

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24570
Docket Number CL-24811

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Chicago and Western Indiana Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9672)
that:

1. Carrier violated the effective telegraphers' agreement when, following an investigation held on January 6, 1982, it dismissed Leverman T. B. Moran from its service effective January 13, 1982;

2. Carrier shall now return Mr. Moran to service with his seniority and all other rights unimpaired and shall compensate him for all time lost including any potential overtime and shall make all payments for premiums due under Travelers Policy GA-23000 and Aetna Policy GP-12000.

OPINION OF BOARD: Claimant was employed as a leverman-operator with seniority date of December 1, 1976. On December 13, 1981, claimant was on duty at State Line Tower from 3:00 PM until 3:00 AM of December 14.

On December 15, 1981 the following letter was addressed to claimant by M. W. Anderson, Superintendent:

"Arrange to be present at a formal investigation in accordance with Rule 11-Discipline, as found in the current working agreement between the Chicago and Western Indiana Railroad and the Transportation - Communication Division of the Brotherhood of Railway and Airline Clerks. This investigation will be held in the Office of the Superintendent, Chicago and Western Indiana Railroad, 51st Street Office Building (2nd floor), 428 West 47th Street, Chicago, Illinois 60609, on Friday, December 18, 1981, at 9:00 a.m.

At this investigation you will be charged with allegedly firing a 'BB' and/or 'pellet' rifle and in so doing damaged company property inside State Line Tower and company vehicle A106 parked outside of the tower. This incident occurring between 3:00 p.m., December 13, 1981, and 3:00 a.m., December 14, 1981.

In addition to the above you will also be charged with violation of General Rules A, D, L, M, O and Safety Rules 800, 801, 803 and 804, as found in the Chicago and Western Indiana Railroad Company Book of Rules and Regulations effective October 30, 1966.

You may bring with you to this investigation any witness and/or representative of your choice as outlined in your current working agreement without expense to the company."

The hearing date set for December 18, 1981 in above letter was postponed until January 6, 1982 at the request of the Union. Hearing was held on the latter date and on the basis of evidence adduced by its investigation the claimant was terminated from service. Carrier's dismissal letter is dated January 13, 1982, as follows:

"This in reference to the investigation held in my office on Wednesday, January 6, 1982, in which you were charged with violation of Western Indiana General Rules A, D, L, M, O, Safety Rules 800, 801, 803 and 804 and having unauthorized articles on company property.

After reviewing the transcript of this investigation, I find you did in fact violate the above mentioned items.

In view of the above violations and also after carefully considering your past record with the Western Indiana, this is to advise that effective 7:00 A.M., January 13, 1982, you are hereby dismissed from all services of the Chicago and Western Indiana Railroad Company."

The dismissal was appealed by the Union as provided in the agreement. In declining the appeal, Carrier Manager of Personnel, H. E. Crow stated:

"Under no circumstances can this carrier tolerate such serious offenses from its employees. Firing a rifle while on duty is not only damaging to company property but, more important, could be fatal to anyone who is working in the area. Based on the seriousness of this offense and claimant's past record, permanent dismissal is justified."

It was developed during the hearing that claimant was relieved at 3:00 AM on December 14, 1981 by J. W. Frazier. At about 7:30 AM he noticed several BB's on the floor of the tower and also BB holes in the paneling and windows on both the north and west sides of the tower. At 8:00 AM he telephoned his findings to his supervisor, R. L. Henry, Assistant to Superintendent who caused an on-the-ground inspection by the Special Agent Department. Their report was to the effect inspection revealed 54 BB holes in the paneling and seven window panes damaged by BB's. In all, the officers found 94 BB rounds as having been shot at the windows and paneling. Indications were that the shots had been made by unknown persons using a device from inside the tower. They also found an empty box for a DAISY POWER LINE AIR GUN with sale price tags from K-Mart. BB's were found on the floor and in a plastic bottle. Damage by BB shots were also found by the officers to a window and dents in the body of a company van parked near the tower. Their investigation developed that the van had been inspected in the same location at 7:56 PM on December 13, and no damage was apparent.

In addition to ordering the Special Agent investigation Mr. R. L. Henry also testified as follows at the hearing:

"Q. Did you have any conversations with any of the employees after the initial report by the Police Department was made?

A. I called Mr. Moran on the phone after getting the report, and I asked Mr. Moran did he have a BB gun at State Line Tower. He advised me on the phone that he had one there, and I asked him, 'Did you shoot a BB gun in State Line Tower last night, which would be Sunday?' and he said, 'Yes', he did.

I said 'Where did you get the rifle or the BB gun,' and he said, 'I bought it at K-Mart the night before.'

Q. Did you have any conversation with Mr. Moran about the Signal Department truck outside?

A. In the conversation on the phone I asked him, I said, 'Tim why did you shoot the windows out of the truck?' He said, 'I did not shoot outside the tower.' That's when I said 'Well, I'll talk to you later,' and we hung up."

The claimant testified at the hearing to the effect that he did not remember the telephone call from Mr. Henry.

The General and Safety Rules of the Carrier which were made a part of the hearing record emphasize safety and provide that employees careless of safety to themselves and others will not be retained in the service.

Evidence definitely established that the BB damage to the building and van parked outside occurred during the period claimant was on duty. Sale tags and the carton which was used for a BB gun were found in the building. They were definitely linked to the claimant in his admission during the telephone conversation with Mr. Henry. Claimant's statement he did not recollect any such telephone conversation is not impressive in view of the extensive amount of evidence linking him to the incident. Bad memory is a convenient although weak defense. There is much more basis to accept at face value the testimony of Mr. Henry regarding the telephone call to claimant. On the whole we find the evidence clear and convincing in support of Carrier's finding that claimant violated the safety rules and regulations as charged. The claimant received a fair and impartial hearing at which he was represented by officers of the Union.

Claimant's past record was included by Carrier in declining to reverse the dismissal action. That record is summarized as follows:

<u>Date</u>	<u>Violation</u>	<u>Discipline Assessed</u>
5/6/77	Constant tardiness - not providing proper relief on assignment	10 days suspension
1/30/78	Constant tardiness - not providing proper relief on assignment	20 days suspension
8/2/79	Not providing proper relief on assignment	10 days suspension

12/6/79	Improperly performing duties causing unnecessary train delays	15 days suspension
9/19/80	Excessive personal calls made from company communication system while on duty and under pay	letter of reprimand
10/28/81	Failure to protect assignment	10 days suspension
1/13/82	Having and firing a BB and/or pellet gun at State Line Tower	Dismissed

On the basis of the evidence reviewed herein the Division finds the Carrier's action dismissing the claimant was for just cause.

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

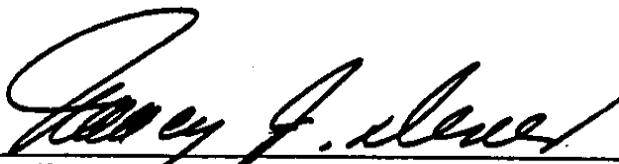
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1981

