

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22041
Docket Number CL-22085

David P. Twomey, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8391) that:

1. The Carrier violated the effective Clerks' Agreement when following an investigation on May 4, 1976, it arbitrarily and capriciously suspended Clerk W. J. Shukitis from service for a period of thirty (30) days, commencing with May 10, 1976, and continuing through June 8, 1976, after it failed to sustain the charge as well as denying him a fair and impartial investigation.

2. The Carrier shall now compensate Clerk W. J. Shukitis for all time lost as a result of this suspension from service and that his record be cleared of the charges placed against him.

OPINION OF BOARD: The Claimant, Mr. W. J. Shukitis, was the incumbent of Position GT-55, Assistant Chief Yard Clerk, with hours of work from 4:00 P.M. to 12:00 midnight and having rest days of Monday and Tuesday. The Claimant is also Local Chairman of the Organization. On April 21, 1976, Clerk A. J. Piwovar, whose tour of duty was completed at 4:00 P.M., sought out the Claimant at his work location to ask his assistance as a Union Official concerning the manner in which he was being treated on his vacation relief position at the Carrier's Gary Agency. Clerk Piwovar related his story to the Claimant. The Claimant then called the Agency and asked to speak to Agent Culver, who returned the call at approximately 4:30 P.M. A telephone conversation followed. By letter dated April 28, 1976 the Claimant was notified to appear at a formal investigation concerning the following charges:

1. That you allegedly engaged in the conduct of union oriented activities while on duty and without proper permission at or about 4:30 p.m. on April 21, 1976, involving agency clerk A. J. Piwovar.

2. That you allegedly engaged in conduct unbecoming an employe in your conversation with Agent B. J. Culver at or about 4:30 p.m. on April 21, 1976.

By letter dated May 10, 1976 the Carrier notified the Claimant that he was suspended for 30 days as follows:

"Formal investigation was held in the Transportation Department Conference Room, Main Office Building, Kirk Yard, Gary, Indiana, commencing at 9:33 a.m. on Tuesday, May 4, 1976, at which you and your representatives were present. At this investigation it was determined:

1. That you engaged in the conduct of union oriented activities while on duty and without proper permission at or about 4:30 p.m. on April 21, 1976, involving Agency Clerk A. J. Piwowar, in that as brought out in the testimony you (1) discussed a grievance with Clerk A. J. Piwowar and Agent B. J. Culver at or about 4:30 p.m. on that date; (2) you were on duty and did not have proper permission to engage in such union oriented activities; and (3) this action by you was taken in spite of prior carrier instructions that such activities by you, while on duty, were to be discontinued.
2. That you engaged in conduct unbecoming an employe in your conversation with Agent B. J. Culver at or about 4:30 p.m. on April 21, 1976, in that as brought out in the testimony (1) you were agitated and not using your normal tone of voice (that the tone of voice was higher than necessary to overcome any noise level in the office) and (2) your choice of words was not appropriate for use and discussion with another employe or supervisor.

For your responsibility in this matter you are hereby suspended from the service of the Elgin, Joliet and Eastern Railway Company for a period of thirty (30) days, commencing on May 10, 1976 and continuing through June 8, 1976.

"Your personal record was reviewed and considered, in part, in the determination of the degree of discipline assessed...."

We find the charges were adequate to allow the Claimant to prepare a defense. We find that the Carrier's use of Exhibit "J" before this Board in any context is totally contrary to the language therein:

"Without prejudice to the position of either party in future or similar cases, the Carrier agreed to clear the Claimant's record and compensate him for all time lost."

We find that the usage of Exhibit "J" is highly improper. The Carrier asserts in its submission before this Board that the Claimant is guilty of insubordination. The Claimant was not charged with insubordination nor was he found to be responsible by the Carrier for insubordinate conduct. As such the Carrier's assertions in this regard are a burden on this record and are rejected as totally untenable.

The Organization contends that the Hearing Officer's conduct was improper in that he refused to call witnesses requested by the Employees, which caused the rendering of a decision without all pertinent evidence. The Employees sought to establish what the understanding was on the property with respect to the discussion of labor relations matters between the Local Chairman and those Carrier Officials that were requested as witnesses. This request was denied by the Hearing Officer. We find that since the Claimant was charged with the offense of conducting union oriented activities while on duty without proper permission and since the Carrier clearly contended at the investigation that the fact that a conversation took place between the Claimant and Mr. Culver on union related business without permission from his supervisor was a disciplinary offense, the Claimant was entitled to have a reasonable number of witnesses to prove the practice of the parties on the requirement of permission for the Local Chairman to discuss a matter with Carrier Officials. The record does indicate, and it is not rebutted by the Carrier, that Carrier Officers had normally consulted with the Claimant and the Claimant had normally consulted with them, concerning union-management related matters, without first getting permission from his supervisor. As such, this Board will review the assessed discipline accordingly. We find that this ruling of the Hearing Officer is not a basis to overturn the entirety of the Carrier's findings and discipline.

Referring to the findings in the Hearing Officer's letter of May 10, section 1, we find that the Claimant did violate Rule 58 of the Agreement by listening to Clerk Piwovar's grievance. Rule 58 required that the Claimant obtain permission to consult with an employe during working hours, and this the Claimant did not do. The evidence of record is clear that when Clerk Piwovar met with the Claimant, he was crying and very upset. The Claimant testified that he thought Mr. Piwovar was going to have a heart attack. The Carrier gave notice to the Claimant by letter of October 12, 1975 that he was not to make statements or announcements to the clerical group without making prior arrangements with the Carrier under Rule 58. The Carrier would be within its rights to dock the Claimant for the time in question, and to issue a reprimand. However under the circumstances of this case it is difficult to imagine a disciplinary suspension for such consulting with an employe in such a state without obtaining permission to do so.

Mr. Culver discussed the matter with the Claimant without questioning whether the Claimant had permission to speak to him. Mr. Seabron, the Claimant's immediate supervisor; who observed the Claimant on the telephone and heard in part the content of the discussion, did not take any exception at any time to the Claimant talking to Mr. Culver on a union related matter, but instead inquired about the reason for withdrawing the vacation agreement. We found previously that the un rebutted testimony indicated that the Claimant had in fact initiated discussion of union related matters with Company Officials without objection, and without threat of discipline. It is within the Carrier's right to require that employes under pay get permission from their supervisor to discuss a union-management related matter with a Carrier Official. But, we find that the Carrier cannot change a longstanding understanding without a clear and precise notice of intent to that effect.

Section 2 of the May 10, 1976 letter finds the Claimant responsible for conduct unbecoming an employe for being "agitated and not using your normal tone of voice (that the tone of voice was higher than necessary to overcome any noise level in the office)." This Section states as a further basis for the finding of conduct unbecoming an employe that "your choice of words was not appropriate for use and discussion with another employe or supervisor."

Mr. Culver testified as follows:

"Okay, after explaining to Mr. Shikitis what we were doing, he informed me that that was in variance with the vacation agreement and then furthermore he stated that we were not in compliance with the basic agreement, okay, by not cooperating with Mr. Piowar. By this time, Mr. Shukitis and I had some dialogue and he had become - his voice had gotten very loud - he was loud and he verbally attacked me and by attack I mean that he would state a charge - he would not permit me to respond to the charge - he would just repeat the charge, belabor the point by shouting down any response that I tried to make, continually interrupting me and repeating his charges. Finally, I shouted at one point - he said that you're not cooperating with Piowar and I shouted that's just not true - that's not true and at that point he said to me, I don't believe you I have Andrew Piowar here - I believe him before I believe any supervisor and you guys are just out to get me, you're out to screw me, but I'm not going to let it happen, I'm going to screw you by shoving this vacation agreement up your ass. He said he was going to mark off, go home and have his wife type up the letter to withdraw the agreement at that time, immediately. I told him that I didn't think that response was warranted. This was the first man to take a vacation job this summer. He'd only worked in there for two weeks. I didn't believe that any dispute was so major that it required that but he told me, he said I'm going to teach you - I can screw you - I can screw you and I can screw this company I'm going to withdraw that vacation agreement....." (emphasis added)

The matter of permission aside, as the duly authorized representative of the clerical employees, the Claimant was entitled to vigorously represent the interests of employees under his jurisdiction without fear of discipline. To allow the Carrier to discipline a Local Chairman for being "agitated and not using your normal tone of voice" when representing the interests of an employee is untenable. Or, to discipline a Local Chairman where he argued ineffectively by repeating the charges and interrupting responses would also be untenable.

Such would have the effect of dampening the vigor in which employee rights under the Agreement would be pursued, and indeed would serve to deter employee representatives on this property from pursuing legitimate grievances because of the risk of discipline and loss of income.

"Choice of words" by a Local Chairman, in conference with the Carrier, not impacting personally on Carrier Officials, other employees or within the hearing of customers, while not condoned, should not be a subject of discipline, but rather may result in the Carrier Officer terminating the discussion until a more professional manner of labor relations can be followed by the local chairman. In the instant case however, the Claimant's words were in part specifically abusive to Mr. Culver.

"You guys are out to get me, you are out to screw me, but I'm not going to let it happen, I'm going to screw you by shoving this vacation agreement up your ass...."

While there exists no corroboration to Mr. Culver's testimony, and while the Claimant denies having used such language, we find that Mr. Culver's testimony is substantial evidence of record to support the Carrier's finding that such language was used. And, such language is of a personally abusive nature and a proper basis for discipline once the Carrier made the credibility choice. We find that the Carrier need not tolerate such conduct from an employee who is under pay, even though such employee is conducting union related business with the Carrier. And, it must be pointed out that such a finding is limited to the extremely narrow facts of the instant case.

We find that the 30 days' suspension is unwarranted in part, and excessive and unreasonable as it now stands; and the discipline shall be reduced to a 10-workday suspension, with the Claimant being made whole for all of the remaining workdays lost because of the suspension.

We recommend that the parties follow the below listed procedures in discussing grievances in the future:

1. The moving party presents his or her case in its entirety without interruption or objection.
2. The responding party then presents its side in its entirety, until he or she chooses to rest.

3. The first party is entitled to a full response, and the second party may then proceed, until ultimately on this basis, the matter is fully discussed. Neither party is obligated to continue discussions that are acrimonious in nature, or pursued with offensive language.

It is in the best interest of both the Organization and the Carrier to conduct labor relations in a civil and professional manner; and we strongly urge the parties to do so.

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 Employees involved in this dispute are respectively Carrier and Employees 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 in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April 1978.