PUBLIC LAW BOARD NO. 2420

AWARD NO. 24

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

CONSOLIDATED RAIL CORPORATION

Docket No. 432

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 MW Repairman H. Hester, November 22, 1978.

b) Claimant Hester's record be cleared of the charge brought against him on October 12, 1978.

c) Claimant Hester 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 on, found guilty of, and disciplined by discharge by Carrier for the following charges:

1. Failure to report for duty on your regular assignment at 7:00 AM on September 28 and 29, 1978.

2. Engaging, abetting and participating in an unauthorized work stoppage at Canton MW Shop at 8:30 AM on September 28, 1978 and 5:30 PM on September 29, 1978.

3. Insubordination in that you refused a direct order to return to duty from F. Buccèri, Shop Engineer, at 8:30 AM on September 28, 1978.

The disciplinary termination was imposed on Claimant because of his alleged participation in an illegal and unauthorized strike at Carrier's Canton, Ohio, Maintenance of Way Shop on September 28 and 29, 1978, by members of Local 3050 of the Brotherhood of Maintenance of Way Employees employed there.

We have described the general circumstances of this strike and picketing situation revealed at the hearings thereon in our previous Award No. 1, as well as our opinion on certain procedural and substantive questions raised by Organization there as well as here.

Turning to the particular facts of the instant situation, the record shows:

A procedural conflict arose at the outset of the trial of Claimant as it was going through its preliminary stages, on October 25, 1978. Trial officer asked Claimant by whom he was to be represented. He named two individuals - the District Chairman of Pennsylvania Federation of the Organization and the Vice-Chairman/Secretary-Treasurer of Federation. He was then asked to designate which was his trial "spokesman." Claimant replied that both were to act as such. Trial officer insisted that he name one. District Chairman objected. Trial officer reiterated his insistence on a single spokesman. District Chairman requested postponement on the grounds that Claimant was being denied "full representation as he so requested." Request for postponement

was denied. District Chairman stated that he regarded the proceedings as "unfair and partiality shown toward the employer's position" and that he could not "concur with any further proceedings at this time."

Claimant and District Chairman nevertheless continued in the trial room, while trial officer addressed inquiries to Claimant concerning his alleged participation in the strike of September 28 and 29, 1978. District Chairman interposed an objection to each of these questions, and Claimant refused to answer them "without my representatives."

Trial officer then proceeded to elicit testimony from other witnesses with District Chairman and Claimant participating. Said testimony was as follows:

1. Shop Engineer T. Bucceri testified that he observed an unauthorized work stoppage at the Canton MW Shop on September 28, 1978. At that time, while accompanied by Assistant Equipment Engineer H.F. Reedy and Assistant Equipment Engineer R.P. Muir, Mr. Bucceri saw Claimant "standing around" with others at approximately 8:30 AM at the main road leading into the plant where an "On Strike" picket sign had been placed in the center of the roadway.

Mr. Bucceri's further testimony is that he gave a direct order to the group, of which Claimant was one, to return to work. (Claimant's regularly scheduled hours were 7:00 AM to 3:30 PM.)

Claimant did not obey the order. Questioned by District Chairman concerning whether Claimant had engaged in picketing or other overt strike movements or encouragement, Mr. Bucceri replied, "That I couldn't say because he was just standing."

2. Mr. Reedy testified that at approximately 8:30 AM he observed a group of Canton Shop employees, Claimant among them, standing at a plant entrance where an "On Strike" sign was stuck in a cement block. He heard Mr. Bucceri notify those present to return to work. None did.

In answer to a question from trial officer as to the part played by Claimant in picketing activities or encouragement thereof, Mr. Reedy responded: "Well, it looked to me just like Hobart was standing there trying to find out what was going on, if the boys were coming back to work or not. As for participation, I can't answer yes or no."

3. Mr. Muir testified that while there with Bucceri and Reedy, he recognized Claimant as one of those congregated at approximately 8:30 AM on September 28 at the main entrance to the Shop. He heard Mr. Bucceri ask those present to return to work. None did. Claimant did not come in to work on September 28 or 29.

Mr. Muir answered in the affirmative, when asked whether he had seen Claimant "engaging, abetting and participating in an unauthorized work stoppage at the MW Shop at approximately 8:30 AM on September 28, 1978. He further stated that a strike sign was on display near where Claimant was seen.

4. Shop Engineer R. Campitella testified that on September 29, 1978, he saw groups of men congregated at three different plant entrances with strike signs displayed near them: at Division Road entrance at approximately 3:45 PM; at Broadway Road entrance at approximately 5:30 PM: at YMCA entrance at approximately 6:00 PM.

He identified Claimant as standing among the group at the Broadway Road entrance at approximately 5:30 PM.

5. Equipment Engineer E.E. Waggoner testified that he was with Mr. Campitella at that time and made the same identification concerning Claimant's presence among the group.

We disagree with Organization's contention that Claimant was not given a fair and impartial hearing. As we have said before, insistence on a single active arguer and interrogator on behalf of Claimant is not a denial to him of representation and is within permissible, valid procedural authority of a trial officer for expeditious and fair hearing, not in violation of applicable rules or laws.

As to the merits of the charges, we find the evidence to show a degree of active participation (and therefore encouragement and augmentation) by Claimant in these illegal and unlawful activities which, while justifying the imposition of a substantial disciplinary penalty on him therefor, do not show with reasonable conclusiveness that it reached a level warranting the termination penalty. We believe that reinstatement without restitution for lost earnings for the long period involved will more equitably serve as appropriate penalty for the circumstances revealed.

A W A R D

The claim is disposed of by awarding that the discharge penalty shall be amended by reinstating Claimant to his former position without payment of lost earnings. Said reinstatement shall take place within thirty (30) days.

LOUIS YAGODA, CHAIRMAN & NEUTRAL

FRED WURPEL, JR., ORGANIZATION MEMBER

N.M. BERNER, CARRIER MEMBER

DATED December 5, 1979