

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22431  
Docket Number CL-22041

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and  
( Steam Clerks, Freight Handlers,  
( Express and Station Employes  
(  
(The Denver and Rio Grande Western  
( Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-8389) that:

"(1) Carrier acted, and continues to act, in an illegal, arbitrary capricious and unjust manner and they violated and continue to violate the rules of the current Agreement when they suspended Mr. Edward T. Asche on March 5, 1976 and subsequently dismissed him from service of The Denver & Rio Grande Western R.R. Company on March 22, 1976 as a result of an investigation held on March 15, 1976.

(2) Carrier shall now be required to compensate Mr. Edward T. Asche eight (8) hours' pay for each and every day that he is dismissed and he shall now be restored to service with all rights and privileges unimpaired, beginning with March 5, 1976 and continuing until corrected.

(3) Mr. Edward T. Asche shall be compensated for increased cost of Health and Welfare benefits paid by him or be made whole for any money he was required to spend for medical services and other benefits which otherwise would have been provided to Mr. Asche during the period he is withheld from service."

OPINION OF BOARD: The Claimant, Mr. Edward T. Asche, was withheld from service on March 5, 1976. He was initially served with a notice to attend a formal investigation on March 12, 1976, and this investigation was postponed until March 15, 1976. The purpose of the investigation was as follows:

"...to develop facts and place responsibility, if any, in connection with your refusal to comply with your supervisor's instructions, specifically your refusal to comply with Mr. Amen's instructions on Friday afternoon, March 5, 1976."

The investigation was held on March 15, 1976. By letter dated March 22, 1976, from Mr. C. T. Driesbach, Auditor of Expenditures, the Claimant was notified that he was dismissed from the service of the Carrier. On April 9, 1976, the Claimant was notified by Mr. Driesbach that he was reinstated to service, effective April 19, 1976, on a leniency basis.

The Organization contended on the property the following procedural points: 1) that the charges were not precise; 2) that the General Rules and Notices Form 3017 was not part of the original charge; 3) the prejudging of the case by the Hearing Officer in the manner in which he called the witnesses and the prejudicial questions asked of the Claimant; 4) the initial refusal of the Hearing Officer to allow a summation; 5) the deletion of pertinent testimony from the transcript. The Organization contended on the property as to the merits that the Carrier failed to prove its case. The Organization contended on the property that Mr. Asche's rights to representation were violated, as set forth in Article 24 of the Agreement, the Railway Act (Tr-15) and the United States Supreme Court rulings in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) and Garment Workers v. Quality Manufacturing Co., 420 U.S. 277 (1975). All of these contentions are properly before this Board. All other contentions, not being discussed on the property, are not properly before this Board.

The Carrier disagrees with all of the Organization contentions.

Our findings concerning the procedural contentions raised by the Organization follow.

We find that the charge was sufficiently precise to meet the requirements of Rule 24(c). This Board has found on many occasions that the charge need not contain the rules which Claimant allegedly violated, and in the instant case we can find no prejudicial error in not setting forth a rule in the charge. We find no evidence of prejudgment of the case by the Hearing Officer; nor was it erroneous to call the Claimant as the first witness as was done in the circumstances of this particular record. The matter concerning Mr. Kingsolver's summation was resolved at the hearing with Mr. Kingsolver being given his right to make a vigorous and wide summation.

On March 5, 1976, the Claimant, Mr. Edward T. Asche, was working as Voucher Clerk Expenditures in the Carrier's Accounting Department. After lunch, Mr. Carroll Reece, Assistant Accounting Supervisor, told the Claimant that Mr. Alfred Amen, Accounting Supervisor, wanted to see him in Mr. Driesbach's office to discuss his work. Thereafter, Mr. Reece and Mr. Amen met with Mr. Asche.

Mr. Reece testified as follows:

"Well, we went in and Mr. Amen said I told you that I wanted all those vouchers today and so all I got is one blue and one red package. Why haven't you got the rest of them? Mr. Asche said I have been closing and I said I know you have been closing, but why haven't you got the vouchers? Tom said he hadn't had the time. Mr. Amen said you have been staring at the ceiling and you have been talking on the phone, you have had plenty of time to get the vouchers. Mr. Asche said, I want to see my Union Representative. Mr. Amen said you can talk to your Union Representative all afternoon when we are through in here, but we are not finished yet. What were you thinking about? Tom said I can't work with vouchers when I am thinking. Al said what were you thinking about. Mr. Asche then again said, I want my Union Representative. Mr. Amen said, you can see him when we are through with our discussion. Then Al turned to me and said what is your opinion, Carroll, and I said I will have to go along with you Al. At this time Mr. Asche got up and said he wanted to see his Union Representative. Mr. Amen said, Tom don't do it. If you leave this room it is an act of insubordination and you can get your hat and go home. Mr. Asche said I don't see why it is an act of insubordination and Al said don't do it, but Mr. Asche went out and started to talk to Bob Johnson."

Mr. Asche testified:

"He Mr. Reece came to me right after lunch. He called me into the office along with Mr. Al Amen. At this time the first question he asked was why I didn't have more vouchers ready. I replied that I was working on the close out, as I was told by Mr. Carroll Reece and Mr. Al Amen, because I was going on vacation on Monday and would have

"to be closed out today as they wanted the close out completed before my vacation. The next question he again asked why I didn't have more vouchers and that if I had time to talk on the telephone and look out the window I had time to do vouchers and there was another thing said which I don't remember now but I felt these were serious accusations to me. Then I again requested a Union Representative and whereas Mr. Al Amen refused again saying not until he was through. He then went on to tell me that my work was very poor. At this point I told him that it was going too far and I again requested a Union Representative. He denied this saying it would be insubordination. In turn I told him that I was just going out of the office to get a Union Representative and would come back and that I was not going any further than his office."

Mr. Asche further testified:

"Q. Mr. Amen testified that twice he asked you not to leave the room and said he meant it. What was your reply to Mr. Amen?

A. I just told him that I felt I needed a representative.

Q. And you did get up and leave the room?

A. I left the room as I felt the accusations were going too far and I had no defense against two witnesses against me."

We find that Rule 24 does not support the Organization's contention that this Rule was violated when the two Carrier Officials refused to allow Mr. Asche leave from the meeting being held in Mr. Driesbach's office to obtain a union representative. Rule 24 does not entitle an employee to have a representative present at a meeting with supervisors under the circumstances related by the Claimant above.

In NLRB v. J. Weingarten, Inc., the United States Supreme Court found that the employer had violated Section 8(a)(1) of the National Labor Relations Act by denying an employee's request that

her union representative be present at an investigatory interview where the employee reasonably believed the interview might result in disciplinary action. The Court approved the National Labor Relations Board's construction of Section 7 of the National Labor Relations Act, since action of an employee seeking assistance of union representation in confrontation with an employer clearly falls within the literal wording of Section 7 of the NLRA that employees have the right to engage in

"...concerted activities for...mutual aid or protection..."

That this Supreme Court decision contains a cogent rationale for the right of employees to have union representatives where the employee reasonably believes the investigation will result in disciplinary action is not challenged. However, the Weingarten decision is an interpretation of the National Labor Relations Act not the Railway Labor Act. The statutory language on which the Weingarten decision is based does not exist in the Railway Labor Act. This Board's authority extends to disputes "...growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions..." See Section 3, First (i) of the Railway Labor Act. We are compelled to find that the holding of the Weingarten decision is inapplicable to the instant case.

We find that the Carrier has proven its case of insubordination in the instant matter. The amount of discipline is not an issue before us. We must deny this claim.

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;

Award Number 22431  
Docket Number CL-22041

Page 6

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 15th day of June 1979.

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