NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20919
Docket Number CL-20870

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Robert W. Blanchette, Richard C. Bond, and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7629) that:

(a) The Carrier violated the Rules Agreement, effective September 15, 1957, particularly Rules 16 thru 20, when it assessed discipline of dismissal on Claimant, Mary Kahramanidis, Clerk in the office Division Sales Manager at New Haven, Connecticut, in the Carrier's Northeast Region, New Haven Division (former New Haven Railroad).

(b) Claimant Mary Kahramanidis' record be cleared of the charges brought against her on May 17, 1973.

(c) Claimant Mary Kahramanidis 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: On May 17, 1973, Claimant was the regular incumbent Clerk in the office of the Division Sales Manager, Mr. Maurer, at New Haven, with 31 years of service with Carrier. On said date, an altercation occurred between Claimant and Miss Rousseau, temporary Chief Clerk, whose regular assignment was Secretary to Mr. Maurer. The following morning, May 18, Mr. Maurer took the matter up with both ladies, whereupon Claimant was relieved of duty as of 10:00 a.m. that very day. On May 21, 1973, Mr. Maurer notified Claimant to attend a hearing on May 24 in connection with two charges; viz: "1. Insubordination in that you refused an order from your supervisor", and "2. Creating a disturbance in the office".

The hearing was rescheduled at Organization request for May 29, and letter to that effect mailed by Mr. Maurer to Claimant's P.O. Box No., by registered mail, return receipt. Petitioner asserts that Claimant did not receive such letter in time, if at all. Claimant did not appear at the hearing, which was then held in absentia over the repeated protests of the Division Chairman. Claimant was found guilty as charged and dismissed from service as of June 1, 1973.

Petitioner contends that Carrier violated the Agreement as detailed in the Statement of Claim. Similarly, the relief demanded is set forth in the Statement of Claim. However, Claimant was restored to service as of February 26, 1974. Thus, the latter issue is no longer a factor in this dispute.

Procedurally, Petitioner raises objection based on the fact that Sales Manager White made the determination of guilt instead of the hearing officer, Mr. Maurer. On this issue, this Board has held repeatedly that such procedure is not improper, particularly where there is nothing in the Agreement that prescribes who shall prefer charges, conduct hearings, render the decision or assess discipline. Accordingly, we do not sustain Petitioner's objection.

See Awards 16347, 15714, 14021 and 20828, among many others.

Other procedural objections are raised as to certain items of "new matter". But these are rather minor in nature and not of sufficient impact to deter us from resolving this dispute on the merits.

The conduct of the hearing itself, however, leaves much to be desired. Claimant did not attend, based on the fact, as asserted by Petitioner, that she did not receive the notice of the adjourned hearing date and was subject to illness. It is not disputed that the notice was mailed to Claimant on May 24, with a weekend and Decoration Day intervening, and the hearing date, May 29, falling on the next day after the holiday weekend. Carrier offered no proof of Claimant's receipt of the notice and, although registered mail was used, the return receipt was not produced in evidence. On these circumstances, the Organization raised strenuous objection to the propriety of the investigation, at the very outset and at other times throughout the conduct of the hearing.

We are not, however, disposed to resolve this dispute strictly on procedural issues, but rather do we address ourselves to the merits.

We do not disagree with Carrier's contention that insubordination is a serious matter often justifying the discipline of dismissal. Nor, do we take issue with the cited precedents in support of this principle. Conversely, however, it is also well established principle that the burden of proof rests upon Carrier in discipline cases. The precedents on the latter issue are legion and need hardly be cited.

On the merits, therefore, and based on the record evidence, we are not persuaded that Carrier sustained its burden of proof on the charge of insubordination. Insubordination is defined as deliberate and inexcusable failure or refusal to obey a proper order of a superior.

Obviously, mere temporary delay in compliance due to other work involvement does not constitute insubordination; nor does the fact that protest was made thereafter. This is the sum total of what was involved in this dispute.

The chief witness, practically the only witness, was Miss Rousseau. Stripped of various irrelevant matters the crux of her charge was that she had twice told Claimant to answer the telephone. Claimant protested that she was sending out a wire, but when told to "stop that for now," she did in fact answer the phone. The balance of Miss Rousseau's testimony relates to various aspects of altercation between two women, who apparently did not get along with each other, and at a time approaching the end of the workday when both were obviously quite busy at their respective duties and under some degree of pressure. Essentially, the latter testimony is also the basis of Carrier's charge that Claimant created "a disturbance in the office."

In passing, we note Miss Rousseau's testimony that she "was not very efficient since this thing happened" and that "it affected everything I tried to do in the office after that". Clearly, the incident with Claimant was not of such serious nature as to warrant such obvious exaggerated description of its aftereffects. Nor did it corroborate that the "disturbance" did in fact occur.

The only other witness at the investigation was Mrs. Marenholz, and her testimony was exceedingly brief and of insufficient corroborative value as to the two elements of the charge. She testified that after Miss Rousseau twice asked Claimant to answer the phone, that Claimant did in fact do so. This witness stated further "I didn't really hear everything between their phone calls". Thus, it seems quite clear that the incident here involved hardly "disturbed" Mrs. Marenholz. Nor was it of such consequence as to make any substantial impression upon Mrs. Marenholz or to cause her to remember it when she testified.

We cannot conclude, on the basis of the testimony, that Carrier sustained its burden of proving by substantial probative evidence that Claimant was guilty of insubordination or that she created a disturbance in the office. This is particularly true when we take into account that Claimant was tried in absentia and, in view of the short notice over a holiday weekend, was not given sufficient opportunity to be present at the hearing and to offer her own explanation of the occurrence upon which the charge was based.

Carrier has cited several prior Awards as having precedential bearing on the issues of this dispute, but these deal with much more serious charges of insubordination.

Thus, for example, Award 16948 involved deliberate insubordination and the use of vulgar and abusive language to a supervisor, most of the charges being admitted by Claimant. Award 18563 dealt with the repeated refusal "to perform duties of his position" until his complaints were heard. Award 20102 involved repeated refusal to check a certain interchange and insistence on checking another interchange. Award 19698 concerned "indifference to duty, being quarrelsome, and absence from employment without proper authority". Award 18362 dealt with aggravated and continuous insubordination and being resentful of and resistant to authority. And finally, in Award 20263, the claim was denied in view of only four years of service and a poor service record. Additionally, none of these hearings were held "in absentia".

We are cognizant of the fact that in March, 1972, a somewhat similar but minor situation occurred, on the basis of which Claimant received a reprimand. We are compelled, however, to weigh this "prior occurrence" against Claimant's otherwise unblemished record of 31 years of service with Carrier. The record evidence does not speak to the contrary.

We conclude, therefore, on the evidence produced in this record, that Carrier has failed to establish by a preponderance of probative facts that Claimant was guilty of the charges lodged against her. Additionally, we find that the discipline here imposed, nine months suspension with resultant loss of earnings, is unreasonable and arbitrary, and unwarranted when measured by the minor nature of the offense.

Accordingly, with one exception, we will sustain the claim. That exception relates to the demand "plus interest at 6% per annum compounded daily."

We find nothing in the Agreement to support such claim for "interest", and, although several cases are cited by Petitioner as precedent, the overwhelming weight of authority in this Division holds to the contrary. Such demands have been denied consistently by this Board.

See Awards 6962, 13478, 15709, 18433, 19935, 20014, 20151, 20348, and 20547, among a host of others.

Finally, with respect to the claimed loss of earnings, Rule 20 provides, in the event that charges are not sustained, that the employee be "compensated for the wage loss, if any, suffered by him". On the basis of established precedent in prior Awards of this Board, we construe this to mean that wage loss compensation shall be reduced by any earnings of Claimant in other employment during the period of suspension. We so hold here.

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 violated.

A W A R D

Claim sustained in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January 1976.