NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21289
THIRD DIVISION Docket Number CL-21475

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-8047, that:

1. Carrier violated the current Agreement Rules, particularly Rule 21, when under date of November 20, 1974 it dismissed Mr. Leroy O. Burnley, Freight Rate Revisor, from service account investigation held on November 13, 1974; and

2. Carrier shall be required to reinstate Mr. Leroy O. Burnley on his position, and compensate him for all time loss from November 20, 1974 forward, until such time as the violation is corrected.

OPINION OF BOARD: In this discipline case Mr. Leroy O. Burnley, a Freight Rate Revisor working in Carrier's accounting office at Ravenswood (Chicago), Illinois, was discharged from all service effective November 20, 1974. The charges against Claimant, which Carrier found to be substantiated on the basis of hearing held November 13, 1974, were set forth in a letter to Burnley from Mr. G. S. Piontek, Auditor Freight Rates and Claims, reading in pertinent part as follows:

"Charge: 1) Your responsibility for your failure to comply with instructions previously issued with respect to your continual talking and being away from your desk.

2) Your responsibility for excessive talking and being continually away from your desk on the following dates:

October 29, 1974
October 30, 1974
October 31, 1974
November 1, 1974
November 4, 1974 "

Mr. Burnley, through his Labor Organization, appealed his dismissal without satisfaction on the property. Confining our review, as we must, to issues joined on the property, the Organization contends the claim should be sustained in its entirety for three basic reasons: 1) The hearing of Novem-

ber 13, 1974 was not timely held under Rule 21 of the controlling Agreement; 2) Arguendo, Carrier has not proven the charges against Claimant to be true by substantial evidence on the record; and, 3) Dismissal is arbitrarily and unreasonably harsh in this case. Carrier resists the claim by maintaining 1) The record clearly supports the charges against Claimant; 2) In light of prior warnings and Claimant's past discipline record discharge is not unreasonably harsh discipline; and, 3) Arguendo, if there was a two-day delay in holding the hearing there was no prejudice thereby to Claimant and he should not escape responsibility for his misconduct due to a technically strict reading of the contract.

Turning first to the question of procedural timeliness we observe that Article 21 reads as follows:

"RULE NO. 21 - DISCIPLINE AND INVESTIGATION

(a) An employe who has been in the service sixty calendar days or more or whose application has been formally approved, shall not be disciplined or dismissed without a fair and impartial investigation, and prior thereto will be notified in writing of the precise charge. At the investigation the employe, if he desires to be represented, may be accompanied and represented by the 'duly accredited representative' as that term is defined in this agreement. He may, however, be held out of service pending such investigation in which event he shall be immediately apprised in writing of the precise charge against him. The investigation shall be held within seven calendar days of the alleged offense or within seven calendar days of the date information concerning the alleged offense has reached his supervising officer. In cases where discipline is administered, a decision in writing, with copy to the duly accredited representative, will be rendered within seven calendar days after the completion of investigation. Investigation shall be held, whenever practicable, at point of employment of the employe involved and at such time as not to cause the employe to lose rest or time. Employe shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses. Forty-eight hours will, under ordinary circumstances, be considered reasonable time."

The record shows that Claimant's supervisory officer, Piontek, returned from a one-week vacation on Monday, November 4, 1974, and was told by two of his assistants (the Office Manager, Mrs. S. G. Barnett, and the Head Clerk, Mr. W. P. Hogan) that Claimant had been "gold-bricking" during his absence. Hogan, who was Claimant's immediate supervisor, presented Piontek with a written report of Hogan's direct observations of Claimant's activities, for the most part on a minute-by-minute basis, during the 8:30 A.M. to 4:50 P.M. workdays from Tuesday October 29, 1974 to Monday, November 4, 1974. The Hogan report, attached to the hearing transcript as an addenda, indicated

that Claimant spent over 50% of the available work time away from his desk in conversation with other employes, making personal telephone calls, or whereabouts unknown. That report includes the afternoon of November 4, 1974 up to 2:00 P.M. and it may logically be presumed this is approximately when Piontek received the report on that day. The charges were filed on November 6, 1974 and the hearing was held November 13, 1974. The Organization points out that strict construction of Rule 21 required the hearing to be held on November 11, 1974 and therefore the entire disciplinary proceeding is void ab initio and irrevocably defective. Upon careful consideration of the record we do not concur with this view. The Organization is correct in its assertion that the agreement time limits are important safeguards against dilatory handling and prejudicial delays which can negatively impact on accused employes. But we do not find such fatal flaws in the handling of this matter. The supervisory officer Piontek received the information from his subordinate late in the day of November 4, 1974, filed the charges two (2) days later and the hearing was held within seven (7) days of the filing of charges. Claimant was entitled under the Agreement to forty-eight (48) hours notice of the hearing and he received 7 days notice. There is not a shred of evidence to show that he was prejudiced by the failure to hold the hearing on November 11, 1974 rather than on November 13, 1974. We recognize and Carrier concedes that there was herein a technical violation of the Rule but in our considered judgment such does not warrant invalidation of the entire procedure. We shall award Claimant two (2) days compensation at the hourly rate applicable to his position, however, as damages for the two-day time limit violation and delay in hearing by Carrier. See Atlantic Coast Line RR v. BRAC, 120 F. 2d 812 (1954).

As we read this record there is ample evidence to support Carrier's conclusion that Claimant was away from his desk excessively and unaccountably and that he talked excessively rather than working. Large portions of the excessive talking was during personal telephone calls during business hours for which Claimant received no permission. His periods of absence from his desk, even during times when his duties did not require him to ambulate, were excessive and unexplained. Claimant testified that the personal calls were necessary to effectuate repairs of his automobile and to discuss legal matters with his attorney. These are not adequate or acceptable excuses for conducting personal business at a time when he was under pay and assigned to perform specific work. Nor do we find persuasive his explanations that it was "possible" that he was performing work in another area or that he "could have" or "might have" been working away from his desk during the several times when supervisors searched the work premises for him to no avail. Carrier has, in our judgment, carried the burden of persuasion on these points.

The only question remaining is whether, in all of the circumstances, the discipline is excessive and unreasonably harsh. On first

impression, dismissal for excessive talking and "gold-bricking" appears patently excessive. But the instances proven by Carrier to have occurred between October 29 and November 4, 1974 were not isolated occurrences. The unrefuted record shows that Claimant had been warned on several occasions to refrain from using the telephone for personal business during the work day and for excessive talking which was disruptive of other employes. The oral warning most immediately preceding written charges on November 6, 1974 occurred on Friday, October 25, 1974. We can only assume that Claimant chose to ignore these warnings and that Carrier was justified in resorting to a progressively more severe disciplinary reminder. On the other hand, dismissal from all service is the ultimate industrial penalty and there are considerations basic to just cause discipline and determinations of the appropriate quantum of discipline which Carrier ignored herein. The record strongly indicates that Claimant's misconduct was most egregious during the period when he was under direct observation by Hogan, yet the supervisor never admonished Claimant, asked where he went during his periods of absence nor objected when Claimant misused the telephone privileges while in his presence. Rather, Hogan silently kept the increasingly incriminating record upon which Claimant was dismissed, without the assessment of other progressive discipline more severe than oral warnings for such offenses. Carrier did assert that Claimant's past discipline record was very bad but did not present supportive evidence for this assertion. Documented past discipline records are most important in assessing whether dismissal in a given case for a given offense was reasonable. Carrier has the burden of presenting such documentary evidence if it exists. We have been deprived of the opportunity to pass on this important question because of a void in the record before us. Even if we assume the accuracy of Carrier's bare assertions in this regard, they include consideration by Carrier of punishment for alleged malfeasance by Claimant unrelated to the charges of November 6, 1974 and imposed on November 20, 1974.

For the foregoing reasons we must conclude that the maximum discipline of discharge was levied unreasonably against Claimant on November 20, 1974. We are convinced, however, that severe discipline short of termination is warranted. Accordingly, we shall return Claimant to service but without back pay except for the two (2) days described supra for the delay in hearing. Claimant further is placed on notice that proven recurrences of the unacceptable conduct of which he was found guilty may result in his termination by Carrier.

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 but only to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1976.