

Award No. 28
Case No. 51

Public Law Board No. 2363

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Louisville and Nashville Railroad Company

STATEMENT
OF
CLAIM:

1. The dismissal of Machine Operator J. A. Maxwell was without just and sufficient cause; on the basis of unproven and disproven charges and in violation of the Agreement.
2. Machine Operator J. A. Maxwell shall be afforded the remedy prescribed in Rule 27(f).

FINDINGS:

Claimant, a machine operator with 3 1/4 years service, was dismissed for (1) failing to follow Foreman Puckett's instructions, (2) harassing a fellow employe, (3) driving a company truck in an unsafe manner and (4) destroying company property.

Claimant had been duly charged with each of these rules infractions and hearing sessions were held with respect to those charges on February 10, 22 and 23 and March 27 and 28, 1978.

As to the first count mentioned above, testimony by Foreman Puckett is to the effect that on January 25, 1978, claimant failed to comply with orders to get into a fuel truck with the other men. According to Mr. Puckett, first assistant foreman Daugherty instructed claimant three times to get into the truck and then Mr. Puckett himself issued two such orders. Mr. Puckett also testified that claimant had failed to comply with orders on previous occasions that same month.

We find nothing in the record that persuasively overcomes Mr. Puckett's testimony. It supports Carrier's findings that claimant did not comply with direct orders from his foreman.

Carrier's second finding is based on testimony by Michael Rogge, a trackman, that claimant threw snowballs at his car while claimant was backing out of a company parking area. Rogge did not regard the incident as playful.

The evidence presented with respect to this charge is not sufficient to warrant discipline. We will not take into consideration the hearsay testimony of Carrier officials regarding Mr. Rogge's off the record discussions with them. Nor, in view of Mr. Rogge's insistence that he was never threatened by claimant, are we impressed by his inconsistent testimony in that regard, particularly in view of some of the unanswered questions that arise regarding possible lack of control and poor judgment on Mr. Puckett's part in dealing with the situation. In order to avoid reviving old tensions, we have decided not to discuss these points; they have not been emphasized by the parties.

The third count, relating to unsafe driving, is based on Mr. Puckett's testimony. He testified that he followed a company van

operated by claimant and filled with employees. He observed that the van "would swing on and off the road, speeding and slowing almost to a complete stop. In one instance, the vehicle stopped right in the middle of the lane, let a man out and drove off."

Standing alone, this evidence is not sufficiently clear or detailed to provide a sound basis for discipline. Claimant's testimony indicates that stops were required to accommodate one of the employees and also because of an accident and that some maneuvering was necessary because of ice on the road.

It should be emphasized that we are not attempting to resolve an issue of credibility. We simply hold Mr. Puckett's testimony too sketchy to support a finding that claimant was guilty of unsafe driving on January 23, 1978. Of course, the fact that claimant had been dismissed on June 4, 1976 for a like offense does not prove that he was negligent two years later.

The fourth finding -- destroying company property -- is based on Foreman Puckett's testimony that on January 3, 1978, claimant threw a Ford ignition key belonging to Carrier into the weeds. Claimant had found that it did not work in the company vehicle he was to operate. It does not appear that Carrier regarded the incident as sufficiently serious to take immediate action against claimant. Nor is there any indication that the act was wilful or defiant. There is no evidence that any delay or appreciable inconvenience resulted from the incident. At the most, it would warrant a one or two-day suspension.

The present record is a matter of some concern for a number of reasons. First, it was serious error for Carrier's hearing officer

to restrict claimant's representative's right to raise objections to the hearing officer's questions. Examples of these shortcomings are to be found on pages 36 and 39 of the hearing transcript. In questioning Mr. Lamm, the Division Engineer, regarding critical points, the hearing officer sought to elicit testimony of a flagrantly hearsay and prejudicial nature. It was a proper time for an objection, but the hearing officer ruled that no objections would be permitted until his questions and Mr. Lamm's statements had been completed.

Again, it was major error for the hearing officer to rule that the Local Vice Chairman, who claimant wished to represent him at the hearing, would not be permitted to continue that representation. So far as the record shows, claimant's representatives were not so disorderly and irresponsible as to occasion such exceptional repressive measures.

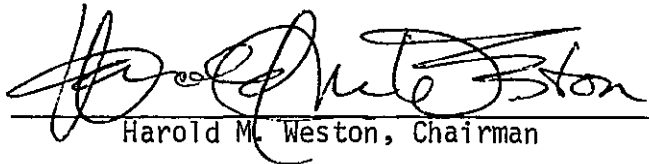
Although formal rules of court procedure do not apply here, it is essential that an employee, particularly one whose livelihood is at stake, be given the protection of elementary fair play. In view of the serious errors that have been committed in this case, we would be disposed to sustain the claim in its entirety if not for the fact that, in our judgment, claimant has been shown by competent evidence to have been a difficult and troublesome employee.

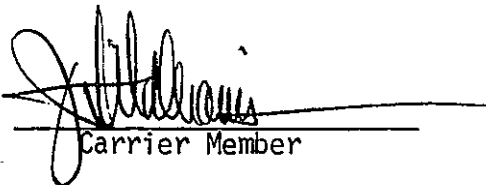
In weighing the respective rights of the parties, it is our conclusion that the appropriate remedy is to require Carrier to offer claimant immediate reinstatement with seniority rights unimpaired and compensation for time lost from April 18, 1979, until the date of reinstatement. The long period of suspension without pay will emphasize to

claimant and other employes the importance of prompt compliance with orders of a foreman. On the other hand, the back pay awarded will serve to underline the requirement for reasonable procedural safeguards in dismissal cases.

AWARD: Claimant to be reinstated with seniority rights unimpaired and with compensation for loss of earnings from April 18, 1979 to date of reinstatement. To be effective within 30 days.

Adopted at Louisville, Kentucky, *April 30,* 1980.


Harold M. Weston, Chairman


Carrier Member


Employee Member