NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26058
THIRD DIVISION Docket Number MS-25095

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Eathen R. Martin, An Individual
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(National Railroad Passenger Corporation

STATEMENT OF CLAIM:

"PLEASE BE ADVISED that this letter is to serve as notice of E. R. MARTIN, service attendant for AMTRAK, to file a grievance with the National Railroad Adjustment Board Division 3 and have the ex-parte decision of the FORMAL INVESTIGATION BOARD dated June 25, 1982 and the Denial of the Appeal to the Corporate Director of Labor Relations dated January 18, 1983 set aside and have this matter reset for hearing, or in the alternative reinstate E. R. Martin with back pay and attorney fees."

OPINION OF BOARD: The above Statement of Claim was derived from a letter dated April 11, 1983, addressed to the Board by Mr. John Becker, Counsel for the Claimant. Subsequently, on February 8, 1984, Mr. Becker addressed a second letter to the Board stating:

"By this letter we respectfully request a referee hearing, and for Eathen Martin and myself to appear and present our case".

Acting on these communications the Board scheduled a Hearing before the Referee for 1:00 P.M., May 23, 1984. Report on the Hearing is set forth in Award 24880 as follows:

"It is also noted that Claimant's counsel requested a hearing before the referee for the purpose of presenting oral argument as set forth in his Petition For Review to National Railroad Adjustment Board. A date for such hearing was set for May 23, 1984 at 1:00 PM and counsel was duly notified. Representatives of the Board together with the Referee were present at the appointed time at the Board offices at 10 West Jackson Blvd., Chicago, Illinois but Counsel and Claimant did not make an appearance. The hearing continued until 1:35 PM awaiting their appearance and when they failed to appear within a reasonable time, the hearing was closed".

Subsequent to issuance of Award 24880 on June 28, 1984, a Civil Action (No. 84 C 8117) was filed on behalf of the Claimant in the United States District Court for the Northern District of Illinois Eastern Division. In full and final settlement of that litigation the parties agreed to remand the Claim to the Board for reconsideration and ruling. That settlement was in the form of a Dismissal with the parties stipulating that their Agreement made no determination "of any alleged error or wrongful action by any party, and no determination on the merits of the claim."

The Stipulation on which the Dismissal was based is set forth in the following terms:

"(a) The parties agree that plaintiff's claim for reinstatement and other relief arising out of his discharge on or about June 25, 1982 (Docket No. MS-25095) will be remanded to the Third Division, National Railroad Adjustment Board ('Board') for the sole purpose of permitting plaintiff or his representative the opportunity to be heard in person by the Board and for a ruling upon such reconsideration;

(b) The parties further agree that plaintiff or his representative will be notified of the date and place of the hearing at least two weeks prior to such hearing which will be held in or about Chicago, Illinois;

(c) No party will be permitted to file additional written materials with the Board;

(d) This stipulation is agreed to by the parties to settle a disputed matter and does not constitute an admission by any party contrary to the positions on the merits heretofore taken by the parties in this proceeding;

(e) The parties agree that the remand to the Board provided for in this Stipulation shall be undertaken by the parties by serving the attached letter, Attachment 'A' on the Board, and that such letter shall serve as the explanation of the parties to the Board as to why the matter is remanded."

In compliance with the Court action, the Board scheduled a Rehearing before the Referee in the Board offices at 10:00 A.M., May 7, 1986. Attending the Hearing were the Claimant together with his Counsel, Mr. John Becker. Mary Bennett, Counsel, represented the Carrier.

The Rehearing was delayed a short time awaiting arrival of all the parties and finally began at 10:50 A.M. It continued with all of the above participating and concluded at 11:35 A.M. by mutual consent. All of the terms stipulated in the Dismissal action by the Court were fully complied with in the Rehearing of May 7, 1986.

At the Rehearing both the Claimant and his Counsel presented respective versions and argument on what had transpired as related to charges on which Claimant was terminated, whether Claimant had been notified of the Investigative Hearings held by Carrier and also the Board Hearing of May 23, 1984. The salient points advanced by Claimant and his Counsel during the Rehearing were:

1. Claimant did not authorize the Brotherhood to represent him.

2. Claimant did not receive notice of Hearings held by Carrier Representative on the charges which served as a basis for his termination from service.

3. The charges were not sufficiently serious to warrant termination.

Dealing first with the question of representation, it is noted Claimant was employed as a Train Attendant for Amtrak. This position is part of the craft or class of employes represented for collective bargaining purposes by Dining Car Employees Local No. 43 functioning through the Brotherhood of Railway, Airline and Steamship Clerks. Being the duly authorized Representative, the Organization was legally bound under provisions of the Railway Labor Act to represent the Claimant in the handling of his disciplinary problems. The governing Labor Agreement applicable to this craft or class sets forth Rules for the handling of claims and grievances under Items S and T. Paragraph f in Item S provides:

> "This Rule recognizes the right of the duly accredited representative to file and prosecute claims and grievances for and on behalf of the employes."

From May, 1982, and for the balance of 1982, the Organization represented Claimant in accordance with its legal responsibility as the duly authorized Representative of his craft or class of employes. Personally involved as his Representative during that period was E. E. Davis, General Chairman, the designated Union Officer responsible for handling matters of this kind. Thus, in accordance with the usual practice, a copy of the original Carrier notice of May 24, 1982, to Claimant stating the charges and setting up an Investigative Hearing for June 3, 1982, was sent to Mr. Davis. This was in accordance with usual procedures required by the Railway Labor Act. Acting on this initial notice, General Chairman Davis first endeavored to get the Hearing date postponed. These efforts were successful as evidenced by the Carrier's letters of June 7, 1982, and June 14, 1982. Through the General Chairman's efforts the date for the Hearing was set back to June 22, 1982.

Subsequent to the Carrier letter of June 25, 1982, notifying Claimant of his termination, the Organization continued its efforts by endeavoring to get the termination action reversed by an appeal to a higher Officer of the Carrier. Thus, the General Chairman addressed a letter on July 9, 1982, to M. J. Hagan, Regional Manager--Labor Relations, stating his position as follows:

> "We, the Organization, disagree with the decision on the grounds that Mr. Martin was not present at the investigation proceedings, to allow a proper defense to be mounted in his behalf, and therefore was unable to defend himself during the aforementioned 'absentia', proceedings.
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> Further, we do not feel that the weight of the Company's charges was sufficient to warrant dismissal, and that our member, Mr. Martin, was not accorded a fair and impartial investigation as our current and governing agreement guarantees all employees in Amtrak's service. We, therefore, request that Mr. Martin be returned to service immediately with all seniority, vacation, health and welfare, and all other rights restored, unimpaired. Should you disagree with our entreaties, we ask for conference. Date and time may be set by your office."

That appeal resulted in a conference with the Carrier and a further review of the record. The Carrier's letter of August 11, 1982, declined the appeal and sustained the termination. Still another appeal was made by the Organizatation; this by letter of August 16, 1982, from Thomas Fitzgibbons, Chairman of Amtrak Service Workers Council to J. W. Hammers, Vice President of Labor Relations. The appeal led to a conference between them on December 28-29, 1982. Following further consideration the Carrier declined the appeal and stated the basis of its decision by letter of January 18, 1983, to the Organization.

It was following that denial of the Organization's appeal efforts that steps were taken to refer the case for further consideration to either a Public Law Board or the National Railroad Adjustment Board.

The first notice the Carrier received that Claimant had retained Timpone & Rickleman as Counsel was the Firm's letter of April 7, 1983.

All of the appeals referred to above were progressed in accordance with provisions of the Railway Labor Act particularly Section 153 First (i) and (j) as set forth below:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
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> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Now to deal with the matter of whether the Claimant was notified of the Hearing on the charges set forth in the Carrier's letter of May 24, 1982. The record of Carrier efforts to notify him are set forth in detail in the original Award No. 24880 and are incorporated herein by reference. Two of the letters of notification sent by the Carrier, i.e., those of May 24, 1982, and June 7, 1982, were sent to the address Claimant had registered with the Carrier. They were both sent via Certified Mail Return Receipt Requested. The third notification letter dated June 14, 1982, was hand-delivered to the Claimant by Richard J. Jones, of the Carrier. All of these actions by the Carrier in attempting to notify the Claimant of the charges against him and the Investigative Hearing to be held thereon were documented in the Carrier Submission which was reviewed during the Board Hearing of May 24, 1982.

During the Rehearing, the Claimant stated he had not received the two letters sent to him via Certified Mail. He acknowledged living at that address for a time but stated he was not living there at the time the letters were sent. He added that he checked for mail at that address from time to time and on one such occasion found a notice that a Certified letter was being held for him at the Post Office. On checking the Post Office, however, no record of the letter was found. The notification letter of June 14, 1982, addressed to the Claimant was hand-delivered to the Claimant by Richard J. Jones, a Carrier Representative. There was some question on the matter of his reluctance to accept that letter because Mr. Jones was unable to advise him of its contents. The letter was delivered to him nonetheless as documented in Exhibit 4-C of the Carrier Submission.

Now to deal with the contention made by the Claimant during the Rehearing that the charges covered by the Carrier's letter of May 24, 1982, were not sufficiently serious to warrant termination.

The specific charges filed against Claimant were a result of his conduct in the Ramada Inn, Ogden, Utah, on the night of April 24, 1982, and were set forth in the original Award together with supporting evidence. There is no need for repetition at this point. The charges were not refuted in the original Board Hearing since the Claimant was not there nor was he present at the Investigative Hearing conducted by the Carrier. At the Rehearing, the Claimant admitted to differences with the Hotel Clerk but minimized his own actions as to creating a disturbance. Claimant also stated there was some problem about paying extra for a separate room but that he later returned and offered to make such payment.

During the Rehearing the Grievant made no reference to previous disciplinary actions which were taken into account by the Carrier in its decision to terminate his services.

DISCUSSION OF FINDINGS

Claimant's allegation of misrepresentation is to the effect that he did not authorize the Organization to represent him in the handling of his grievance. This falls for lack of support in provisions of the Railway Labor Act and the terms of the applicable Labor Agreement. It is basic in the handling of Railway Labor claims and grievances that the Organization was duty bound to represent him under its responsibility as the duly authorized Representative of his craft or class. Thus, when the Carrier filed charges against Claimant in its letter of May 24, 1982, and set a date for an Investigative Hearing, it was required to file a copy of the charges and notice of Hearing with the General Chairman. He did not need any special authorization from Claimant to proceed in fulfilling his responsibility as Claimant's authorized Representative. This is the usual manner for handling grievance matters on the Railroad as prescribed in the Act as set forth in Section 153 First (i) quoted above.

The Organization's actions as Representative of the Claimant began in May, 1982, soon after the charges were filed and a date was set for the Investigative Hearing. As such Representative, actions continued through the rest of 1982 by various efforts, first in arranging with the Carrier for postponements, and later in appeals for reversal of the termination. It was not until April, 1983, some eleven months after the charges were filed, that any notice was received by the Carrier that Claimant had elected to retain his own Counsel to represent him. It was then, and only then, that the Organization was relieved of its responsibility to represent him as a member of the craft or class.

Thus, we must conclude that the Organization acted in accordance with its statutory obligations in proceeding to represent Claimant in his disciplinary problems with the Carrier. It did not need any special authorization from him to represent his interests. The record speaks for itself as to the Organization's persistent efforts in his behalf.

On the point that Claimant alleges he did not receive notice of the Investigative Hearing it must be noted that the notices were sent to him via Certified Mail as is the usual practice with notices of this kind. They were sent to the address he had supplied the Carrier authorities. His failure to receive the notices was due to his own indifference to the need for picking up his mail regularly at that address or, as an alternative, change his address at the proper Carrier Office. His failure to act responsibly on these matters can only be characterized as negligence. Certainly the Carrier cannot be faulted in following the usual procedures by sending such mail notices via Certified Mail at the address listed with them by the employe. Also, in another instance, to make sure he received the notice, the Carrier sent a Representative to hand-deliver a notice of Hearing to Mr. Martin. During the Rehearing Claimant admitted that the Carrier Representative attempted to deliver a letter to him, but he stated he refused to accept it.

Thus, we must conclude that if Claimant did not receive the Hearing notices, as alleged, it was due to his own conduct and the Carrier cannot be held at fault. It certainly cannot be said that the Carrier violated its duty under the Agreement to provide the Claimant with notice that an Investigation had been scheduled.

Now we come to Claimant's account of the events at the Ramada Inn on the night of April 24, 1982, which led to his termination. During the Rehearing he admitted to having differences with the Hotel Clerk over his room assignment. While his account of the incident tends to minimize the seriousness of their confrontation, the reaction of the Hotel Clerk at the time shows he felt Claimant's conduct was unacceptable. Thus, that same night he made a long distance call to Chicago and reported the matter to the General Manager of Amtrak Crew forces. It is also important to note his written report of the incident included a comment that Claimant's conduct was unjust and that future problems of this kind should not be allowed to occur. The quantum of evidence as reviewed herein and also in the original Award supports a finding that Claimant was guilty of violation of the Rules as charged.

Once guilt was established it was entirely within the Carrier's rights to consider Claimant's past service record in determining the extent of discipline warranted. While we might recognize merit in the argument that this single offense was not sufficiently serious to warrant termination, we must also recognize that his past record was not good. He had been disciplined previously on five separate occasions for Rules violations and some of them were for the same Rules as in this case. In all of the previous cases the violations were deemed sufficiently serious that each time he was suspended from service for periods varying from 5 to 90 days. Suspensions of this kind are imposed to serve as a warning to employes that Rules violations will not be tolerated. The record in this case does not indicate that this approach was effective with the Claimant. Thus, we do not disagree with the Carrier in reviewing Claimant's past record and its decision to terminate his services. We find the Carrier's action just and reasonable in the circumstances reviewed herein.

A W A R D

On the basis of a full review of the evidence and argument as set forth above, the Board hereby affirms its original Award (24880) in this case, and denies the Claim.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of June 1986.