

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25588
Docket Number MW-25650

Paul C. Carter, Referee

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

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

"(1) The Dismissal of Carpenter J. Carter for alleged insubordination on November 23, 1982 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File C #2-83/D-2573).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Prior to the occurrence giving rise to the dispute herein, Claimant was employed by the Carrier as a first-class carpenter, assigned to Crew A with headquarters at the ABC Building, Milwaukee, Wisconsin, working under the supervision of Bridge and Building Relief Foreman T. J. Rueda. On November 23, 1982, he was removed from service by Relief Foreman Rueda for alleged insubordination resulting from his refusal to perform work as instructed by the Relief Foreman. On the same date, November 23, 1982, Claimant was advised by the Carrier's Division Engineer:

"Concerning the incident that occurred at approximately 1:10 p.m., Tuesday, November 23, 1982, wherein Mr. T. J. Rueda, B&B Foreman, sent you home.

"Effective immediately you are hereby dismissed from the service of the Milwaukee Road for insubordination."

The General Chairman of the Organization made request upon the Division Engineer for a hearing for Claimant. The Division Engineer scheduled the hearing to start at 10:30 a.m., December 17, 1982, at Milwaukee, Wisconsin. The hearing was conducted as scheduled, with the Division Engineer acting as Conducting Officer. On December 21, 1982, the Division Engineer advised Claimant that his dismissal was upheld. On January 5, 1983, an appeal hearing was conducted by Carrier's Director-Labor Relations in Chicago, Illinois, with the decision that Carrier's actions in terminating Claimant's services on November 23, 1982 were proper. Claimant's prior record was also referred to in the appeal hearing decision.

In the handling of the dispute on the property the Organization contended in part:

"...further, the Organization finds Mr. Carter's right to a fair and impartial hearing may be in jeopardy, as Mr. E. E. Howard who conducted the hearing was also the Carrier Official who signed the written dismissal notice."

In hearing before the Division on June 21, 1985, with the Referee present, this issue, which had also been raised in the Organization's submission, was vigorously pursued by Organization representatives taking the position that as the Division Engineer signed the letter on November 23, 1982, to Claimant dismissing him from service, then some other officer should have conducted the hearing. The Carrier representative took the position that the procedure followed was in accordance with the Agreement, and in accordance with accepted procedure on the property.

We have carefully reviewed the transcript of the December 17, 1982, hearing, wherein the Claimant was represented by the General Chairman. At no time prior to or during the course of the hearing was any exception taken to the Division Engineer acting as Conducting Officer. In fact, near the close of the hearing the General Chairman stated:

"...I would also like to thank Mr. Howard for a gentlemanly held hearing..."

It is so well settled as to require no citation that if exceptions are to be taken to a letter of charge, the timeliness of the hearing or investigation, or the manner in which a hearing or investigation is conducted, such exceptions must be taken prior to or during the course thereof; otherwise, such exceptions are deemed to have been waived. We find that principle to be applicable in the present case. Any exception taken by the General Chairman in the appeal process came too late. Many awards of this Board have upheld the same officer issuing the charge, conducting the investigation, and rendering the decision. Further, we have been referred to no rule in the Agreement specifying who shall prefer charges, conduct hearings or investigations, or render decisions. We do not find that Claimant's Agreement rights were violated in the present case.

As to the merit of the dispute, there was substantial evidence in the investigation, or hearing, that Claimant did, on three occasions, refuse to perform work as instructed by the Relief Foreman; that he directed obscene language to the Relief Foreman, and that he threatened the Relief Foreman when the latter removed him from the service. Any of these acts constituted insubordination, which cannot be condoned and which usually results in dismissal.

While there were conflicts between the testimony of Claimant and others in the hearing, it is well settled that this Board will not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses. Such functions are reserved to the Hearing Officer.

The record also shows that Claimant had been dismissed in January, 1981, as a result of insubordination and profanity directed to his foreman, and reinstated on a leniency basis some sixty days later. An employee's prior record may always be considered in determining the discipline to be imposed for a proven offense, but may not be used to prove the charge under investigation.

Considering Claimant's actions in the present case, and his prior discipline record, the Board finds no proper basis for interfering with the discipline imposed by the Carrier.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

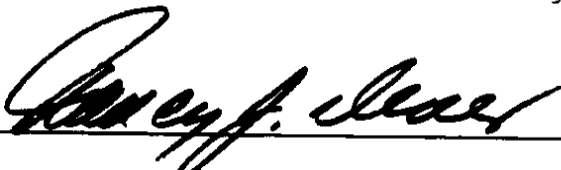
That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1985.