

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20860
Docket Number CL-20767

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees
(
(Southern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7539) that:

(a) Carrier violated the Agreement at Charlotte, North Carolina, when it suspended Mr. Harry Yandle, Clerk, from the service of the Carrier February 17, 1972 through February 27, 1972; and

(b) Carrier shall be required to compensate Mr. Harry Yandle, Clerk, for nine (9) days' pay at his daily rate for each work day lost beginning February 17 and ending February 27, 1972.

OPINION OF BOARD: Claimant entered service with Carrier in December 1969 and in February 1972 he occupied the position of Yard Clerk at Charlotte, North Carolina with regularly assigned hours of 3:00 to 11:00 p.m. Tuesday through Saturday. On Thursday February 17, 1972 an incident occurred which resulted in Claimant's suspension from service at about 4:30 p.m. By letter dated February 17, 1972 Carrier informed Claimant as follows:

"This is to advise that effective today, you are suspended from the service of Southern Railway for a period of ten (10) days, time ending 3 p.m., Thursday, February 27, 1972. Anytime that you are off after this will be of your own accord.

The reason for this suspension is that you were observed on more than one occasion loitering in washer/locker room not protecting your assignment."

Claimant requested an investigation and on his return to service on Tuesday February 29, 1972 a hearing was held at which Claimant was represented by Petitioner herein. On April 12, 1972 Claimant notified Carrier that he was claiming nine "(9) days pay account the company unjustly holding me out of service from February 17, 1972 until February 27, 1972." The matter was handled through all appeals procedures on the property, time limits were extended as necessary by mutual agreement of the parties and the claim ultimately was declined on December 15, 1973.

The record shows that Claimant on February 17, 1972 at approximately 4:20 p.m. was confronted by his supervisor, G. F. Helms, Assistant Agent-Terminal Control, while seated at a table in the switchmen's locker room talking with another clerk, one W. A. Meade. Meade was just completing a tour of duty and Claimant had come on at 3:00 p.m. The switchmen's locker room contains a lavatory and is open to all employees in the yard. The incident between Claimant and Helms is best reconstructed by reference to their respective testimony in the transcript of the investigation held February 29, 1972, to wit:

Helms: "At approximately 4:20 p.m., February 17th, I went in the switchmen's locker room to pick up some yard placing tickets. I observed Mr. Yandle and Mr. Meade sitting across the table from each other. Mr. Meade had his radio on the floor and Mr. Yandle had his radio on top. I asked them then if there wasn't any work on the yard for them to be doing. Mr. Yandle stated that we had four yard clerks at that time. That there wasn't any work to be done. I told him if I observed him in the switchman's locker room any more when he was on duty, supposing to be performing his duties, that I would take him out of service. Mr. Yandle said then, 'Well, you can take me out of service now if you want to'. I told him he was out of service."

Yandle: "I went to work at 3 o'clock and worked continuously until I got all my duties performed. I had some gravel in my shoe and I had to go to the rest room. Being near the new building there, I stepped inside, washed my hands, used the restroom, sat down on the bench and I took the gravel out of my shoe and had just got my shoe back on and tied when Mr. Helms walked in and confronted me about work to be doing and me loitering in the locker room. I didn't have a chance to explain to him. He told me to get outside and do something or I would be taken out of service."

The unrefuted record shows that Helms transported Claimant, at the latter's request, to the yard office where they met with Helms' superior G. K. McKinna, Agent-Terminal Control. At this meeting, Helms indicated to McKinna in Claimant's presence that he had just suspended Claimant but would defer to McKinna's judgement on the matter of restoration to service. Claimant interjected "I am already out of service and I will leave it up to my local chairman," whereupon Claimant left the property.

Petitioner on behalf of Claimant contends that Carrier has failed to prove by substantial record evidence the charges of "on more than one occasion loitering in washer/locker room not protecting your assignment." There are no allegations herein that Claimant did not receive a fair and impartial investigation but Petitioner does maintain arguendo that the discipline imposed was excessive and consequently arbitrary, unreasonable and capricious.

Rule 40, the Discipline Rule of the parties' agreement, has since been amended but at the time of this incident read in pertinent part as follows:

"(a) Employees will not be discharged or disciplined except for cause.....Pending investigation employees may be relieved from service. If found blameless, they will be paid for lost time. If employee receives remuneration for services from Company or others during suspension or dismissal, only actual amount lost will be paid."

Our review of the record herein leads to a conclusion that Claimant was not without blame regarding the incident of February 17, 1972. He was in an apparent state of rest when confronted by his supervisor and rather than provide his explanation when questioned he arrogantly challenged the supervisor. On the other hand, in the peculiar facts of this case supervisor Helms likewise was not without blame. Upon encountering Claimant he ordered him to return to work which is within his prerogative but also in the same breath he threatened suspension without waiting for Claimant to obey or to explain his presence in the locker room. In our considered judgement, the precipitous threat by Helms and the petulant challenge by Yandle equally contributed to the incident. Each engaged in brinkmanship and escalated a relatively minor incident into a confrontation and a disciplinary matter. Claimant further aggravated his situation by rejecting out of hand the overture to return him to service.

The record does not indicate that Carrier considered the precipitating role of supervisor Helms when it assessed the ten (10) days suspension on the day of the incident. To this extent we deem the penalty arbitrary and hereby reduce the assessed discipline to a suspension of five (5) days. Since Claimant actually lost nine (9) days pay, he shall be recompensed for four (4) days pay at his daily rate in February 1972, less any offset consistent with Rule 40 (a) of the then-existing Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

The claim is sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1975.