisors, all of which justified his dismissal; in addition he had a bad record including a prior dismissal for a similar offense.

Although, as Petitioner states, this dispute started innocuously over the issue of Claimant eating a sandwich at 8:25 A.M., it rapidly became a more serious matter, transcending the triggering incident. We cannot ignore, for instance, the conduct of Claimant during the process of dismissal on the afternoon in question; he remained under pay for the entire day and was accountable for his behavior to his superiors on the property that entire day. It should be noted, however, that we deem the evidence of misconduct for the

morning incident sufficient for the conclusion reached by Carrier, without the added problems attendant upon the dismissal. With respect to the Organization's apparent condonation of the language used by Claimant, we do not agree; although the language in itself, though profane, was not of the extremely profane variety, it was beyond the normal shop talk level. More important, we view Claimant's language used to the Foreman as deliberately provocative and defiant which is more significant than the words themselves. We do not agree with Petitioner's position with respect to the "one witness" theory; in most altercation cases there are only the two participants as witnesses. We are not precluded from making a finding for this reason alone (See Awards 14356 and 15713 for example) in such cases, but at the same time judgments as to credibility and the weight of the evidence are reserved to the hearing officer rather than to us. We also reject the argument as to the hearing officer not signing the final decision of Carrier; the argument was both untimely raised and unsound in this case.

A review of the testimony at the hearing reveals substantial evidence to support the affirmation of the dismissal. At the very least in the morning incident the evidence indicates Claimant used profanity, exhibited a totally disrespectful attitude to his foreman and refused to submit to reasonable authority and instruction. The afternoon confrontation contained even more serious misconduct. It is also noted that this employe started working for the Carrier in 1965 and had twice been admonished for, in one instance, profane and vulgar language to a foreman and in the other for refusal to follow instructions. In addition Claimant had been dismissed on December 20, 1971 for conduct including profanity, indifference, and quarrelsome language adding up to insubordination (he was reinstated six months later). It is obviously appropriate for an employe's past record to be considered in the determination of penalty for misconduct, once the matter of guilt has been decided.

In this dispute there is substantial probative evidence in support of Carrier's conclusion; as a matter of long standing policy we will not substitute our judgment for that of the Carrier in evaluating such evidence. The penalty invoked in this case was neither arbitrary nor capricious, particularly in view of Claimant's past record, and we will not disturb it.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1975.