

PUBLIC LAW BOARD NO. 1760

Award No. 17

Docket No. MW-MPR-76-6

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Norfolk and Western Railway Company *Western Region*

Statement of Claim 1. Carrier violated the effective Agreement on August 14, 1976 by unfairly and arbitrarily dismissing David J. Musall, Laborer, from the service of the Carrier.
2. Claimant David J. Musall shall be reinstated to Carrier service, compensated for all lost wages and shall have all seniority and other rights returned unimpaired.

Findings The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated February 2, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Laborer, as a result of an incident on August 13, 1976 in the Fort Wayne Division Engineer's Office Building, was dismissed from service. Division Engineer wrote Claimant, under date of August 16, 1976 as follows:

"This will confirm that you were dismissed from service on August 14, 1976, for conduct unbecoming an employee of the Norfolk & Western Railway Company in connection with your loud, boisterous behavior in the presence of other employees and your use of profane, abusive threatening and disrespectful language toward superior offices at approximately 4:00 PM, on August 13, 1976, in the Fort Wayne Division Engineer's Office Building."

Claimant requested and was granted a hearing which was held on September 8, 1976. As a result thereof it was concluded that there was sufficient evidence to support the conclusions and that Claimant would remain dismissed.

A review of the transcript reflects that Claimant, on August 13, 1976 was not at work. He arrived at the Division Engineer's Office Building about 4:00 PM, at which time he was not wearing any shoes or a shirt. Claimant demonstrated a loud, boisterous and profane behavior in the presence of other employees. While the language he used might well be appropriate in the presence of a track gang it was not clearly appropriate in the presence of either office employees or supervisor. It is clear from the record that there was sufficient cause for Claimant to be severely disciplined.

We find no merit to the employees contention that the hearing officer should have sequestered all witnesses in the absence of language so providing. As pointed out in Second Division Award No. 4001, (Anrod):

(1) At the investigation hearing, the Claimants representative requested that the witnesses be excluded from the hearing room until each had testified. Since the Hearing Officer denied this request, the Claimant contends that he was not afforded with a fair and impartial hearing as provided in Rule 10 of the Labor Agreement. The flaw in this contention is that Rule 10 does not require the exclusion of witnesses from the hearing room during the testimony of other witnesses.

'The matter is left to the discretion of the Hearing Officer. Thus, the latter's refusal to grant the request for the exclusion of witnesses did not violate Rule 10 or make the investigation unfair and impartial. See Awards 18179 of the First Division and 5061 of the Third Division."

The Neutral of this Board believes that sequestering witnesses, when requested, tends to lend a more impartial and balanced tone to an investigation. The Hearing Officer was not compelled to do this by Rule and such failure does not constitute prejudicial error.

The Hearing Officer does have control of the hearing and thus controls the order of calling witnesses, while it is more preferable that Carrier, as the moving party, should put its witnesses on first in order to lay the foundation for the case for and against Claimant. It is not error to put him on first. Therefore, the Board concludes that there is no procedural error so egregious that it serves to cause reversal of the discipline.

However, the Board believes that Claimant should be given another opportunity which will serve as his "last chance". Consequently, Claimant will be returned to service, without pay, on a probationary period for six months. Claimant and his Local Chairman will meet with the Division Engineer, or his representative in order that Claimant may know how to properly conduct himself when he is attempting to personally

handle a grievance, or as here, an alleged payroll shortage. Rule 20-B proscribes such procedure and Claimant should therefore become thoroughly conversant therewith.

Award Claim disposed of as per findings.

Order Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

M. A. Christie
M. A. Christie, Employee Member

E. N. Jacobs, Jr.
E. N. Jacobs, Jr., Carrier
Member

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, April 4, 1980.