

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24098  
Docket Number MW-24067

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees  
{ Terminal Railroad Association of St. Louis

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

(1) The dismissal of Crossing Watchman R. L. Chandler for failure to protect his assignment on March 23, 1980 was unwarranted and without just and sufficient cause (System File TRRA 1980-12).

(2) Crossing Watchman R. L. Chandler shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered, including overtime pay, beginning April 14, 1980."

OPINION OF BOARD: The Carrier directed the Claimant to attend an investigation. The Claimant was charged with "failure to protect your assignment". The charges were preferred in connection with the employer's belief that he was scheduled to work the 6:30 a.m. to 2:30 p.m. crossing watchman assignment on March 23, 1980, and failed to do so. The investigation was held April 7, 1980. On April 14, 1980, the Carrier directed a letter to the Claimant dismissing him from services from the company.

The Organization argues that the Claimant cannot be found guilty for failing to protect his assignment because there is no evidence of a direct order to the Claimant to protect the 6:30 a.m. to 2:30 p.m. crossing watchman assignment at the Ninth Street crossing tower. The day in question is a Sunday and not normally worked by the Claimant. When the Claimant was contacted over the radio by the train director, the Claimant replied that he would not be able to protect the assignment. It was the Claimant's testimony that subsequent to his informing the train director that he would not be able to protect his assignment he heard nothing over the radio in terms of communication and thus assumed that he was not required to protect the assignment. This is consistent, according to the Organization, with the testimony of the train director who indicated that after having received the Claimant's indication that he would be unable to protect his assignment, he was unable to maintain or initiate any further contact with the Claimant. The Organization asserts that it is obvious that there was a failure in the communication equipment at this point and that the Claimant cannot be faulted for failing to comply with an order which was never given. The Organization would suggest that it was reasonable for the Claimant to assume in light of the fact there are no further communications that Claimant was excused from protecting the assignment.

The Organization also argues, even assuming arguendo, that the Claimant was absent without permission for one day, such an offense does not warrant dismissal. They cite cases where the Third Division has frequently held that

misdemeanor-type assignments should not carry the equivalent of industrial life sentences. Moreover, they object to the Carrier's attempt to justify the discharge based on the Claimant's past record, a copy of which was included as an exhibit in the Carrier's submission. Inasmuch as the Organization believes that the past record was not handled on the property, they contend that it is not properly before the Board as evidence.

It is the position of the Carrier that the evidence clearly established that the Claimant received direct order to protect the assignment, and moreover, that the evidence clearly indicates that he failed to protect that assignment. In addition, the Carrier argues that the Claimant's defense is not credible. They direct attention to the testimony of train director Thomas, the Claimant, and Sergeant Eultgen, which establishes that the train director relayed Sergeant Eultgen's order to protect the assignment. The Carrier does not believe that the Claimant's initial refusal to protect the assignment is justified. They also direct attention to Thomas' and Eultgen's testimony which indicates that the Claimant was informed three times that he must protect the assignment. The Carrier does not believe that there was a breakdown in the communication equipment inasmuch as the testimony of the Claimant established that the speaker between the crossing tower and the tower at which the train director was located was in proper working condition on the day in question. Moreover, they cite inconsistencies in the testimony of the Claimant which could be said to affect his credibility. The Carrier believes that the dismissal of the Claimant was justified particularly when his past record was taken into consideration. The Carrier included as part of their submission a detailed synopsis of the past record of the Claimant.

After considering the arguments of the respective parties, it is the conclusion of the Board that there is substantial evidence to support the Carrier's finding of guilt. There is little question that the Claimant did in fact fail to protect his assignment. However, in the context of this record, the critical issue is whether the Claimant received a direct order to protect his assignment. The Claimant testifies that he indicated to the train director that he could not protect his assignment and that subsequent to this he heard nothing further from the train director. If we could believe this, the Claimant's absence might be understandable or mitigated. However, the Claimant's defense is not credible. It is the hearing officer's function to assess credibility and resolve conflicts and evidence; it is not the Board's function. The Board's function is to uphold the Carrier's findings on the evidence so long as that finding is supported by substantial evidence. In this case, there is substantial evidence to support the hearing officer's decision not to grant much weight to the Claimant's testimony. There are a variety of reasons why the Claimant's defense might not be considered credible. First, by his own admission, the speaker was functioning properly on the day in question. Second, it is not credible to believe that in one second the equipment would be working and the next it would not. Third, there are inconsistencies in the Claimant's testimony as to why he could not report, which dilutes his credibility. Lastly, it could be said if there was an equipment failure, that the Claimant should have sought confirmation that he was being excused from protecting the assignment. It is credible to believe that if communication failure had occurred, that the Claimant would have sought acknowledgement and assurance that he was not in fact being required to work.

Having resolved the question of guilt, it is necessary to consider whether the penalty of discharge is appropriate. The company seeks to justify the penalty based on the Claimant's past record. However, the union objects the Carrier's inclusion of the past record as it was not made part of the evidence exchanged and handled between the parties before the case was referred to the Board.

In reviewing the record, there is no evidence that the Claimant's past record as detailed in Carrier's Exhibit N was handled with the Union. There is a reference to it (poor past record) in the claim handling, however, there is no evidence that specific details of that record, on which the Carrier relies, was available to the Union when the case was handled on the property. It has long been established that all evidence being considered by the Board must be handled between the parties on the property. The evidence in form of the past record should have been handled with the Union prior to the time the case was appealed to the Board. The delineated record has not been made part of the record as handled on the property, thus, it has not been subject to scrutiny, review, or comment by the Organization. There may be inaccuracies or other factors, which can only be discovered by having the record subject to review and rebuttal while on the property.

In view of the fact that the past record is not properly before the Board, we are thus faced with the question of whether the penalty of discharge for the instant offense standing alone is appropriate. Refusal to protect an assignment is a serious offense. However, under the circumstances of the case, discharge is too severe. Although some discipline is appropriate, permanent discharge is excessive and therefore, the Board will direct the reinstatement of the Claimant without pay for time lost, with seniority, and other rights unimpaired.

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

Claim sustained in accordance with the Opinion.

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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 5th day of January 1983.

