NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23539
THIRD DIVISION Docket Number MW-23494

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way
(
(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Cook Herbert Lacy for alleged 'dishonesty' was unjust, unreasonable, arbitrary and an abuse of Carrier's discretion (System File 37-SCL-77-76/12-39 (79-25) J).

(2) The hearing held on February 26, 1979 was not held as required under Section 7 of Agreement Rule 39.

(3) For the reasons set forth in either or both (1) and (2) above, Cook Herbert Lacy shall be reinstated with seniority rights unimpaired and compensated for all wage loss suffered."

OPINION OF BOARD: Mr. Herbert Lacy, the Claimant, was employed as a Cook by the Carrier for six and one half years. On December 12, 1977, he was arrested for and charged with receiving stolen goods and for contributing to the delinquency of a minor. Claimant was released on bond and his case ultimately disposed of by the General Sessions Court at Conway, S.C., on November 30, 1978. He was found guilty of the charge of receiving stolen goods, sentenced and placed on probation for three years. The charge of contributing to the delinquency of a minor was nol-prossed.

The Carrier filed charges against Claimant on February 5, 1979, under Rule 39 of the agreement for violation of Rule 18 of Carrier's Safety Rules for Engineering and Maintenance of Way Employes, specifically for violation of that portion of the rule dealing with dishonesty as a result of his arrest on December 12, 1977, and subsequent conviction on November 30, 1978, for receiving stolen goods. He was ordered to attend formal hearing set for February 12, 1979.

Because of an alleged misunderstanding of the notice Claimant did not show up for the February 12, 1979, hearing, it was postponed, and was held on February 26, 1979. Carrier amended its charges, adding the charge of insubordination for failing to attend the February 12th hearing. Carrier found Claimant guilty of the charges and formally dismissed him from service on March 5, 1979.

From the outset the Organization took the position that Carrier failed to comply with the time limit provisions of Rule 39, in that it failed to file charges against Claimant within ten days from the date violation became known to Management, and that Carrier's Discipline Rule 18 did not apply since the incident took place off the property when Claimant was off duty.

The pertinent part of Rule 39 read as follows:

> "Rule 39, Discipline and Grievances.
>
> Section 7. Whenever charges are preferred against an employee, they will be filed within ten (10) days of the date violation became known to Management. Of course, this would not preclude the possibility of the parties reaching agreement to extend the ten-day limit."

There are two questions for this Board to decide:

(1). Was Carrier aware of this alleged violation more than ten days prior to February 5, 1979, and

(2). Did this "off the property and off duty" incident injure Claimant's effectiveness on the job, or result or cause damage to Carrier's reputation in the market place or in the industrial community. (See Referee McBrearty's Third Division Award 21293)

The Carrier in defending its position in Question No. 1, argues that the Division Engineer was the "Management" referred to in Section 7 of Rule 39, quoted above, since he was the officer authorized to prefer charges against the Claimant. It takes the position the Captain of its Police Department and his subordinates are not included within the scope of the term "Management" as used in the Rule. Therefore, the ten-day time limit did not start running until the Division Engineer received the letter of January 25, 1979, from the Captain of its Police Department informing him of the incident. The record, specifically Carrier's Exhibit "H", Special Agent Biggs' letter dated January 23, 1979, addressed to Captain of Police, clearly shows Carrier's Special Agent informed his supervisor, the Captain of Carrier's Police Department in a telephone conversation on December 17, 1977, of the charges and arrest of Claimant on the previous week end. It is a universal practice in this industry that the police departments or special agents departments promptly inform department heads of the Carrier of any misconduct coming to their attention. Thus, if we accepted Carrier's argument, it is inconceivable that Division Engineer or his supervisor was not promptly informed by the Captain of Police of the serious charge of contributing to the delinquency of a minor. We can not, however, accept the argument that the Captain of Carrier's Police Department is not included within the meaning of the term "Management" as used in Rule 39. It is inconceivable that the negotiators of Rule 39 intended for the Carrier to have the

right to unilaterally interpret the application of the term "Management" on a case by case basis, designating whomever it desired to come within the meaning of the term, thereby frustrating the application of the rule. The term "Management" in this rule has the same connotation as the terms "Carrier" or "Employer". Absent such application the Carrier could logically, in the extreme, contend the only person qualifying under the term would be the President of the Company.

Question No. 2 poses intriguing arguments. Claimant was arrested and charged by civil authority on December 12, 1977 for violation of the law for receiving stolen goods and for contributing to the delinquency of a minor. Carrier's Special Agent reported this to his supervisor, Captain of the Police Department, on December 17, 1977. A charge of contributing to the delinquency of a minor which also included the engagement in unnatural sexual acts before a minor are normally "front page" news and becomes common knowledge to the community. The Carrier had every right at that time to protect its reputation by conducting its own investigation of the incident under the provisions of rules of the agreement to determine Claimant's responsibility, if any, in the civil charges. Its investigation would have been conducted under procedures far less stringent with respect to rules of evidence as opposed to a court of law. But the Carrier chose to take no action and retained Claimant within its employment until February 5, 1979, 67 days after the Court's decision and almost 14 months after the incident. There was no evidence produced in the investigation that the continued employment of Claimant during this period harmed Carrier's reputation or did harm to its revenues. Thus, it is difficult for this Board to accept any argument, since Claimant had been retained in Carrier's employment for 14 months without causing harm to the Carrier, that his continued employment after the investigation would cause harm or damage to Carrier's reputation. (It is clear to this Board that the Carrier slept on its rights.) Additionally, the Court in its infinite wisdom chose not to punish the Claimant. It handed down a three year sentence but suspended it and placed him on probation. This Board, under the circumstances present here, should do no less.

The Board after careful and painstaking study of the entire record finds that (the Carrier erred in its determination that its first knowledge of the incident was the receipt on January 26 or 27, 1979, of Captain of its Police Department's letter of January 25, 1979. The record shows it had knowledge of the incident on December 17, 1977. Additionally, if the Carrier wanted to protect its reputation against Claimant's activities "off the property and off duty", it should have done so in December 1977. The Claim must be sustained.

Since we have ruled the investigation was not held in compliance with the rule, we are dismissing the charge of insubordination.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1982.

CARRIER MEMBERS' DISSENT
TO
AWARD NO. 23539, (DOCKET MW-23494)
(Referee Lowry)

This award overturned the dismissal of an employee who was found guilty of receiving stolen goods by a criminal court. Subsequent to the conviction, the Carrier charged the Claimant with dishonesty, held a fair and impartial investigation, and then dismissed him. The Majority determined the charges were not filed against the Claimant within the ten day time limit provision of Section 7 of Rule 39; Discipline and Grievance.

Section 7 of Rule 39 reads as follows:

> "Wherever charges are preferred against an employee, they will be filed within ten (10) days of the date violation becomes known to Management. Of course, this would not preclude the possibility of the parties reaching agreement to extend the ten-day limit."

In this case the proper Carrier Official, the Division Engineer, did not have knowledge of the violation until January 26, 1979. The letter of charges was sent to the Claimant on February 5, 1979 - well within the ten-day time limit. However, the Majority in this award determined that the agreement intended the term "Management" to include the Captain of Police, who had knowledge more than ten days before the letter of charges was issued. Clearly, the appropriate Carrier Official to be charged with knowledge of a violation of the rules would be a claimant's supervising official, the Division Engineer in the instant case. The Majority was over-inclusive in its interpretation of the word "Management" as used in Section 7 of Rule 39.

It is inappropriate for this referee to suggest that the National Railroad Adjustment Board follow the actions of local courts when considering the disciplinary action taken by a Carrier. Surely, the difference between a criminal trial and industrial justice in the Railroad Industry has been delineated many times before, and is common knowledge.

In Award 20423 (Lieberman), the Board held:

> "At the outset we must point out that the disciplinary process in this industry does not follow the careful technical procedures required in criminal trials; on the other hand the rights of employes to due process and equity in the investigation process must be scrupulously preserved."

This Award does not address, even an allegation of prejudicial error which would have deprived the Claimant of his due process rights. Rather, this Referee rushes to blithely skip over the requirement of substantiating some fatal flaw in the investigation process, in his eagerness to reinstate an obviously undeserving employee.

It is instructive to recall Justice Douglas' words from the Steelworkers' Triology:

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." (United Steelworkers of America v. Enterprise Wheel Car Corp., 363 US, 593 (1960).

In the instant award the Arbitrator did, in fact, dispense his own version of justice, by reinstating a clearly guilty individual. Many awards

of this Board have held that a procedural error should not be used to overturn the discipline imposed. See -

Third Division Award 11775 (Hall):

> "We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that the Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed."

See also Third Division Awards Nos. 20423 and 21805.

The Majority in this award had every opportunity to deny reinstatement. Unfortunately, they took umbrage from a minor, unproven procedural technicality. Because of the improper interpretation given to the contract language, and the gross miscarriage of justice, we are compelled to dissent.

D. M. Lefkow

W. F. Euker

J. E. Mason

J. R. O'Connell

P. V. Varga