

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22681
Docket Number CL-22792

Martin F. Scheinman, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
PARTIES TO DISPUTE: (
(Missouri-Kansas-Texas Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8746) that:

(1) Carrier violated the Rules Agreement between the parties; including but not limited to Rules 26, 27 and 33 of DP-451 when on February 1, 1978 it arbitrarily and capriciously discharged Mr. A. V. Carlson, Jr., Clerk, Freight Claims, General Office, Denison, Texas, from its service without just and sufficient cause and did not give him a precise reason for his discharge.

(2) Carrier shall compensate Claimant for all time lost during the period of February 2 through March 3, 1978, when his dismissal was changed to a thirty (30) day suspension and shall clear his personal records of the charges and discipline assessed.

OPINION OF BOARD: A. V. Carlson, Jr., Clerk, Freight Claims, General Office, was suspended for thirty days from February 2 - March 3, 1978 for the use of profanity on February 1, 1978. Carlson was charged with violating Carrier's general rules, Circular No. DP-2 Paragraph C which requires courteous deportment and Paragraph D which states, "Employees must not be...(5) Immoral... (6) Quarrelsome, or otherwise vicious."

Carrier argues that Carlson is guilty as charged. It maintains that Carlson admitted saying, "Oh f---," and as such, given two previous warnings against profanity, a thirty (30) day suspension is appropriate.

The Organization insists that Carrier did not provide a fair and impartial hearing on the property. The Organization argues that the bias exhibited by the conducting officer, M. D. Woodroff, warrants dismissal of the charges.

As to the merits, the Organization asserts that the discipline imposed is unreasonable. It urges that we set it aside as excessive.

There is no doubt that Carlson used the words "oh f---" on February 1, 1978. He admitted saying so. But this does not necessarily make him guilty of being discourteous, immoral, quarrelsome or otherwise vicious as charged. His guilt or innocence can only be determined by an analysis of the circumstances and context in which the words were uttered. Particular attention should be addressed to whether the words were directed toward anyone, whether the language is commonplace, whether those hearing it were offended, what other language would also offend them, and whether others, similarly situated, would have been offended.

The only way to determine these and other relevant questions is to afford petitioner an opportunity to present evidence and arguments, to call relevant witnesses, and to amply cross-examine witnesses who testify. That is, a full, fair, and impartial hearing must be provided.

To be sure, the hearing officer must be given great latitude in conducting the hearing on the property. The hearing is subject to his sole discretion. A reviewing body must give considerable deference to his determination on whether evidence is admissible and whether arguments are relevant.

However, when the record indicates that a fair, adequate, and impartial hearing has not been provided, the deference given to the hearing officer must end. That is, when the hearing officer's actions and comments do not afford an impartial investigation, it cannot be tolerated. Rule 27 of the Agreement between the parties provides, in part:

"An employe who has been in service more than sixty (60) days shall not be disciplined or dismissed without just cause and upon written request made upon the disciplining officer or agent,...shall be given an investigation...."

It is implicit that the investigation be fair, impartial and complete.

The record here is replete with examples of the conducting officer exceeding the boundaries of propriety. While verbally assuring Claimant and Claimant's representatives of Carrier's intention to provide a "fair and impartial investigation," his conduct did not. Despite objection, the hearing officer precluded relevant cross-examination, refused to allow the Organization to call witnesses in the order it wished, and inappropriately instructed witnesses not to answer questions posed. In short, he generally exhibited conduct which suggested partiality. He did not permit Claimant a full opportunity to present his case.

This Board has previously set aside discipline when a hearing officer failed to conduct the investigation objectively and fairly. See for example Third Division Awards 20014 and 17156. This is the appropriate disposition of this case. We must sustain the claim presented without reaching the merits.

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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1979.