

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21293
Docket Number CL-21212

James C. McBrearty, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employes
{
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-7825, that:

1. The Carrier acted in an arbitrary, capricious and unjust manner and violated the Agreement between the parties when on October 23, 1974, it dismissed Clerk J. J. Hawkins from service of the Carrier.

2. In view of the foregoing arbitrary, capricious and unjust action of the Carrier it shall now be required to:

(a) Restore Clerk J. J. Hawkins to service of the Carrier with all seniority, vacation and other rights unimpaired.

(b) Pay Clerk J. J. Hawkins for all time lost commencing with October 23, 1974, and continuing until Clerk Hawkins is restored to service, less outside earnings.

(c) Pay Clerk J. J. Hawkins any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Company under Group Policy No. GA-23000 and, in the event of the death of Clerk J. J. Hawkins, pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of substitute health, welfare and life insurance.

(d) Pay Clerk J. J. Hawkins interest at the rate of ten (10) per cent, compounded annually on the anniversary of this claim, for amounts due under Item (b) above.

OPINION OF BOARD: Claimant began service with the Carrier on June 8, 1970. He first worked the extra clerk list at Victoria, and later became an Extra Clerk at Crewe, Virginia. Crewe, Virginia, is an intermediate point on Carrier's Norfolk Division, approximately half way between Roanoke and Norfolk, Virginia. The Carrier maintains a clerical extra board there to which Claimant was assigned on October 27, 1973.

On October 27, 1973, Claimant was involved in an altercation off Carrier's property, which resulted in Claimant being served with an arrest warrant for "Unlawfully and feloniously making an assault on a one James Ray Hazelwood with the intent to maim, disfigure or disable the said James Ray Hazelwood." On December 3, 1973, the Grand Jury in the Circuit Court of Lunenburg County (Virginia) returned a true bill. (A "true bill" is the indorsement made by a grand jury upon a bill of indictment, when they find it sustained by the evidence laid before them, and are satisfied of the truth of the accusation). As a result, on April 25, 1974, Claimant was sentenced to confinement in the County Jail for a term of twelve (12) months, and assessed a fine of \$500.00.

On May 14, 1974, an Assignment of Error was made by Claimant. (An "Assignment of Error" is a formal complaint against some action of the trial court). As a result of the "Assignment of Error" being at least partially sustained, the felony charges were reduced to a misdemeanor, and on September 12, 1974, the twelve (12) months' jail sentence was suspended subject to Claimant serving a period of thirty (30) days in Lunenburg County Jail commencing on September 12, 1974, and ending at 5:00 P.M. on October 11, 1974. Moreover, Claimant was ordered to serve an additional full thirty (30) days in the Lunenburg County Jail during the calendar year 1975. Furthermore, after Claimant's completion of the initial thirty (30) day jail sentence, Claimant was placed on probation for a period of two (2) years, fined \$500.00, and ordered to pay all court costs.

Claimant was notified by Carrier on September 20, 1974 (at which time Claimant was in jail) that an investigation would be held on September 27, 1974 to "determine your responsibility, if any, in connection with conduct unbecoming an employee of Carrier resulting in being sentenced by Lunenburg County Court to a monetary fine and jail sentence on April 25, 1974."

Since Claimant could not be released from jail on September 27, 1974, to attend the hearing, the hearing was postponed until October 14, 1974.

As a result of the hearing, Claimant was notified by Carrier on October 23, 1974, that he (Claimant) was being dismissed from the service of Carrier "for your responsibility in connection with conduct unbecoming an employee of Carrier due to your being sentenced by Lunenburg County Court to a monetary fine and jail sentence on April 25, 1974."

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

Turning then to the case at hand, the Board notes that an employe may commit improper acts which subject him to disciplinary action while he is on duty or off duty. The most common cases involve on-duty misconduct. However, employes are also frequently disciplined or discharged for committing improper acts while off duty. In the latter type of cases, however, in order to justify disciplinary action, including discharge, there must be some evidence of damage to the Carrier.

Looking at the record as a whole, the Board finds in the instant case that there is not substantial evidence to indicate that Claimant's offense injured his effectiveness on the job, or damaged Carrier's reputation in the marketplace or in the industrial community.

The generally understood principle in the industry is that a Carrier may not discipline an employe for what he does off duty. To do so would constitute an invasion of the employe's personal life by the Carrier and would place the Carrier in the position of sitting in judgment on neighborhood morals, a matter which should be left to civil officers.

An exception to this principle permits discipline when the off-duty conduct affects the employer-employe relationship. Critical to such an exception, however, is the guiding principle that the outside activity, in order to be subject to discipline, must definitely relate to Carrier's operations. By this it is meant that the misconduct must have arisen out of plant activities or carry with it a serious threat of disrupting the orderly, efficient, or safe conduct of the Carrier's business. Such has not been shown by substantial evidence in the instant case.

In view of the foregoing, Parts 1 and 2 (a), (b) and (c) of the Claim are sustained, but Part 2 (d) is denied.

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 Employee involved in this dispute are respectively Carrier and Employee 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 set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

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

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD NO. 21293

DOCKET NO. CL-21212

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employes

NAME OF CARRIER: Norfolk and Western Railway Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

Part 2 (b) of the Claim in the instant case reads:

"Pay Clerk J. J. Hawkins for all time lost commencing with October 23, 1974, and continuing until Clerk Hawkins is restored to service, less outside earnings."

Part 2 (h) of the Claim was sustained by the Board. However. Carrier only paid Claimant for 93 workdays between the period of October 23, 1974 and February 28, 1975. On February 28, 1975, Claimant entered military service in the U.S. Army, where he remained until he obtained his discharge on March 30, 1977. On April 7, 1977, Claimant was re-employed by Carrier, exercising his seniority on the Clerk's extra list.

Carrier argues that Claimant is not entitled to any back pay for the period of time he was in military service, because during this time, Claimant was "unavailable for all types of service with Carrier." (See National Labor Relations Board v. Revlon Products Corporation, 144 F. 2d 88 (1944), and National Labor Relations Board v. Harbison-Walker Refractories Co., 137 F. 2d 596 (1943)).

The Organization argues that military service is indeed in the category of gainful employment, "the same as any other employment in which Claimant may have been engaged while discharged from service of the Carrier."

This is an issue of first impression before this Board, and we find that in the instant case, Rule 27 (d) of the Agreement is clear and unambiguous in this regard.

Rule 27 (d) states:

"If the charge against the employe is not sustained, his record shall be cleared of it. If dismissed or suspended, on account of unsustained charge, the employe will be reinstated and compensated for wage loss, if any, suffered by him, less compensation received from other employment." (Emphasis added)

Military service is to be considered "other employment" for purposes of Rule 27 (d). This Rule takes precedent over the NLRB decisions cited by Carrier, since it came after these decisions, and makes no exceptions for military service.

Claimant, therefore, is to be compensated for the wage loss suffered by him during his military service, less his military compensation.

However, Claimant is only to be compensated up through January 15, 1977, since it was his responsibility to report for duty with Carrier in a reasonable time, after being notified on January 10, 1977, that he was medically qualified for service with Carrier.

Referee James C. McBrearty, who sat with the Division as a neutral member when Award No. 21293 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1978.