

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24208
Docket Number CL-24105

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: ((Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-9420) that:

(1) Carrier violated the Agreement between the Parties when it arbitrarily determined that Chief Clerk V. R. Costa was insubordinate, boisterous and used profane and vulgar language to Yardmaster J. P. McCoy when he was instructed to copy a train order at Pit Yard Office, Hamilton, Ohio, on August 9, 1978, and he was suspended from Carrier's service for fifteen (15) days, and

(2) Because of such wrongful action, Carrier shall be required to clear the service record of Mr. Costa in connection with charges and discipline assessed and compensate him for all wage losses suffered during the fifteen (15) day period he was suspended from Carrier's service.

OPINION OF BOARD: Claimant herein was disciplined following an investigative hearing held on August 15, 1978. The Notice served on Claimant provided in part:

"Attend hearing....to determine your responsibility in connection with being insubordinate, boisterous, profane and using vulgar language direct to Yardmaster J. P. McCoy on August 9, 1978...."

As an initial position, Petitioner alleges that the notice was not precise as required by the rules. We do not agree. From an examination of the transcript it is evident that Claimant was well aware of the incident being investigated; he understood the complaint and was not impaired in any discernable fashion in mounting his defense. As we have said in prior disputes (e.g. Award 19746), rules such as that herein "....are designed to protect employes from capricious investigations and to afford them a reasonable opportunity to prepare a defense; they are not designed to afford employes a technical basis for avoidance of discipline." Petitioner also contends that the hearing was "conducted in a manner prejudicial to Claimant's rights and that the hearing officer was biased." Contrary to this contention, the record does not support such allegation. The hearing was conducted in a fair and impartial manner protecting Claimant's right of due process.

The essence of the factual basis for this entire dispute is contained in the following testimony of Yardmaster McCoy:

"On the date in question at 1:45 p.m. Mr. Costa came into my office to return some papers. I asked him then to copy a train order that I had to have for the 2:30 job he asked me then what my other clerk was doing. I told him then he was trying to get the list up to date, for him to copy the train order. He said no I am not going to copy the train order so I told him then to copy the train order, Then he said go fuck yourself and give me the finger then I told him that I would get him a direct order to copy the train order. So then he told me I not going to do it because of the hours of service so then I said we'll see when the Trainmaster gets here. I then got on the radio and got ahold of Mobile 2 and asked him what his location was he said around south Hamilton be there in five minutes. Then when the Trainmaster arrived I told him what had happened and was said."

The Organization argues that Claimant was justified in refusing to copy the train order in view of his hours of service and further that the language used was common "shop talk". In short it is maintained that the Yardmaster was asking Claimant to perform an illegal act and his reaction was justified. The Organization also scores the alleged ignorance of the Yardmaster.

Carrier notes that if there had been a violation of the Hours of Service Law, the penalty would have been leveled against Carrier and it was at risk. Carrier argues that Claimant's language and refusal to follow orders were both inexcusable and exceeded common shop language. Carrier insists that if Claimant indeed had a complaint he should have followed his orders and grieved later.

In spite of Claimant's testimony that he was not sure of the use of profanity, the testimony is clear from both the Yardmaster's and Brakeman Fugate's testimony that he did indeed use the profane and vulgar language and gestures, and that he refused to follow the order. He himself agreed that he did refuse the instruction in view of the hours of service problem. Thus, the question of guilt as determined by the hearing officer is clear and unequivocal. As the Board views it, there was no justification for Claimant's conduct and insubordination based on the hours of service problem. Particularly as a local union official Claimant should have known better. The discipline imposed cannot be construed to be arbitrary or capricious since similar conduct has been found to justify termination; there is no basis for this Board substituting its judgment for that of Carrier.

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 not violated.


A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
 National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of March 1983.