

Award No. 13
Case No. 13

PUBLIC LAW BOARD NO. 5097

PARTIES
TO
DISPUTE:

Transportation Communications International Union
and
Elgin, Joliet & Eastern Railway Company

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement, when following an investigation on October 9, 1990, it imposed discipline in the form of forty-five (45) demerits against the record of Mr. Robert Winstead.
2. Carrier shall now rescind the discipline imposed, shall compensate Mr. Winstead for the time spent attending the investigation, and shall clear his record of the charge placed against him.

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was charged with an incident, which occurred on September 16, 1990, in that Carrier alleged that he became "uncivil and discourteous, and used boisterous, profane, vulgar, and abusive language in your conversation with Supervisor Allred." Following an investigation, Claimant was found guilty of the charges and assessed the forty-five (45) demerits indicated supra.

There is no dispute that Claimant used obscene and vulgar language in the course of the incident. It appears that the computer, which he was to use in preparing a train for departure, was down. He was instructed to perform the task on a manual basis. He obviously was frustrated and expressed his extreme frustration by the use of profanity in the yard office at the time. In the course of his profanity, not only was Mr. Allred his supervisor present, but also another Carrier officer and various clerical employees. Carrier contends that Claimant's action on the day in question constituted verbal assault of a supervisor in the presence of other employees. Carrier maintains that the Claimant's culpability, with respect to the charges was amply established at the hearing, that he was afforded due process and that in view of the egregious nature of the transgression the discipline imposed was proper. Carrier argues that the record is clear and unambiguous, and that he was responsible for instigating and engaging in the verbal assault in using the vulgar and abusive language during working hours in Carrier's office and in the presence of other employees, and such conduct is unbecoming and intolerable.

Petitioner takes the position that Carrier's actions in this instance was incorrect for three basic reasons: First, the Organization argues that Claimant was not accorded a fair and impartial hearing; second, it is also claimed that there was no justification for discipline in that he did not engage in any conduct, which is not generally acceptable in the yard office where he works, and further it was not directed against anyone. And finally, it is argued that Carrier has imposed a double standard of conduct where the Claimant is involved, which does not apply to others, particularly supervisors.

With respect to the due process contention, Petitioner maintains that the hearing officer refused to permit the introduction of evidence, which the Organization felt was vital in the defense on this particular charge. In particular, information

concerning the testimony of the supervisor dealing with the credibility of his statements was refused by the hearing officer. In addition, the hearing officer refused to permit the introduction of evidence concerning how other employees of Carrier were treated for similar infractions.

The Board has carefully considered the record of this matter and concludes that one of the most grievous mistakes made in this matter was the conduct of the hearing officer in refusing to permit testimony on behalf of the Claimant. When Claimant sought to introduce evidence, going to the credibility of Carrier's principal witness, the hearing officer refused to permit its introduction. This is totally inconsistent with the hearing officer's role of the objective investigator of an allegation of a rule violation. His conduct should be above reproach, and in the course of such conduct, he must accord a Claimant due process from the standpoint of mounting a defense. In this instance, the very heart of the defense was cut out when the Organization was unable to present information indicating the inconsistency and error of testimony on the part of the Carrier's principal witness. This constituted a fatal flaw, which is sufficient to sustain the claim.

Furthermore, as an additional conclusion, the Board believes that the conduct of Claimant in this instance was not, per se, violative of the rules. The use of four letter words in a yard office is customary. This was demonstrated by the fact that other employees who were present did not object to the language used, nor was there any evidence that such language was unusual in the setting of a yard office. On the contrary, the Organization attempted to introduce evidence showing that such language was indeed customary, and had been used by the very supervisor who objected in this instance. While the use of profanity in an office setting is generally considered to be improper, it is certainly in this instance within the ambit of "shop talk" in view of the entire circumstance. The Board does not

believe that the use of the four letter words in this case, not directed at any individual, constituted a serious breach as contended by Carrier. The language used by the Claimant in this instance was clearly a result of the frustration which he felt, and although distasteful, was not in itself sufficient to justify discipline.

It must be noted that Carrier argues that there was nothing in the rules which provides for the payment of time for attendance at a hearing by an employee such as Claimant herein. Furthermore, Carrier argues that attending an investigation does not constitute "work" performed for the benefit of the Carrier, particularly by a principal in such investigation. While the Board does not disagree with Carrier's conclusions, an examination of Rule 32, makes it clear that Claimant in this instance should be compensated for pay lost, as a result of attending the investigation in view of his exoneration. Based on the entire record of this matter, and the reasoning indicated above, the claim will be sustained.

AWARD

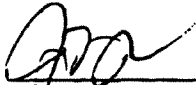
Claim sustained.

ORDER

Carrier will comply with the Award herein within thirty days from the date hereof.



F.M. Lieberman, Neutral-Chairman



J.F. Ingham
Carrier Member



J. C. Campbell
Employee Member

Joliet, Illinois
January 9, 1993