

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24998
Docket Number MS-25208

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Richard Fetzer
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(Illinois Central Gulf Railroad Company

STATEMENT OF CLAIM: "This is to serve notice, as required by the rules of the National Railroad Adjustment Board, or our intention to file an ex parte submission on May 6, 1983 covering an unadjusted dispute between former employee, Richard Fetzer, and the Illinois Central Gulf Railroad involving the question of whether termination of Mr. Fetzer was the proper disciplinary action taken for his alleged violation of ICG Operating Rules E and H and Train Dispatcher's Rule 3. Specifically, Mr. Fetzer was charged with failing to report information concerning the derailment of an ICG train on September 28, 1982."

OPINION OF BOARD: The record shows that in the early morning of September 28, 1982, Illinois Central Gulf dispatch train GS-2 was moving northbound from Geismar, Louisiana, via Baton Rouge, to St. Louis, Missouri, with 84 loaded cars and 17 empties, pulled by three diesel locomotives. While proceeding through the town of Livingston, Louisiana, at about 40 miles per hour, the 16th through 58th cars derailed at about 5:05 A.M. 27 of the derailed cars contained hazardous commodities. Fires broke out among the derailed cars, and shortly thereafter explosions took place. 14 homes were destroyed or made uninhabitable by the explosions and fires, and about 3,000 residents were evacuated from their homes. The derailment and damage received wide media coverage.

Numerous Federal and State agencies, in addition to the railroad, were involved in containing the fires, explosions and contamination, and investigating the cause of the accident. While devoting all necessary resources to dealing with the derailment, the Carrier began its own investigation of the cause of the accident. Members of the train crew were questioned by Company officials and other agencies, as were numerous other persons, company employees and non-employees. Eventually the direct cause of the derailment was found to be a broken center pin on an empty gondola car, which permitted the rear truck and wheel assembly to come out from under the car and derail over a recently broken joint in the track. A following tank car ran over the truck and wheel assembly, and numerous following cars derailed and turned over. Other aspects, such as alleged alcohol consumption by crew members, the presence of unauthorized personnel in the locomotive cab, alleged excessive speed of the train, and a worn air hose connection were thoroughly investigated.

On October 11, 1982, railroad clerk Janet Byrd, of the Baton Rouge area, admitted to railroad officials that she was on the locomotive from Baton Rouge to Livingston and at the controls of the locomotives when the derailment occurred. Shortly thereafter, the company received information that clerk Byrd had telephoned certain train dispatchers in Chicago shortly after the accident and told them about her presence on the locomotive when the derailment occurred.

The record shows that on September 28, 1982, Claimant (Petitioner) was on duty as a train dispatcher until 7:59 A.M. On October 2, 1982, he was informed by another train dispatcher of Byrd's involvement. Claimant contends that knowing of Byrd's reputation of unreliability and tendency to lie, he did not believe the story and forgot about it. On October 20, 1982, Carrier's Director of Police and Special Services had an interview with Claimant. During the interview, Claimant stated that two or three days after the derailment another train dispatcher told him about her conversation with Janet Byrd, who had told the other dispatcher that she (Byrd) was at the controls of the train when the derailment occurred, and that later there was a conversation between Claimant and Byrd about Byrd's involvement, and that on the same day he discussed Byrd's call with other train dispatchers. In the statement given to Carrier's Director of Police and Special Services, the following transpired:

"Q. Do you feel that you should have discussed this matter with any of your supervisors?

A. No I don't because I did not believe the story to begin with and I felt that I was doing the right thing. I am not going to go repeating lies."

Claimant was suspended from service on October 20, 1982, and on October 21, 1982, was given notice by Carrier's General Superintendent to attend a formal investigation on October 22:

"... for the purpose of determining the facts and your responsibility, if any, in connection with information you had concerning the circumstances involving derailment of Train GS-2 at or near Livingston at approximately 5:05 a.m., September 28, 1982; also to determine if the facts known by you that were under investigation were reported promptly; in addition, to determine if you concealed these facts concerning this incident."

By agreement the investigation was postponed and conducted on November 2, 1982, a transcript of which has been made part of the record. The Claimant appeared at the investigation scheduled for November 2, 1982, accompanied by his father, a retired Carrier dispatcher, and also an attorney. Over strong protest, the attorney was not permitted to participate in the investigation as Claimant's representative, or to remain in the hearing room. His father was permitted to represent him.

It is well settled that a Claimant's right to representation in an on-property disciplinary hearing arises only from the provisions of the collective bargaining agreement. See *Carle vs. Conrail*, U.S.D.C., Southern District of New York (February 9, 1977) 94 LRRM 2719; *Edwards vs. St. Louis-San Francisco R.R.*, 361 F. 2d, 946, 954, 62 LRRM 2300, 2305-06 (7th Cir. 1966); and *Broady vs. Illinois Central R. Co.* 191 F. 2d 73 (7th Circuit 1951) cert. denied 342 U.S. 897, 72 S. Ct. 231, 96 L.Ed. 672 (1951). See also Third Division Awards Nos. 15676, 21228, 18352, Fourth Division Award No. 3134.

The collective bargaining agreement is silent, and the Petitioner so agrees, concerning the right of representation in on-property disciplinary hearings. It has been stated repeatedly by awards of all Divisions of the National Railroad Adjustment Board that Carrier's managerial rights are restricted only to the extent that they are limited by the collective bargaining agreement. In Third Division Award No. 10950, it was stated:

"We thus proceed to a consideration of the claim on its merits. At the outset the Employees advance the novel argument that Carrier has not pointed to any rule or group of rules which permit the action taken by the Carrier in this case. It is sufficient answer to say that the burden is not on the Carrier to show that its action is authorized by some provision of the Agreement. Rather the burden is upon the complaining employees to show that the action taken violates some part of the Agreement. ****"

In Fourth Division Award 733 it was held:

"... Consequently, in all matters that have not been limited by agreement, the Carrier's authority remains unrestricted."

In Second Division Award 3630:

"It is a fundamental principle of the employer-employee relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law. Contractual surrender in whole or in part of such basic attribute of the managerial function should appear in clear and unmistakable language."

In Second Division Award 8352:

"... The terms of a collective bargaining agreement do not establish an employer's rights, they limit them."

In the absence of a contractual provision permitting outside representatives to attend on-property disciplinary hearings, the Carrier was free to restrict the representation as was done. In the absence of an agreement rule on the subject, this Board cannot find a violation of the Agreement. The Carrier points out that under its policy, Claimant had three options: to be represented by an officer of the Union; to be represented by a fellow dispatcher; or to represent himself.

As to the merits of the dispute, Rule 3 of Rules for Train Dispatchers reads:

"Rules for Train Dispatchers

Rule 3. They must be familiar with all rules, special instructions, bulletin orders, bulletin notices and general orders governing the portion of the railroad they are dispatching and promptly report any violation thereof.

They must also promptly report any irregularities, neglect of duty, disobedience or apparent incompetence of which they have knowledge, defects in engines, cars, tracks, signal and related equipment or failure of trains to move at usual speed and other unusual occurrences must be recorded and promptly reported."

"Operating Rules

Rule E. Employees must assist each other in complying with the rules and special instructions. Any violation of rules or special instructions must be reported to their immediate supervisor."

"Rule H. Dishonesty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral character or serious violation of the law, are prohibited.

Employees are forbidden to make unauthorized charges for service performed in line of duty."

In the investigation, the statement that Claimant had given to Carrier's Director of Police and Special Services, on October 20, 1982, was read and admitted without protest. Claimant admitted that on September 30 or October 1, 1982, he discussed the Byrd incident with other dispatchers; that he had a conversation with Byrd on Wednesday night or Thursday morning, the 14th, and admitted that he did not inform his supervisors of the information he had received about Byrd, even though he did discuss it with other dispatchers.

On November 11, 1982, Claimant was notified of his dismissal from the service for violation of Train Dispatchers' Rule 3, and Operating Rules E and H, heretofore quoted. There was substantial evidence in support of the charge and to justify dismissal. The Claimant most certainly should have passed on to his supervisors any information that he had received involving the serious derailment. Whether he believed the information is immaterial. As it eventually turned out, the information that he had received was correct. Claimant's action in not reporting the information to his supervisors amounted to disloyalty to the Carrier. Any case involving disloyalty has always been considered extremely serious, justifying dismissal. See N.R.L.B. vs. Local Union No. 1229, I.B.E.W. (364 U.S. 464); also Third Division Awards Nos. 18363, 19811, 10930, 15932, 24761 and 24766.

The argument raised on behalf of Claimant that the rules involved provide no penalty for violation, simply is not persuasive. The Carrier has a right to issue such rules as it sees fit for the government of its employees, except to the extent limited by Agreement, and has the right to expect such rules to be complied with. The complaint is also made that Rule H is ambiguous in defining what constitutes "information" and what "concealing" means. We think that anyone qualified for the responsible position of train dispatcher knows, or at least should know the meaning of "information" and "concealing" as used in the rule.

For the reasons stated herein, the claim will be denied.

The record also shows that Claimant was dismissed for another offense, handled under a separate investigation, which case was not timely appealed on the property. This in itself would be proper grounds for dismissal of our present dispute (MS-25208), but in view of the serious issues involved, we have decided the case on its merits.

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

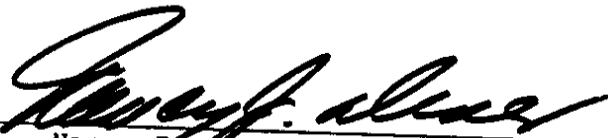
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Lever - Executive Secretary

Dted at Chicago, Illinois, this 26th day of September 1984.

