Award No. 23

PUBLIC LAW BOARD NO. 2720

Parties to Dispute: International Brotherhood of Firemen and Oilers, AFL-CIO
and
Consolidated Rail Corporation

Statement of Claim: System Docket CR-2057
Dismissal of D. E. Lewis

Opinion of Board:

Claimant was hired on December 12, 1978, as a Laborer at Carrier's Avon Diesel Terminal, Avon, Indiana. The record, without specific documentation, indicates that at the time of his employment and continuously thereafter Claimant's true duties were as an undercover agent at the Avon facility although he was assigned as a Laborer.

On April 29, 1981, Claimant was sent a directive by Carrier instructing him to appear for a trial on May 22, 1981, in connection with the following charge(s):

"#1 - Violation of Rule 13 of your controlling agreement on April 25, 1981.

#2 - Unauthorized absence on April 25, 1981, which in view of your previous attendance record, constitutes excessive absenteeism.

#3 - Failure to complete a full tour of duty on April 24, 1981, which in light of your previous attendance record, constitutes an excessive loss of time from your assigned position."

As per Organization and Claimant's request, the originally scheduled hearing was postponed and rescheduled for May 29, 1981. Said hearing was held as per rescheduling, Claimant, however, did not appear. Pursuant to said hearing, Claimant was adjuged guilty as charged and was dismissed. Said termination was appealed and is now properly before this Board for resolution.

Organization's basic contention in this dispute is that Claimant's termination was motivated solely because his (Claimant's) identity had become known to other employees and Carrier believed that he was no longer of value as an undercover agent. Moreoever, Organization maintains that Claimant had received permission from his supervisor to leave work early on Saturday, April 24, 1981, in order to

attend a class in the Marion County Sheriff's Academy in Indianapolis, Indiana which was part of an extended course of study in which Claimant had been enrolled since March 1, 1981, and which he had attended every Saturday during that period.

Organization next contends that Carrier erred procedurally in that Claimant's trial was conducted in absentia and ". . . Claimant was not notified of the time and date the trial was rescheduled for, thus causing the Claimant a serious injustice of due process." Additionally, Organization further argues that Carrier violated Rule 20 (1) of the current agreement by considering in its decision to terminate Claimant incidents which occurred more than thirty (30) days prior to the holding of Claimant's trial.

Carrier's major contention is that there is sufficient, probative evidence in the record to indicate that Claimant, ". . . violated Rule 13 . . . (failed to properly notify his General Foreman of his absence as soon as possible)"; ". . . that he was absent sans proper authority on April 25, 1981; and that he failed to complete a full tour of duty on April 24, 1981." Continuing, Carrier also asserts that, when considered in light of Claimant's previous record (four letters of warning regarding his poor attendance; exceeded four occurrences of absenteeism, tardiness and early quits in a six month period prior to his termination; and a fifteen day suspension, deferred, for violation of Rule E, paragraph 5, by sleeping or assuming an attitude of sleep while on duty on February 21, 1981), the present infractions warrant termination. In this same context, Carrier further maintains that it (Carrier) ". . . has the right to expect and in fact demands (such) diligence, faithfulness and availability from an employee . . . (and) . . . Carrier has no obligation to 'forgive and forget', thereby jeopardizing its operations" (See: Second Division Awards 5049 and 7348).

Regarding Organization's various procedural allegations, Carrier agrues that Claimant's hearing was properly held in absentia because "Claimant did not personally request a postponement or give any satisfactory reason for his absence from his trial even though he was properly notified by a letter sent certified

mail of the time, date and place of the proceedings". Additionally, Carrier also contends that reference to Claimant's previous record (incidents 30 days prior to Claimant's trial) was entirely proper because "(W)hen preferring such a charge (excessive absenteeism) it was incumbent upon the Carrier to prove that over a protected (sic) period of time that Claimant was absent for an excessive period". Such action, Carrier argues is supported by the following Awards: Second Division Award No. 8431 and Award No. 39 of Public Law Board No. 2618.

Carrier's last major contention in this dispute is that reference to any material which was contained in a deposition which was taken from Claimant after the hearing was held on the property, cannot be considered by the Board at this time.

The Board has carefully read and studied the complete record in this dispute and is convinced that Carrier's action was proper and, therefore, will remain undisturbed.

As a point of departure, Organization's procedural objections are found to be completely meritless. The record demonstrates that Claimant had already been granted a postponement of his first trial; Carrier's notification to Claimant of the rescheduling of the trial was mailed to Organization and Claimant in accordance with normal procedures; and there was no satisfactory reason adduced or even suggested which would have justified a second postponment.

Concerning Carrier's reference to incidents which might have occurred thirty (30) days prior to Claimant's trial and Organization assertion that such reference was in violation of Rule 20D, suffice it to say that said rule clearly applies to the precipitating incident which has given rise to an immediate action, and in no way precludes Carrier from considering previous infractions for purposes of determining the appropriate degree of penalty which is to be assessed by Carrier. Such was Carrier's obvious motivation in the instant case and which, under the circumstances, cannot be faulted.

Turning to the merits portion of this dispute, our first area of concern is Carrier's objection to Organization's reference to any information which may have

been contained in Claimant's post-hearing deposition. Regardless of Organization's assertion that Claimant was improperly denied the opportunity to testify at his own trial and thus Organization had to resort to this action in order to get the "facts" before the Board, the almost universal nature of the principle that the party's respective case must be made "on the property" is so firmly established in railroad labor/management relations that any further consideration of this particular issue is entirely unnecessary.[1]

Having made the foregoing determinations, the disposition of any of the remaining issues becomes an almost foregone conclusion. The facts of record relating to Claimant's relatively short tenure with Carrier and the unenviable record which he amassed up to the point of his termination, convinces the Board that Carrier's action herein was neither arbitrary, capricious, nor an abuse of managerial discretion.

Award:

Claim denied.

G. B. Welsh, Carrier Member

I dissent G. J. Francisco Jr.
G. J. Francisco, Jr., Employee Member

John J. Mikrut, Jr.
John J. Mikrut, Jr.
Chairman and Neutral Member

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1. Even if this Board was inclined to consider this particular offering (which it is not), it might be helpful to the parties in future cases of a similar nature to note that Items #11, #12 and #13 thereof contain numerous, significant inconsistencies. Particularly noteworthy in this consideration is that Item #11 alleges that Supervisor Tyler would not grant Claimant "outright permission" to leave work early but ". . . advised me (Claimant) to make arrangements with my foreman . . ." However, in Items #12 and #13, Claimant thereafter states categorically that Mr. Tyler gave him (Claimant) permission to leave work early on the days in question.