

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25046
Docket Number CL-25032

John F. Cloney, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9734)
that:

(a) Carrier violated the Agreement when they did on July 24, 1979 administer sixty (60) calendar days actual suspension to Mrs. Anita L. Price as a result of investigation conducted July 18, 1979 wherein she has been charged with being insubordinate on June 13, 1979.

(b) Carrier shall now be required to clear Claimant's record of this discipline and compensate her for any and all wages lost due to such disciplinary action.

OPINION OF BOARD: On June 18, 1979 Anita L. Price, an AAR Clerk with a seniority date of July 29, 1966 received a letter signed by H. J. Harbert, Director of Payroll Accounting which stated in part:

"You are hereby charged with being insubordinate when on June 13, 1979, contrary to and in defiance of the direction of your Supervisor, you refused to perform work he assigned to you."

The letter notified her of an investigation to take place on June 27, 1979. Harbert later rescheduled the investigation to July 18, 1979 as requested by her representative.

There is no factual dispute. Price was assigned to do the work of an absent employee. She had never done this work before. As she was dressed in a new and expensive blouse (because of an after work appointment) which she feared would be soiled if she performed the task, she admittedly refused and another employee had to be assigned.

At the hearing Price's then immediate supervisor, Solomon read into the record a statement which he prepared on the day of the incident. The statement, addressed to Harbert begins "I hereby request to have a board of inquiry held on Anita Price for refusing to perform an AAR function requested of her". The statement goes on to detail Solomon's version of the incident. At the investigation Harbert testified Solomon came to his office, stated he had a serious problem, explained his version of what had happened and said positive action should be taken. Harbert told Solomon to "document the conversation". Solomon did so and Harbert notified his Chief Clerk to issue an insubordination

charge. Later in the day employe Price visited Harbert and asked if she should get her blouse dirty. He testified he did not render an opinion but commented she knew the demands of the job and had made a bad mistake in declining to do assigned work, noting "no blouse was worth losing your job for". (In her version of the interview, which she admits she initiated, Price does not recall that comment.)

On July 24, 1979 Price was notified by letter signed by Operations Staff Officer W. B. Richardson that the "Decision of the Board is that you are guilty as charged of being insubordinate ..." and she was to be suspended for sixty days.

On August 28, 1979 the Organization appealed to Harbert. On October 5, 1979 Harbert notified the Organization the "claim is denied". On November 2, 1979 the Organization appealed to Director of Labor Relations Massie alleging, inter alia, that:

"... Claimant's right to a fair and impartial consideration on appeal ... were violated. Mr. Harbert served in a three fold capacity in this case. He was the Carrier Officer making the charge, served as a Carrier witness and was required to consider independently and fairly Claimant's contention of improper discipline on Appeal ..."

Rule 27 of the parties Agreement provides in part:

"(a) An employee ... will not be disciplined or dismissed without investigation. He shall have a fair and impartial investigation at which he may be represented only by one or more duly accredited representatives....

* * *

(c) If an employee considers his discipline unjust he has the right to appeal through his duly accredited representatives from the decision of the local officer up to and including the highest official designated by the Railway to whom appeals may be made."

The Organization argues that Harbert was the highest appeals officer designated by the Carrier to handle appeals at the local level and, due to his having made the charge and served as a witness, was incapable of "fair and impartial" consideration.

The Organization points to several Awards in support of its position that consideration at the Appellate level must be as fair and impartial as at the hearing level. These Awards seem to fall into three main categories.

1. Cases in which appeal must be taken to the same individual who had decided the matter upon initial investigatory hearing (Award 1742 - Fourth Division).
2. Cases in which evidence establishes the appellate officer had prejudged the issues (Fourth Division Awards 1743 and 1909. Third Division Awards 7021 and 14031).

3. Cases in which the decision is arrived at by persons other than those who heard the evidence. (Third Division Awards 7088 and 17156).

In the instant case Harbert neither decided the case initially nor is there evidence that he prejudged the issue. While it is true he signed the original charge it is also true he issued the charge at the request of and based upon the written report of a subordinate. This Board does not interpret Harbert's statement in the charges as value judgments made by him based on evidence. Rather they are statements reflective of allegations made to him by a subordinate and regarding which he ordered an investigation be made.

Further, this Board does not agree that Harbert's having appeared as a witness precludes his fair consideration of the matter on appeal. In this connection this Board notes Harbert's interview with the employe after the incident was occasioned by her going to his office and asking to speak to him. His statement that "No blouse was worth losing your job for", made in response to Claimant's explaining why she refused to do the work does not constitute a judgment of guilt on his part in our view but rather was a reply to her admitted statement to him. He neither sought nor instigated the interview.

This Board had held "there is nothing in the Rules prohibiting an officer who acted as a witness from serving as an appeals officer. There appears to be no evidence or support ... for the contention that the functioning of the Superintendent as the presiding officer, after appearing as a witness in the earlier investigation, in any way impaired the rights of Claimant." (Third Division Award Number 19708).

While this Board finds no evidence Claimant was deprived of fair, impartial treatment or prejudiced in any way it is appropriate to note that circumstances alter cases and what does not appear unfair in one context may easily seem so in another. Accordingly it may be prudent for the Carrier to devise methods to minimize the possibility of charges being brought or testimony being given by persons who may be called upon to serve in an appellant function in a given case.

Claimant also argues the discipline imposed was harsh. This Board has historically considered insubordination extremely serious and has refused to upset the extent of discipline unless there is evidence of arbitrary, capricious or discriminatory treatment of employes. There is no such evidence here.

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 Employes involved in this dispute are respectively Carrier and Employes 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

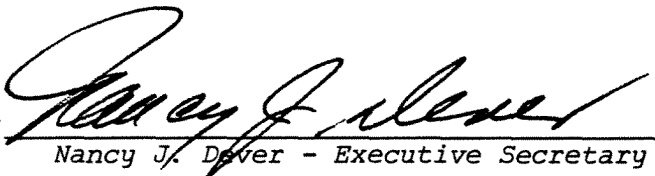
That the Agreement was not violated.

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 4th day of October 1984.