

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23864
Docket Number CL-23903

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE:

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9410) that:

1. Carrier violated the Agreement Rules, particularly Rule 27, when under date of August 7, 1980 it dismissed from service Mr. W. Hardaway, Agency Accounting Clerk, as well as Chairman of the employees local protective committee at Detroit, Michigan, account of investigation held on July 29, 1980 and;

2. Carrier shall be required to compensate Mr. W. Hardaway for all time lost commencing June 18, 1980, the date first held out of service, and continuing thereafter until the violation is corrected, to include all fringe benefit losses as a result of expenditures by Mr. Hardaway during the suspension from service, plus interest at rate of one (1) percent per month per annum.

OPINION OF BOARD: The Claimant was directed to attend an investigation on the following charge:

"You are hereby charged with failure to properly perform the clerical duties of your assignment (Position 112, Accounting Clerk) at 12:40 p.m. on June 18, 1980 when you were engaged in circulating a petition involving union activities during the assigned hours of your position.

You are also charged with being insubordinate to Chief Clerk T. D. Byle during the period 12:40 p.m. to approximately 1:05 p.m. on June 18, 1980, in that you refused to return to your work place and perform the duties of your assignment and you also used profane and obscene language towards Chief Clerk T. D. Byle, which occurred in the Detroit Terminal Agency, 115 Rosa Parks Blvd., Detroit, Michigan.

You are hereby instructed to report to the office of the Superintendent, 115 Rosa Parks Blvd., Detroit, Michigan, on Tuesday, June 24, 1980 at 10:00 a.m., for a formal investigation in connection with the charges specified above."

On August 7, the letter of dismissal was sent to the Claimant and it read in pertinent part:

"Therefore, for your responsibility, in that you did fail to properly perform the clerical duties of your assignment (Position 112, Accounting Clerk) and were engaged in circulating a petition involving union activities during your assigned hours, were insubordinate to Chief Clerk T. D. Byle during the period 12:40 p.m. and 1:05 p.m., and refused to return to your work place to perform your duties, and also used profane and obscene language towards Chief Clerk T. D. Byle, you are hereby dismissed from the service of the Norfolk and Western Railway Company effective this date."

The Carrier argues that the evidence, even though conflicting, is substantial. They direct attention to the testimony of Chief Clerk Byle and the Claimant in support of this contention. Chief Clerk Byle testified that at 12:40 p.m. the Claimant presented to him a petition having to do with changes in meal periods. He also testified that the Claimant was directed to return to his duties five or six times and refused to comply each time during the period 12:40 p.m. to 1:05 p.m. Byle also testified the Claimant directed obscene and profane language at him. The Carrier also directs attention to the Claimant's testimony as well. We note that although it conflicts with Mr. Byle in respect as to the number of times he was directed to return to work, the Claimant did testify that he was directed to return to work once and, moreover, we note that he clearly admitted that he did not perform any duties of his assignment from 12:40 p.m. to 1:05 p.m.

The Organization argues first that because the Claimant is a Local Chairman the case deserves the close scrutiny of the Board. Secondly, they contend that there is no evidence that the Claimant was circulating a petition while on duty. They refer to testimony of several witnesses who testified that the petition was circulated during the lunch hours. Next, in respect to the profane language, they take the position that there is no evidence to support this portion of the charge. They direct attention to the three Carrier witnesses who were in the room at the time of the incident. The witnesses testified that they did not hear the Claimant use profane or obscene language. Regarding the Claimant's alleged refusal to return to his desk, the Organization contends that he did not refuse but, as a local union official, was only trying to resolve the situation in a peaceful and constructive way. The Organization also contends that the Claimant wasn't afforded due process because the Carrier failed to call all the witnesses necessary to conduct a fair hearing.

It is the Board's conclusion, after careful consideration of the evidence and the respective arguments of the parties, that there is substantial evidence to support the portion of the charge relating to insubordination relating to his failure to perform duties as instructed during the period in question. The substantial evidence in this regard is the testimony of Byle and the testimony of the Claimant as noted by the Carrier.

In respect to the portion of the charge relating to the circulation of the petition and the profane language, we conclude that it is not supported by

substantial evidence. We agree that the Carrier has a right to rely on the hearing officer's assessment of credibility and the resolution of conflicts in evidence when such decisions are supported by substantial evidence. In this case, however, the above mentioned portion of the charge was not supported by substantial evidence. In regard to the petition and profane language, the supervisor's testimony differed sharply with that of three witnesses and the Claimant. The supervisor's testimony is not entitled to more weight per se. In resolving conflicts, the Carrier must rely on more than the hearing officer's right to resolve those conflicts. There must be evidence of a rational deliberation, weighing of evidence and a reasonable conclusion. The Carrier must clearly show reliance on factors such as credibility, demeanor, corroborative evidence and other such facets of evidence.

We are lastly confronted with the question as to whether the degree to which the charges were proven support the supreme penalty of discharge. It is our conclusion that the Carrier has not shown that discharge is appropriate. It is our opinion that the charge, while serious to a certain extent, is not worthy of permanent dismissal unless accompanied by a past record showing a series of progressively severe penalties aimed at correction. As best we can determine, this is the Claimant's first offense. We are mindful that this Board has been slow to substitute its judgment for that of the Carrier. It is our function not to review penalties in light of what we would have meted out if we were the Carrier but in light of whether the penalty is arbitrary or capricious. It is our opinion that any penalty beyond 120 days is arbitrary and capricious. We, therefore, direct the Carrier to compensate the Claimant for all time lost only as a result of the discharge beyond a date of 120 days from the date of discharge. Other items requested in the claim as damages are denied as they are not supported by the Agreement.

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 in accordance with the Opinion.

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Page 4

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By *Rosemarie Brasch*
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April 1982.

