NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21240
THIRD DIVISION Docket Number CL-21452

Dana E. Eischen, 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-8055, that:

1. Carrier violated the terms of the Agreement effective May 15, 1972, particularly Rule 21, when under date of September 12, 1973, it dismissed from service Mr. D. R. Tickal, Yard Clerk, Mason City, Iowa, and;

2. Carrier shall be required to reinstate Mr. D. R. Tickal with all rights unimpaired, and compensate him for all time lost, or, compensate him for all time lost starting with a reasonable date subsequent to his dismissal, in accordance with discipline administered to the other involved parties concerned with the incident in question.

OPINION OF BOARD: Claimant D. R. Tickal entered Carrier's service in December 1962 and at the time this matter arose was employed as Yard Clerk at Mason City, Iowa. The facts out of which this claim arose are not contested and may be summarized as follows:

1) During the period 1970-73 Claimant and certain other employes of Carrier, including Claimant's direct supervisor, Chief Yard Clerk T. A. Benson, removed from Carrier's property grain spilled on the ground or left in cars and sold it for personal profit at a local grain company.

2) Carrier investigation revealed that Benson pocketed $213.64 as a result of his activities and Tickal cleared $3213.53 over three years. Each of these employes acted separately for their own accounts except for one occasion when they jointly removed a large pile of spilled corn and split the proceeds equally.

3) No Carrier policy had been stated relative to removal of grain spillage prior to July 1973 when the Trainmaster instructed a group of employes not to take any grain from Company property. So far as the record shows no grain was taken by Claimant after that date.

4) Carrier security staff began an investigation of grain sales in the Mason City area in August 1973 and determined that Claimant and Benson had made several suspicious sales over the years. When confronted with this information both employes admitted taking and selling the spillage and sweepage from grain cars.

5) In September 1973 both employes were brought up on identical charges of "unauthorized removal of grain from equipment and spillage and the sale of same for personal profit." Following separate hearings at which they were represented both employes were found guilty and, by identical Notices of Discipline dated September 12, 1973, both were dismissed from service.

6) The Organization undertook a consolidated appeal of the Benson and Tickal dismissals in a letter dated October 8, 1973 and reading in pertinent part as follows:

> "In view of their respective years of service with the Carrier, we believe that under the circumstances involved that the complete dismissal of the two employes herein involved is excessive and the imposition of an excessive penalty is a violation of the Agreement protecting employes from what may be considered as arbitrary and capricious action on the part of the Carrier.
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> "Accordingly, it is our believe that the two employes herein involved should be given another chance, without, however, over-ruling the finding of guilt of each of the two employes herein involved. This can be accomplished by reinstating D. R. Tickle and T. A. Benson to their respective former positions with all rights and privileges under our rules agreement, however, with no pay for loss in wages suffered by them.
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> "We hereby request that you give consideration to this request and advise.
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> "Please consider this as an appeal from your decision as rendered in your discipline notices affecting the two employes involved as issued under date of September 12, 1973.
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> "Your prompt consideration and compliance with this request for the reinstatement of the two employes would be most appreciated by all concerned."

This appeal was denied by Carrier's Director of Labor Relations on December 13, 1973 who noted that inter alia the appeal contained no request for back pay.

7) The Organization filed another consolidated appeal of both cases on January 3, 1974, this time seeking back pay from November 2, 1973 (in effect a suspension of about two months rather than a dismissal). This was denied by the Division Manager on January 9, 1974 in part as follows:

> "As you indicate I did decline your original request for reinstatement in my letter to you dated October 12, 1973. Your letter of revision of the basic appeal for reinstatement was received January 4, 1974, your letter being dated January 3, 1974.
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> "I am sure you are aware that your request has gone well past the time limit for such appeals and I am informing you accordingly that your modified appeal is not acceptable."

By letter dated March 9, 1974 the Organization again appealed to the Director of Labor Relations. The record contains no specific disposition of this particular appeal letter but, in a letter to the General Chairman dated October 10, 1974, adverting to the original appeal letter of the Organization, the Director of Labor Relations stated as follows:

> "Please refer to previous correspondence, your file 6-73-21-236 concerning your request for reinstatement of Mr. D. R. Tickal and Mr. T. A. Benson, former Clerks, Mason City, Iowa, on a leniency basis, last discussed in conference on September 12, 1974.
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> "I am agreeable to reinstating former Clerk T. A. Benson on a leniency basis, with no payment for time lost, however, with seniority, vacation rights and insurance unimpaired, provided he can pass such examinations as may be required under current instructions.
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> "I am not agreeable to reinstating former Clerk D. R. Tickal.
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> "If you are agreeable to the above with the understanding that your acceptance of my proposal concerning Mr. Benson in no way prejudices your right of appeal under the Railway Labor Act for Mr. Tickal, please indicate your concurrence by signing and returning one copy of this letter."

The record shows that Benson and two other employes made restitution to Carrier and were returned to service without back pay. Tickal has not been returned to service and since September 1973 has worked at various times for employers other than Carrier.

The position of the Organization on appeal to this Board is succinctly set forth in its Ex Parte Submission as follows:

> "The issue at bar in this dispute is whether the discipline assessed by carrier in this case was arbitrary and capricious, in view of the fact Claimant was actually unaware that he was acting in a manner unsatisfactory to carrier. Further, whether the discipline assessed was excessive, if found guilty as charged, in view of all the facts and circumstances involved in this case; such as Claimant's honest and cooperative attitude toward the charge and the fact all three other employes have been reinstated with all rights unimpaired.
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> "It is the position of the Employes that carrier violated the terms of the Agreement effective May 15, 1972, in spirit and with contempt, particularly Rule 21, when it dismissed Claimant from service for his part in the incidents which gave cause for carrier's investigation, and action which has now been proven to be discriminatory due to the reinstatement of the other involved employes."

Carrier resisted this particular claim on the property and in its Ex Parte Submission on several grounds, to wit: 1) Any claim for wage compensation is untimely and not properly before us since it was not filed within 60 days of the dismissal per Rule 35; 2) The more severe discipline of Tickal is warranted and is not unreasonable because (a) He was involved over a longer period and to a greater extent than the others, (b) "It is believed that the other employes became involved through the investigation of Mr. Tickal," and (c) Those employes who were dismissed and subsequently reinstated in fact made restitution to the Company but Tickal to date actually has not done so, but merely offered to do so.

Accordingly, Carrier urges that the Claim be denied in toto or alternatively that no monetary damages be permitted to run in Claimant's favor.

Reduced to its essence, the question in this case is whether Carrier had a reasonable basis for singling out Claimant for substantially greater discipline than that imposed upon any of his fellow transgressors, including his immediate supervisor. We recognize that in so viewing the case we sweep away a number of procedural questions which might have been presented on this record. We do so only after carefully analyzing the record and determining that such troublesome questions as which claim Carrier dealt with on October 10, 1974, and, whether a true leniency situation with attendant restrictions on our appellate role is presented herein are not adequately joined or were belatedly raised. With respect to the Carrier's Time Limit defense of Part 2 of this claim we find that it is well taken with respect to so much of the claim as seeks compensation for all time lost. Such claim was raised belatedly on January 3, 1974 in an appeal which amounted to nothing more than a more specific reiteration of the Organization's earlier appeal for reduction in the penalty from dismissal to suspension without pay. Thus, the only issues ripe for our review are whether, in all the circumstances, Carrier acted unreasonably in dismissing Claimant and, if so, what should be the appropriate remedy.

There is no doubt that Claimant was afforded a fair investigation or that the record supports a conclusion of his culpability. We do not condone his side-line business in Carrier's spillage nor do we subscribe to the theory that either the contents of cars or spillage from cars belongs to anyone merely for the taking. On the other hand, we cannot close our eyes to the fact that several other employes besides Claimant were engaged in a practice of putting spillage in sacks and hauling it away to grain elevators. Over a period of three years the record shows that Claimant and his supervisor alone sacked and hauled away over 60 tons of spilled grain in assorted small lots during their off duty hours. It is true, as Carrier points out that the employes here did not have permission to do what they did and should have known better than to take the grain without permission. cf Award 20771. But in the face of such persistent and frequent removal of spillage it is difficult in this case not to find Carrier condonation or negligence in permitting such an extensive practice to prevail without admonition, let alone discipline, for three years.

Turning to what we view as the crux of the case, the disproportionate discipline of Claimant, we are guided by the axiom that like offenders should be punished the same, absent some good reason for discrimination, e.g.,poor discipline record, length of service, degree of culpability. Thus, failure to apply and enforce the rules with reasonable uniformity for all employes is one basis upon which this Board may find Carrier imposition of discipline unreasonable, arbitrary or

capricious. See Award 8431 (Daugherty). As we read the precedents the burden in such cases is upon Carrier where the Organization, as here, makes a prima facie showing that co-actors have been disciplined with substantially different penalties. Carrier contends that Claimant was the instigator but there is not a shred of evidence to support this Dickens-like theory. Claimant's supervisor was no Oliver Twist and Claimant was no Fagin leading the others to filch for his gain. Rather the record shows beyond doubt that each was acting as an independent entrepreneur and Benson testified he was not sure whether he enlisted Claimant in their single joint venture or vice versa. Nor do we find Carrier's distinctions regarding restitution to be persuasive. Benson actually made restitution and Carrier accepted it and returned him to service. Claimant tendered restitution several times (twice at his hearing on September 10,1975) but Carrier refused to accept it and dismissed him. On the other side of the comparative process, Claimant had ten years of service without discipline as a subordinate Yard Clerk. Benson had eight years of service and was a supervisor. There is no ready explanation why the supervisor was punished less severly for identical offenses than was the underling.

In all of the circumstances we are persuaded that the dismissal of Claimant was arbitrary and unreasonably discriminatory and should be modified to conform to the discipline assessed his colleague. We shall sustain the claim to that extent. Thus, conditioned upon his restitution to Carrier of the sum of $3213.53, Claimant shall be offered reinstatement to service effective October 10, 1974 with no payment for time lost from September 12, 1973 to October 10, 1974, however with seniority, vacation rights and insurance unimpaired, provided he can pass such examinations as may be required under current instruction. If Claimant is reinstated under such conditions he also shall be compensated for time lost since October 10, 1974 until such reinstatement, less any amount earned in other employment during that time.

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 to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.