

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24746
Docket Number MW-25063

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation (formerly The New
(York, New Haven & Hartford Railroad Company

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

(1) The dismissal of Trackman Patrick Maher in connection with "your arrest and arraignment in District Court at approximately 9:00 a.m. December 8, 1976 on charges of grand larceny from Conrail Corporation between December 1975 and May 1976" was arbitrary, without just and sufficient cause, on the basis of unproven and disproven charges and in violation of the Agreement.

(2) Trackman Patrick Maher shall be allowed the benefits prescribed within the fourth paragraph of Agreement Rule 14 (D).

OPINION OF BOARD: Claimant Patrick Maher was employed as a trackman with seniority date of December 3, 1975, headquartered Oak Point, New York.

On December 13, 1976, carrier addressed a letter notifying claimant to attend a hearing on December 17, 1976, in New Haven, Conn. The body of the letter follows:

"You may if you desire, arrange to be accompanied by a representative as provided in the applicable schedule agreement, without expense to the company. You may produce witnesses on your own behalf, without expense to the company, and you or your representative may cross-examine witnesses. You are expected to be present throughout the entire proceeding. This notice was issued in connection with the charge outlined below:

Arrest and arraignment in District Court at approximately 9:00 A.M. December 8, 1976 on charges of grand larceny from Conrail Corporation between December 1975 and May 1976. It was signed by A. B. Butler, Assistant Division Engineer, and a copy of sent to Mr. Christensen."

At the hearing, Mr. Maher stated he had not received the notice until 4:00 PM, December 16, and did not have sufficient time to notify his counsel to represent him. He requested a postponement of the hearing which was granted. Due to the fact a number of other employees were involved in the investigation, additional postponements were arranged. The hearing did not resume until December 28, 1976. It was continued on that date and intermittently thereafter and was not concluded until March 16, 1978. Claimant did not appear at any of the numerous hearing sessions after the first one on December 17, 1976.

The fact that the hearing was protracted over the period from December 1976 until March 1978 was due to a number of employees being involved. It was also due to the fact that the employees had been arraigned on larceny charges and the proceedings were not concluded until November 1977,

Both the Carrier and the Organization include complaints in their submissions as to failure by the other side to observe time limits and other procedural rules in the processing of this claim. For example, claimant protests being denied an appeal hearing after being notified of his dismissal on April 17, 1978. At the same time, however, claimant chose not to attend any of the investigation hearing sessions after the first on December 17, 1976. Also, the Organization complains that Carrier did not issue its disciplinary notice within 10 days after the hearing was concluded as required by Rule 14. While the point is well taken as shown by the fact carrier dismissal notice was not issued until April 17, 1978, the record does not show that claimant was, in any way, handicapped and thus it cannot be considered fatal to the disposition of his case. In explanation, Carrier points out that there was general agreement between all parties involved that additional time would be allowed because of the voluminous amount of testimony adduced during the hearing.

The Organization has protested that Carrier's charge against claimant was not sufficiently precise and thus violated Rule 14 (C). In this connection it must be noted the larceny charges against claimant and his appearance in court with his co-conspirators is well documented. Thus, we conclude that the charges set forth in Carrier letter of December 13, 1976 were sufficiently informative to enable claimant to prepare a defense, had he been so inclined, and fulfill the requirements of the rule. If claimant had any intention to prepare a defense he had ample time to do so since his request for a postponement on December 17, 1976 was granted and the hearing was not resumed until December 28, 1976.

In reviewing the evidence we find numerous instances on both sides where the usual procedural rules, time limit provisions and appeal processes were not strictly followed. In none of these do we find them prejudicial to the claimant or to the rights of both sides to due process in the ultimate handling of the case. There have been a number of cases before the Board which have dealt with similar irregularities, found them not crucially significant and proceeded to handle the cases on merit. Typical of such cases is Second Division Award No. 9513, as follows:

"Both Petitioner and Carrier contend that the other is guilty of procedural violations in their respective handling of this dispute. We have reviewed all of the record and argument and can only conclude that neither party in this dispute is completely free of blame. The handling of this case will never be used as a text book example of proper disciplinary procedures. For this reason we reject the procedural contentions of both parties and will examine this case on its merits."

The Organization has also protested on the point that the charges against claimant as well as the other defendants were dropped by the court. On this point it must be emphasized that this Board does not function under the same rules of evidence or rules of procedure as criminal courts. These points were dealt with in PLB 550, Award No. 104 in a similar situation wherein criminal court proceedings were involved. Comments of the Referee in that case fit this case and are quoted as follows:

"Our role is, first of all, confined to a place in the employer-employee relations disputes procedure, available in the law, but consented to by the parties under their collective bargaining relationship. As such, we are governed by (a) the contractual commitments entered into by the parties in their agreed-to Rules, (b) the residual rights of management to the extent not qualified by or substituted for by the collective Agreement Rules to carry out its mission efficiently and productively, and (c) the conditions and qualifications, procedurally and otherwise, imposed by the Railway Labor Act.

Those criteria and controls involve us in two characteristics pertinent to the facts in the claim now before us. One of these is that we are not deciding in the same terms, by the same criteria, with the same authority and responsibility, nor with the same purposes or available means of achieving said purposes, as does a criminal court. Our responsibility is the narrower one of deciding whether the employer had good cause to regard the subject employes as no longer employable. The basic questions to which we are answerable in the instant controversy are: were there substantial grounds before the Carrier for support of its decision..."

In this case the very substantial evidence supporting Carrier charge of larceny and fraud is credible, clear and convincing. Not only do we have the accounts of Inspector Dunn and Captain Lynch detailing their extensive investigations, we also have records substantiating that claimant worked full time for the Turner Construction Company and the Jamison Construction Company at the Lincoln Hospital site during a major part of the period he was paid for work as a trackman at Conrail. During the period he was paid a total of \$3,588.11 by Conrail while evidence shows he was not on the property during most of the time for which he was paid. His pay checks were endorsed and deposited in the bank account of one of his co-conspirators and there was testimony by Foreman Hilbert that he had never seen claimant even though claimant was supposed to be working on Hilbert's gang. Evidence established that virtually all of the wages paid to claimant were obtained by fraud and conspiracy with other employes.

Claimant was afforded a full hearing on the charges as provided by Rule 14 of the Agreement but chose to pass up that opportunity to present a defense. In the absence of any counter evidence the charges stand unrefuted. Fraudulent conduct of this nature is utterly destructive of the kind of honesty and trust an employer should be able to expect from its employees. We find Carrier's dismissal action to be just, reasonable and fully warranted in the circumstances.

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

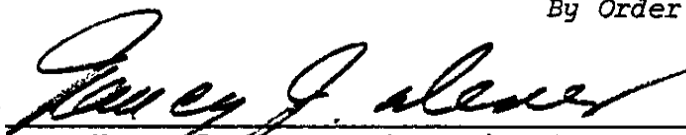
That the Agreement was not violated.

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 30th day of March, 1984

