

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30554
Docket No. MW-30661
94-3-92-3-442

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

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

- (1) The dismissal of B&B Mechanic J. H. Delgallo for alleged violation of Rule D, Paragraph 2 of the General Rules of NORAC Operating Rules in that he sustained an injury on September 12, 1989 and his inability to perform service to Conrail and for alleged absence from his position commencing September 13, 1989 in connection with an incident which occurred on September 12, 1989, was without just and sufficient cause and on the basis of unproven charges (System Docket MW-1890).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. H. Delgallo shall be reinstated in the Carrier's service with seniority and all other rights unimpaired, he shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result of the discipline imposed upon him by 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 employee or employees involved in this dispute are respectively carrier and employee 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 waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as a Bridge and Building Mechanic. His seniority date is September 15, 1976. Prior to the incident here at issue, he had no prior discipline.

On September 12, 1989, while Claimant was off duty and away from Carrier property, he was brandishing and firing into the air a shotgun. When police responded to a complaint about his conduct, he continued to brandish the gun and fired in the direction of a policeman. The police shot him in the stomach. After Claimant was shot, he was involved in a struggle with the police in which he cursed and threatened them.

A story about the incident was published in the Philadelphia Inquirer. It did not identify Claimant as a Conrail employee.

Claimant was hospitalized as a result of the shooting and missed work without permission. He did have a relative call in to notify the Carrier of his inability to work because of the hospitalization, but the Carrier did not authorize Claimant's absence. The Carrier removed Claimant from service, effective September 18, 1989, pending hearing, as a result of the incident.

Claimant was charged with criminal conduct as a result of the incident. He was subsequently convicted of simple assault, terroristic threats, reckless endangerment and resisting arrest and was sent to jail, where he served nine and 1/2 months of a one to two year sentence.

The Carrier charged Claimant with violation of Rule D, Paragraph 2 of the General NORAC Rules for his conduct in the incident as well as with being absent from his position for the period following the incident. Rule D states, in Paragraph 2:

"To remain in the service, employees must refrain from conduct which adversely affects the performance of their duties, other employees, the public, or from conduct which discredits the Company."

The Carrier scheduled an investigative hearing, which was several times postponed during Claimant's incarceration. It was finally completed on March 7, 1991. The Carrier reviewed the record, found Claimant guilty of the charges and, by notice dated March 19, 1991, dismissed him from service. The Organization appealed the Carrier's determination. The appeals were denied; and the dispute was brought to this Board.

The Carrier argues that Claimant's criminal violations, including use of deadly force, are clearly established. It asserts that those violations establish Claimant's violation of NORAC Rule D, since his conduct brought shame to the Carrier, jeopardized the public safety, and interfered with the relationships between Claimant and the Carrier, Claimant and his fellow employees, and Claimant and the public. The Carrier points out that an article about the incident appeared in a major newspaper; and it asserts that a number of members of the public, as well as those employees who would work with Claimant, were aware of his affiliation with the Carrier as well as his conduct in the September 12th incident.

The Carrier also asserts that Claimant's extended unauthorized absence due to his incarceration deprived the Carrier of his services and thereby interfered with his work performance and violated Rule D. The Carrier also argues that Claimant's absence was not merely the result of his hospitalization, since he had also been arrested; and it argues, further, that arrest and incarceration are not excuses for absence.

The Carrier argues that, under the circumstances, the penalty of dismissal was not arbitrary or excessive. It urges that the claim be denied. The Carrier argues that, even if Claimant were to be reinstated, he was unable to perform work during the period he was medically disabled and incarcerated.

The Organization argues that the arguments concerning the alleged use of deadly force by police in response to Claimant's actions, the reference to wide reporting of the incident, connection between Claimant conduct in the incident and the Carrier, Claimant's unavailability to work due to incarceration and medical condition, and his likely furlough, are not supported by evidence adduced on the property. It urges that they may not be considered by the Board.

The Organization argues that Claimant's dismissal from service was without just and sufficient cause, since the Carrier's Rules do not apply because Claimant was off duty and away from the work place at the time of the incident and because the Carrier failed to introduce evidence to support the charges. It asserts that the record is devoid of evidence that Claimant's actions subjected the Carrier to discredit, loss of good will, damage to its reputation or was otherwise related to his employment. It points out that Claimant's employer was not identified in the media or to the police or public and that there is no other indication of damage to the Carrier. It asserts, in addition, that Claimant's conduct was isolated and not characteristic of his conduct. The Organization urges, therefore, that Claimant's conduct in the incident cannot serve as a basis for discipline.

The Organization argues that the Carrier's dismissal of Claimant because of his absence from duty is likewise without just and sufficient cause since his initial absence, from September 13th through 17th, was as a result of the personal injury. It asserts that absence due to personal injury is a justified absence. The Organization points out that the Carrier withheld Claimant from service effective on September 18th and did not thereafter request or allow Claimant to work. It urges that the Carrier cannot charge Claimant with unauthorized absence for a time period when it was withholding him from service and when it never instructed him to return.

The Organization urges, therefore, that the Claim be sustained and that Claimant be reinstated to service and made whole for wages and benefits lost.

The record clearly establishes Claimant's violations of criminal law. However, the record is also clear that the conduct occurred while Claimant was off duty and away from the workplace. It is well-established that the Carrier's right to discipline employees for off-duty conduct is dependent on the establishment of a connection between the conduct and the employer's interest. In the instant case, there is no evidence that the Carrier suffered adverse publicity, loss of business or other damage as a result of the offense. There is no indication that the nature of the offense was likely to cause other employees, customers or members of the public to refuse to deal with Claimant. Indeed, Claimant's prior record, the evidence of his general demeanor and history, and his remorse and positive steps, documented in the record, suggest that the offense was isolated.

The Board notes that the media did not identify Claimant as a Carrier employee. Indeed, there is no indication that anyone other than Claimant's supervisor, the police (who found out only when summoned to appear at Claimant's investigatory hearing), and friends and neighbors of Claimant's who wrote letters of support were aware of the connection between Claimant and the Carrier. The Board is not persuaded that any of these circumstances demonstrate the type of adverse publicity in response to which discipline is proper.

The Carrier has cited cases in which dismissal has been upheld for off-duty violations of criminal laws; however, the offenses and circumstances of the cases reviewed reflect a nexus between the conduct and the employers' interests. Such a connection is not established in this case. The Board concludes, therefore, that Claimant's off-duty misconduct on September 12, 1989, did not constitute a violation of NORAC General Rule 4, Paragraph 2.

Unauthorized absence is a separate offense and can, of course, constitute an independent basis for dismissal. Proof of such an offense requires that the Carrier establish that the employee failed to report when instructed. It is well-established that a Carrier may not discipline employees for failing to report when the Carrier has, itself, held the employee out of service.

The record in this case indicates that the Carrier withheld Claimant from service in connection with the September 12th incident, effective September 18th. The record is not clear if Claimant was incarcerated at the time, or merely hospitalized for treatment of his gunshot wound. The arrest sheet indicates that Claimant was in the hospital after his arrest, presumably for treatment of the gunshot wound, and, in a hand-written note, that bail was "continued" as of September 21st. Thus, it is not established that Claimant was incarcerated, as of the date he was withheld from service or, indeed, that he was unavailable for service from the time of his release from the hospital until he was sentenced in February of 1990.

The Board has searched the record for indication that the Carrier sought Claimant's return to work at any time following its withholding him from service. There is no indication that it did so. In the absence of an instruction that he report, the Board concludes that the Carrier may not use his absence as an independent basis upon which to dismiss him.

That is not to say that Claimant's conduct is acceptable or excusable. Claimant violated the criminal laws, was convicted, and was penalized by incarceration. There are certainly circumstances under which Claimant could have been disciplined for his misconduct or for his absence; however, the facts adduced do not support discipline. For that reason, the Claim must be sustained.

The record is clear that Claimant would not have been available for service during the period of his incarceration, had he been requested to return. Back pay would, therefore, be inappropriate for the period of his medical incapacity and his incarceration. It would also be inappropriate for any period when Claimant would, by virtue of his seniority, have been furloughed. The Organization also asserted, as part of its position that Claimant had rehabilitated himself, that he had been working for another railroad since his release. The Board is persuaded that back pay and benefits would, therefore, also be inappropriate for the period he was employed elsewhere.

Claimant's dismissal shall be rescinded and he shall be reinstated to service, subject to such return to work examinations and requalification as the Carrier may reasonably require. The period of Claimant's absence shall be treated as an unpaid leave of absence. Claimant shall not receive back pay or benefits for the time he was out of service.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.