

PUBLIC LAW BOARD NO. 656

Parties: Brotherhood of Locomotive Engineers
and
Pennsylvania-Reading Seashore Lines

Statement of Claim: "Appeal of Fireman G. H. Albertson from discipline of dismissal imposed by G-32 Notice dated May 20, 1970, the Outline of Offense reading:

'Violation of Rule 2 (Second Paragraph),
Current Book of Rules for Conducting
Transportation, approximately 9:00 PM
Wednesday, April 29, 1970;

and requesting that G. H. Albertson be compensated for lost earnings while out of service."

Discussion: The Claimant entered the employ of the Carrier on January 30, 1943, and was promoted to Engineer on December 12, 1958. Since December 28, 1968, he has been restricted to fireman's work as a result of disciplinary sanction imposed upon him because of his involvement in a collision with another engine.

On April 30, 1970, the Carrier received information that the Claimant had been arrested. It thereupon instructed its Captain of Police, Mr. Bond, to investigate the matter. Captain Bond's investigation disclosed that on April 29, 1970, at 9:00 PM, the Claimant had been arrested and charged with committing arson and about 9:40 PM on the same night, he had been arrested and charged with assault and battery against a police officer.

Captain Bond's investigation also disclosed that the Claimant had also been arrested for arson on May 23, 1966, and that he had been convicted of that offense and given a suspended sentence of one and one half years with the provision that he be under the care of a physician.

On April 30, 1970, the Carrier, as a result of the information received from Captain Pond, sent the Claimant a Notice to report for Trial on May 8, 1970, and charged him with

"Violation of Rule E (second Paragraph) current Book of Rules for Conducting Transportation, approximately 9:00 PM, Wednesday, April 29, 1970."

The Trial was held as scheduled, and on May 20, 1970, the Claimant received and signed a Form G-32 Notice of Discipline which stated that he had been dismissed from the service of the Carrier as a result of the charges filed against him. The Claimant filed a timely appeal which was processed in accordance with the prescribed procedures, and in light of the fact that the appeal was denied at the several intermediate and final steps of the appeal procedure, the parties agreed to place the matter before this Board.

Rule E, Second Paragraph, states:

"To enter or remain in the service, employees must be of good moral character and must conduct themselves at all times, whether on or off Company property, in such manner as not to bring discredit upon the Company.

In the course of the appeal on the Claimant's dismissal, the Claimant's attorney on October 12, 1970, filed a copy of a court record showing that on May 6, 1970, the Claimant had been found not guilty by the Court of the charge of assault and battery on April 29, 1970, against the police officer.

Regulation No. 6, captioned "Discipline," of the former BLF&E Schedule Agreement, under which the Claimant was tried, states in its relevant parts:

"6-A-2. Any fireman directed to attend an investigation or trial will be notified of the place, date and time of the investigation or trial and may be accompanied by the local chairman of his organization, or a representative of his own choosing, who will be permitted to question witnesses and those conducting investigation, or trial, so far as the interests of the fireman are concerned.

6-A-3. A fireman directed to report for trial will, at that time, be informed in writing of the exact charge for which he is to be tried."

Carrier's Position

The Carrier denies that there are any valid bases, procedurally or substantively, for setting aside the discipline imposed upon the Claimant.

Concerning the procedural objections, the Carrier concedes that the Hearing Officer might have phrased more felicitously his intention not to answer any questions directed toward him. What the Hearing Officer, however, meant to convey by his poorly formulated statement was that he wanted to avoid the situation of having to testify in a case over which he was presiding. However, the Carrier states that the record does not show that the Claimant's rights to a fair and impartial trial were in any way prejudiced. The Carrier also states that the Organization was in error when it stated that the G-32 Form "Notice of Discipline" was not properly dated and numbered. The Carrier states that the Notice was numbered and dated by the Claimant in his own handwriting. (At the Board hearing on January 6, 1971, the Carrier produced the original Form G-32 showing that it was dated and signed on May 20, 1970, by the Claimant).

Concerning the substantive aspects of this case, the Carrier asserts that the evidence in its possession justified it in charging the

Claimant with violating Rule E and when that evidence was adduced at the Trial, coupled with the Claimant's prior service record, it was justified in concluding that the Claimant should be dismissed from its service.

The evidence of record showed that the Claimant had been arrested, convicted and sentenced in 1966 for the crime of arson. When he was again arrested four years later for the same crime, the Carrier was warranted in initiating disciplinary action against the Claimant and assessing said discipline when its charges were proved. The Carrier was not obliged to wait until the Claimant was tried in a criminal court on the 1970 arson charge. To have done so would have been a dereliction on the part of the Carrier with regard to its responsibilities toward the public, its customers and the Claimant's fellow employees. The Carrier notes that in the 1966 arson charge, the Claimant was arrested on May 23, 1966, but he was not sentenced until April 13, 1967. Moreover, the Carrier states that if it had not taken any disciplinary action against the Claimant until after his court trial, there can be no doubt that the Organization would be contending that too much time had elapsed between the date of the original incident and the initiation of the disciplinary proceeding.

The Carrier stresses that the judge who found the Claimant not guilty of assault and battery against the police officer, however, found sufficient cause in the arson charge to bind the Claimant over to the Grand Jury. The Carrier's judgment was that its responsibilities as a common carrier did not permit it to allow the Claimant to remain in its service pending final disposition of the Claimant's criminal charges.

The Carrier stresses that there can be no doubt that the Claimant was guilty of breaching Rule E. Arson is a serious criminal offense. In these troubled times, the Carrier is beset with problems of vandalism, fires, thefts and the like. It has solicited the assistance and cooperation of police departments in preventing and detecting these offenses. There can be no doubt that discredit is brought upon the Carrier when one of its employees is arrested twice by the local police department on the serious charge of arson. This conduct also raises serious questions concerning the Claimant's moral character.

The Carrier also states that it was no error or breach of due process to introduce and consider the Claimant's prior service record in determining, not his guilt but the appropriate sanction to impose.

The Claimant's service record shows that he was disciplined for 10 separate incidents. The most serious one occurred in November 1968 when the Claimant, while working as an engineer, collided with a standing engine. This collision resulted in a severe injury to the fireman on the Claimant's engine from which he has never returned to work, and property damage in the amount of \$45,000. As a result of this collision, the Claimant was dismissed from service, but because of pleas of leniency advanced by the officials of the BLF&E and the Claimant, he was restored to service, but disqualified from operating an engine.

The Carrier concludes that both because of his conduct and his past service record, it was justified in dismissing the Claimant from its service.

Organization's Position

The Organization contends that the Carrier erred in dismissing the Claimant for an unproved charge. The Organization stresses that it has not been proved that the Claimant was guilty of the 1970 charge of arson. An arrest is only a charge and the presentment of a charge is no proof or evidence of guilt. The Carrier had no right to assume that the Claimant was guilty of the charge in the absence of a determination of guilt by a court of competent jurisdiction. The Carrier has determined that the Claimant was guilty of the 1970 charge because he was convicted of the same charge in 1966. However, the Carrier brought the Claimant to Trial on the 1970 charge and that charge has not been proven to date.

The Organization also contends that the Carrier committed several serious procedural errors in its conduct of the Trial, which of itself requires that the discipline be vacated.

It was fundamental error for the Hearing Officer to refuse to answer any questions which the Claimant's representative deemed necessary and pertinent to the charge. Such conduct by the Carrier's officer is evidence of prejudice and bias toward the Claimant by denying him a fair and impartial trial.

The Carrier also committed error when the Carrier's highest officer, in denying the appeal, stated that the Carrier's decision was based on the disciplinary procedure conducted under its working rules of the Carrier's rules and regulations, and not what transpired in a court proceeding. The Carrier has to be bound by competent evidence and not hearsay. There was nothing in the Claimant's service record to show any prior violation of Rule 2. and it was pure hearsay that he was guilty thereof in 1970.

The Organization further contends that the Carrier committed error in holding the Claimant guilty of violating Rule E because the operating rules must be deemed to apply to prohibited acts committed on the Carrier's property which affect the Carrier in the operation of its road. The operating rules may not be construed to permit the Carrier to control or discipline an employee for his conduct while off duty and not on the Carrier's property, when such conduct does not directly and adversely affect the Carrier in the operation of its road. To permit otherwise, contends the Organization, would be an improper intrusion into the employee's personal rights and life.

The Organization denies that the Claimant's service record warrants his discharge. For an employee with 27 years and 11 months seniority, incurring incidents which imposed 11 days discipline for 10 separate incidents, is not a bad record. There were no prior citations for any violation of Rule E.

The Carrier acted on charges which were not proved beyond a reasonable doubt, and therefore the Organization urges this Board to set aside the Carrier's unwarranted action.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute, and that the parties to the dispute were given due notice of the hearing thereon.

The Board must conclude that the evidence of record does not support or uphold the Carrier's dismissal of the Claimant for violating Rule E.

The Carrier brought the Claimant to Trial for allegedly violating Rule E on April 29, 1970. The evidence shows that the Claimant was arrested

that night on that charge and that there has been no final disposition of the matter. A charge is not proof and an arrest is not a conviction. The Carrier cannot contend, under our system of jurisprudence, that it has been held up to disrepute because of the arrest of the Claimant. The Carrier must take cognizance of the presumption of innocence which underlies our criminal code. It is particularly not at liberty to disregard this presumption of innocence when dealing with an employee with almost 28 years' seniority, albeit with a service record which could not be described as exemplary. Absent a determination of the Claimant's guilt or innocence by a criminal tribunal of competent jurisdiction, the Carrier is not free to treat or regard the Claimant as guilty of committing arson in April 1970, and thus breaching Rule E in that he thus revealed himself to be a person of poor moral character bringing disrepute on the Carrier.

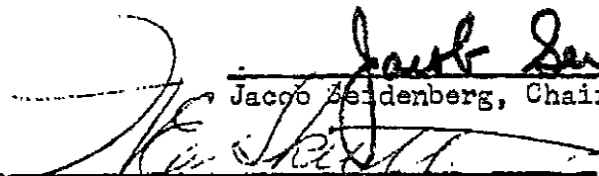
The Carrier also may not, in 1970, discipline the Claimant for a criminal act committed in 1966, for breaching Rule E. In the first place, Rule E cannot be applied retroactively. The Carrier cannot justifiably say in 1970 that the Claimant held it up to discredit or disrepute four years earlier, when it was totally unaware of the Claimant's misconduct and the matter had not been brought to its attention. The Carrier cannot regard itself as being discredited or shamed by acts unknown to it. Secondly, the Carrier in its May 8, 1970, Notice of Charges filed against the Claimant did not mention the 1966 offense, and consequently it cannot charge and try him for that earlier offense. The Carrier is obligated under the contract in Regulation 6-A-3 to inform the Claimant in writing of the exact charge for which he is to be tried. The charge levelled against the Claimant was that

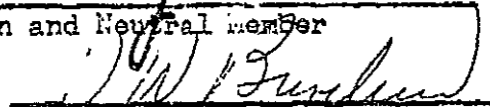
he breached Rule E by his April 29, 1970, arrest. The Carrier therefore is barred from disciplining the Claimant for the 1966 offense since he was not charged in writing with this offense.

In summary, the record discloses no evidence that the Claimant was guilty either of moral turpitude or arson merely because he was charged therewith and nothing more. The 1966 offense is not admissible under the regulation governing discipline, and not admissible because there can be no retroactive application of breaches of Rule E. There being no competent evidence to support the Carrier's disciplinary action, the Board has no recourse but to vacate the disciplinary sanction.

AWARD: Claim sustained.

ORDER: The Carrier is directed to put the Award into effect on or before February 26, 1971.


Jacob Seidenberg, Chairman and Neutral Member


V. W. Bigelow, Carrier Member

W. E. Skutt, Employee Member

January 16, 1971