PUBLIC LAW BOARD NO. 2420

AWARD NO. 1

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

CONSOLIDATED RAIL CORPORATION

DOCKET NO. 409

STATEMENT OF CLAIM:

a. The Carrier violated the Rules Agreement, effective December 16, 1945, as amended, particularly Rules 5-A-1, 5-E-1 and the Absenteeism Agreement of January 26, 1973, when it assessed discipline of dismissal on M.W. Repairman G. W. Wiles, November 22, 1978.

b. Claimant Wiles' record be cleared of the charges brought against him on October 13, 1978

c. Claimant Wiles be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained in accordance with the provisions Of Rule 6-A-1(d), with benefits restored.

OPINION OF BOARD:

Claimant was tried by Carrier on, found guilty of, and disciplined by dismissal for the following charges:

1. Failure to report for duty on your regular assignment at 3:30 PM on September 28 and September 29, 1978.

2. Engaging, abetting and participating in an unauthorized work stoppage at Canton MW Shop at 3:45 PM and 11:20 PM, on September 28 and 2:00 AM on September 29, 1978.

3. Insubordination in that you refused a direct order to return to duty from R. Campitella, Shop Engineer, 2nd. Trick, 3:45 PM on September 28, 1978.

After study of the record of trial and consideration of the positions put before this Board by the parties, we find:

1. It is undisputed that on September 28 and 29, 1978, employees of the Carrier's Maintenance of Way Shop at Canton, Ohio, who are members of Local 3056 Brotherhood of Maintenance of Way Employees, desisted from work in a strike action at that location and took up positions at various entrances of this shop as well as at entrances to related facilities variously located, accompanied by signs to the effect that they were "on strike in sympathy with N&W" - a reference to negotiations between another Union (Brotherhood of Railway Clerks) and the Norfolk & Western Railroad which had purportedly reached a considerable period of delay between those parties in resolving the B.R.A.C. petition for a contract amendment.

2. The MW Repair Shop at Canton is Carrier's central maintenance facility responsible for heavy rebuilding of on-track machinery. It operates on two shifts and has a normal complement of 225 MW employees, as well as approximately 25 miscellaneous clerks.

3. It is also undisputed that approximately 400 employees in the Canton shop and yard facilities failed to appear for work during

the two days of the strike. Carrier's statement is also unrefuted that eleven regular switch assignments and two local freight assignments were annulled at Canton on each of these days as a consequence of the strike and 485 freight cars were immobilized in the Canton yard as a further result of the strike.

4. Strikers made appearances on these two days at entrances to Carrier's Alliance yard facilities, about 17 miles from Canton, causing deprivations of manpower there to the extent of about 100 employees on September 29, 1978. Four of the Local 350 Canton strikers* also appeared at Carrier's Salinesville area about 28 miles from Canton where two surfacing gangs were working. Testimony is in dispute concerning whether said employees addressed themselves to attempting to persuade the construction crew supervisors and the gang members to join the others in going on strike and succeeded in causing the work of one of the gangs to be stopped for a day (as contended by Carrier), or carried out a mission of warning supervisors and employees that others might attempt to make them join the strike, cautioned them against doing so, and no stoppage took place among these employees (contended by Employes).

5. It is undisputed that the subject B.M.W.E. employees were, at the time of this two-day stoppage, under existing and continuing Agreement with Carrier and that said strike was both illegal and unauthorized. By two telegrams dated September 29, 1978, B.M.W.E.

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*Claimant Wiles was not among them.

General Chairman, W. E. LaRue, notified Carrier's Senior Director - Labor Relations, J. R. Walsh, that the Organization had not authorized the work stoppage then in progress. The record shows that strikers and picketers were at various times and in various groups informed over these two days that their Organization had not sanctioned or authorized their activities, but without avail. On the second day of the strike, upon complaint and motion of Carrier, a temporary restraining order was issued to the local Organization by the U.S. District Court for the Northern District of Ohio to cease and desist from strike activities and served on the offices of the Organization at 7:15 PM, as well as on various strikers at picket positions.

6. Although the evidence does reveal effective and widespread abstention from work by B.M.W.E. employees on those two days, and a good many other employees, as well, not belonging to that Organization, it does not, to any definitive degree of specificity, reveal how many actually appeared in picketer congregations and activities at the Canton entrances and roadways as well as at other Carrier facilities.

7. Disciplinary charges were leveled at 45 Maintenance of Way employees by Carrier for their part in the strike and strike activities on September 28 and 29, 1978 and in the course of trial and appeal procedures, the parties arrived at mutually acceptable

adjustments of ten of these. The remaining 35 - all subjected to discharge discipline by Carrier - have reached Public Law Board No. 2420 for final disposition. One of these is the appeal of Claimant Gary Wiles from said penalty. This is the subject of the Opinion and Award herein.

6. We address ourselves first to certain procedural and substantive questions raised by Organization which are common to all the appeals brought to PLB 2420 in respect to the discharge disciplines arising out of the September 28 and 29, 1978 occurrences.

a. The bringing of multiple charges against Claimant to be heard in a single trial, objected to by Organization as a violation of Rule 5-C-I because reference therein is to notice of and action on "charge" in the singular, was not a violation of said Rule. The use of the singular in respect to each charge does not exclude the right to have the Claimant tried at one time on a series of single charges, particularly when, as here, all the accusations arise out of and refer to closely related actions involving a single general event and lend themselves to being heard together, indeed make it preferable to do so, from the viewpoint of affording fullest opportunity of expeditious investigation and due process.

b. Organization's objection to Carrier's not having chosen to withhold the employee from service pending trial does not affect

the question of whether trial officer or Carrier acted rightly or wrongly in their judgment of the merits of the charges and does not constitutue a procedural impediment in prejudice to Claimant. The exercise of the right to withhold from interim service is a separate one from guilt or innocence of the accused. It cannot be a basis for conjecturing concerning the seriousness of the act. When the opposite is argued - that Carrier acted wrongly in withholding an accused from service - that question by itself may deserve separate consideration.

c. Organization's further objection that other employees guilty of the same actions were not tried and disciplined, must be met by our position that we can deal only with the merits of the case before us. If there were a showing of having singled out the subject Claimant because of a prejudice or animus particularly directed to him as causing the disciplinary action involved or that others not tried or punished were guilty in exact degree and kind as those punished but nevertheless not acted against, we might have a basis for reaching a decision of unfair selectivity. But the record shows neither and we have no authority to go look elsewhere. As for those who were at first discharged but for whom lesser penalties were agreed to by Organization and Carrier, we have no means for or authority to intrude on or judge the parties' volitional disposition of Claims; in fact, the law and Agreement procedures provide for such

opportunities to resolve such differences. The fact that the parties did so in some cases cannot be invoked to affect our judgment on the merits of those in which disagreement persisted.

d. Organization contends also that in respect to the charge of "failing to report for duty on your regular assignment..." on the dates involved, Carrier violated the January 26, 1973 Absenteeism Agreement between the parties, inasmuch as this provides for a progressive scale of discipline for absences, starting with a written notice in reaction to the first such offense. Here a discharge was imposed for the first offense.

Inasmuch as the Absenteeism Agreement does not identify or differentiate between the kinds of unexcused absences subject to the required progressive discipline, we agree with Organization that this charge, standing alone, put the way it has been, could only be responded to by the disciplinary formula mandated in the Absenteeism Agreement. The fact is, however, that this is only one of the charges. Other charges are included in the Wiles' set of indictments, as well as in those addressed to others, which are open to far greater disciplinary consequences and which judged together with the unexcused absence violation may justifiably result in the severe discharge penalties which have been imposed, as a total of punishable culpability.

e. Claimant testified that he arrived at the Canton Shop entrance shortly before starting time on the 28th, but did not work "because there was a picket line." He admitted staying in that congregation, adding to the mass thereof and, thus, augmenting and implementing its character as a picket group equipped with picket signs and having as its purpose the desisting from work and the encouraging or persuading of other employees scheduled to work, not to do so.

In our view, Carrier was justified in concluding that by so doing, Claimant was a picketer "abetting" other picketers, as charged. The participation of Claimant in such activities is factually reinforced by an undisputed showing at the hearing that, aside from his being part of the picketers at starting time, Claimant was part of picketing groups at other entrances of the facility in addition to the one customarily used by him, at 11:20 PM on September 28th (a time during his usual working hours), as well as the next day (the 29th) at 2:00 AM (a time not usually worked by him). According to testimony of Assistant Equipment Engineer R. E. Gray, when he encountered Claimant at the latter time standing with another at a small fire behind a strike sign on the Service Packaging entrance to the plant, Claimant responded to inquiry that "he was picketing" because "they told me to."

It should be said here, because the question has been touched on by Organization in this and companion cases, that picketing postures are conformed to, not only by means of the familiar parading of the strikers around plant entrances, but also by notice to others of a strike going on in the presence of a strike sign and strikers, whether the latter merely stand (or even sit) there, whether two, four or 150 such individuals station themselves there as strikers and demonstrators of the strike fact and strike purposes.

f. The fact that Claimant reported off duty on September 28th and called in again as sick at 2:42 PM (before starting time) on September 29th does not exonerate him from the fact that he was a participant in an illegal and unauthorized strike activity against Carrier on those days.

g. Carrier's further charges that Claimant acted in an insubordinate fashion by refusing an order from a management official to return to duty were convincingly established in the evidence by the uncontroverted testimony of Shop Engineer R. Campitella that, pursuant to management instructions to him, he directed a group of employees congregated at the Division Road main entrance to the facility, among whom he identified Claimant: "Your jobs are open; the doors are open; you should report to work. If you do not report, disciplinary action will be taken." This order was given at 3:45 PM

on September 28th, 15 minutes after the start of Claimant's scheduled shift. Claimant did not comply with that order then and continued as a striker and picketer on September 29th.

Organization's attempt to characterize this instruction to the group as not constituting an individual order to Claimant because not stated face-to-face to him alone, is little more than a distinction without a difference. Claimant's further contention that he feared physical injury from the others if he obeyed, may have been a valid impediment to his obedience. But in a case of this kind, the legitimacy of such apprehension can only be established through a burden of concise and convincing proof of its having been objectively demonstrated. Otherwise, it is too easily available as a means of disguising a picketer as a victim of picketers. Such burden was not met here.

We conclude that record does not show Carrier to have acted in abuse of its valid authority and on other than justifiable grounds in imposing the discipline of discharge on Claimant.

A W A R D

Claim denied.

Louis Yagoda
LOUIS YAGODA, CHAIRMAN & NEUTRAL

Fred Wurpel Jr.
FRED WURPEL, JR., ORGANIZATION MEMBER

N.M. Berner
N.M. BERNER, CARRIER MEMBER

DATED August 30, 1979