

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27610
Docket No. CL-28042
88-3-87-3-860

The Third Division consisted of the regular members and in addition Referee W. F. Euker when award was rendered.

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10220) that:

1. Carrier violated the Agreement Rules, particularly Rule 21, when it applied the supreme penalty of dismissal against Mr. Robert Koppelman, Crew Dispatcher, Crew Management Center, account formal investigation which began on January 7, 1987 and concluded on date of January 15, 1987, and

2. Carrier shall now be required to return the Claimant Robert Koppelman to the service of the Carrier with all rights restored, his record be cleared of the charges and the discipline assessed him and that he be paid for all time lost as well as for all monies he may have spent for health benefits he would have otherwise received under the group policies now in effect, beginning with the date of January 5, 1987, the date he was held out of service and continuing until he is restored to the service of the Carrier."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This is a discipline case where Claimant's discharge was appealed after an investigation wherein Claimant was charged as follows:

CHARGE: Your responsibility in connection with your tampering with Passenger coach, being quarrelsome, disorderly conduct, and violation of Rule G at about 8:50 p.m., Friday, January 2, 1987, while you were on Company property in the Chicago Passenger Terminal.

The incident giving rise to the foregoing charge occurred on Carrier property at a time when Claimant was not on duty. The Organization contends, for that reason alone, the Carrier's discipline should be reversed. In addition, the Organization asserts several alleged procedural violations that taint the Carrier's decision, including among others, an imprecise charge; the failure to allow Union representation at the preliminary questioning of Claimant; and the lack of independent review at each step of the disciplinary process.

Dealing first with the preciseness of the charge, we find no evidence that Claimant or his representative were unaware of the true purpose of the investigation and indeed Carrier granted Claimant's representative a recess to further prepare his defense.

Next we consider the Organization's challenge that Claimant was not afforded the opportunity to have his Representative present at the pre-investigation discussion, when Claimant was initially challenged for tampering with Carrier's equipment, with the confrontation between Claimant and several Carrier supervisors and the railroad police immediately following. The Organization cites the Supreme Court's decision in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) as authority. This argument has been previously considered and rejected by this Division in Awards 22431 and 26365. Award 22431 was then appealed to the U.S.D.C., Northern District of Illinois and affirmed on December 23, 1982. The major emphasis for the Board's rejection of this argument in Third Division Award 22431, was the absence of the controlling N.L.R.A. language in the governing Railway Labor Act. Another important distinction in this case, is the Agreement itself, particularly Rule 21, which provides for the right of representation at the investigation or trial. The Agreement is silent on the question of pre-trial investigatory representation. In any event, there is no clear evidence that Claimant requested his representative at the initial confrontation with Carrier's officers.

The Organization skillfully contends that Claimant was deprived of independent review of his case because the Carrier Officer who signed the discipline letter was also the same officer to whom the Organization was required to appeal under the discipline procedure. The Organization cites Third Division Award 24547 in support. We concur with the Board's views expressed in Third Division Award 24547, when the multiplicity of roles played by an appeals officer expresses the final decision on Claimant's case. Here, Claimant's appeal was carried to the next officer who presumably reviewed the matter de novo. See Third Division Award 25149.

On the merits, the fundamental question at issue is whether there was substantial evidence in support of the charges, and whether the totality of Claimant's conduct, if proven, merits discharge. Concerning the evidence, we have carefully reviewed the 76 page Transcript plus Exhibits and we are persuaded that substantial evidence has been adduced in support of the charges. The evidence reveals that Claimant was given the opportunity to walk away from

this confrontation on at least three occasions, but for reasons best known to himself, he refused. Initially he referred to himself as a "~~xxxx~~ drunken employe," and when the Stationmaster was then brought into the discussion, the Claimant made no effort to depart the premises, but insisted on being frisked. After the Carrier's police officer arrived and attempted to defuse the situation, Claimant continued to escalate the matter, until finally the Carrier had no recourse, but to place Claimant in custody, call the Municipal police and charge him with disorderly conduct.

Parenthetically, the fact that the disorderly conduct charge was later dismissed by the Court, if true, is not relevant to the charges at the Carrier's investigation, for as this Board has noted in countless decisions, the quantum of proof is different, just as the rules for excluding evidence are dissimilar. See Third Division Award 20781 involving the same parties.

The totality of Claimant's conduct in this case is not to his credit. His chameleonic attempt to repetitively change from employe status to non-employe (commuter) status when he fancied his interests would be advanced, only served to create contradictory testimony on his behalf. By contrast, the testimony of Carrier's witnesses, for the most part, was clear, consistent and un rebutted. Consequently we feel the charges were proven. See Third Division Award 25838.


However, in view of the complete record, it is our conclusion that Claimant should be given a "Last Chance" to prove to the Carrier and the Organization, he is worthy of their trust and confidence. The Claimant should be reinstated with seniority and all other rights unimpaired, but without backpay or other monies claimed in Paragraph 2 of the Claim, subject to any procedures which are applicable to employees who may have problems with alcoholic beverages.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1988.