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SPECIAL BOARD OF ADJUSTMENT NO. 951

B.C. / 155

PARTIES	METRO-NORTH COMMUTER RAILROAD COMPANY)	
TO	AND)	AWARD NO. 80
DISPUTE	TRANSPORTATION COMMUNICATIONS INTERNATIONAL)	CASE NO. 135
	UNION (TCU))	

STATEMENT OF CLAIM:

- (a) That Carrier violated the Rules Agreement effective January 1, 1983 and acted in an arbitrary and capricious manner when it assessed discipline of dismissal on Tower Director (qua Local Protective Chairman) Thomas G. Tringali on November 4, 1988.
- (b) Claimant Tringali's record be cleared of the charges brought against him on June 13, 1988.
- (c) Claimant be restored to service and be compensated in accordance with the provisions of Rule 51.

HISTORY OF DISPUTE:

At all times material to the dispute in this case Claimant held the position of Tower Director at New York City as well as that of Local Protective Chairman.

On May 27, 1988 Claimant in his capacity as Local Protective Chairman represented a clerical employee at an investigation. At the outset of the investigation Claimant became embroiled in a dispute with the hearing officer over Claimant's repeated objections which the hearing officer believed were preventing him from conducting an orderly hearing. The dispute escalated to the point where Claimant apparently became inflamed. Claimant dared the hearing officer to take him out of service stating that the hearing officer could not do so because Claimant was a

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Local Chairman. When the hearing officer placed a call to Carrier police to assure order, Claimant responded by repeating the dare, spinning around in his chair, shouting, placing his feet on the conference room table and clucking and flapping his arms to imitate a chicken. Claimant also referred to the hearing officer as the lower parts of the human body including male genitalia. The hearing officer recessed the hearing. After the hearing reconvened it proceeded to a conclusion without further problems.

The Carrier notified Claimant to appear for formal investigation on the charge that during the investigation he had been ". . . abusive and offensive to Trial/Appeals Officer in manner and action, disrupted proceedings of hearing and refused to comply with instructions of Trial/Appeals Officer, in violation of Rule D" Following the investigation Claimant was notified that he had been found guilty of the charge and was dismissed from the Carrier's service.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151 et seq. The Board

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also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

The substantive question raised by the claim in this case is whether an employee of the Carrier is subject to discipline for conduct engaged in while that employee is acting as the representative of another employee during an investigation.

The Carrier would answer the question in the affirmative. The Carrier cites a number of arbitral authorities in support of its position principle among which is Award No. 13 of Public Law Board No. 3139, Burlington Northern R.R./International Brotherhood of Firemen and Oilers, Apr. 22, 1983 (LaRocco, Neutral). That Board sustained discipline of an employee acting as an employee representative during an investigation for continuing to smoke after requests and orders not to do so. Noting what the Board termed as "sensitive and legitimate concerns" raised by both parties with respect to the need for employee representatives to operate freely and independently of influence by a Carrier and the need for a hearing officer to maintain order and decorum during an investigation to insure the integrity of the fact finding process, the Board found that Claimant's conduct was an attempt to badger and intimidate the hearing officer and was not related to his duties as a union representative. The Carrier maintains that Claimant in this case engaged in similar but more egregious misconduct for which the discipline of discharge was fully warranted.

The Organization vigorously disagrees. It maintains that no matter how egregious the misconduct by an employee representative at an investigation it may not provide the basis for discipline of that employee. The Organization cites Award No. 624 of Public Law Board No. 912, Norfolk & Western Ry. Co./United Transportation Union, June 30, 1982 (Moore, Neutral) which reinstated an employee representative who during an investigation wore a T-shirt depicting Raggedy Ann and Andy engaged in sexual intercourse, forced a halt to the investigation by insisting upon using a tape recorder contrary to Carrier rules and refused a direct order to leave the property. While finding that the employee representative was guilty of serious misconduct the Board nevertheless held that ". . . the Claimant is just not subject to discipline when he is appearing in the capacity of Local Chairman." The Organization also cites NRAB Third Division Award No. 5367, Southern Ry. Co./United Transport Service Employees, June 20, 1951 (Elson, Referee) setting aside a thirty-day suspension of an employee representative who during an investigation lost his temper, accused the Carrier of framing the Claimant and at times attempted to take over the investigation. Noting the dual capacity of an employee representative at an investigation as both an employee of the Carrier and representative of the employees in disciplinary matters, the Board found that it was essential to the function of employee representative that his capacity as an employee be disregarded and that he be subject to no sanction greater than that to which a nonemployee representative would be subject.

We, like the tribunals in the cases noted above, find ourselves faced with reprehensible and egregious misconduct committed by an employee

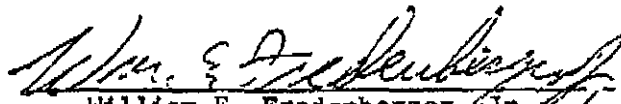
representative during an investigation. The foregoing cases represent diametrically opposite schools of thought on the issue of whether an employee representative may be subject to discipline under such circumstances. There are sound considerations supporting both points of view. However, we find ourselves more in agreement with the tribunals finding absolute privilege.


We are sorely tempted by Claimant's misconduct in this case to hold him subject to discipline. Nevertheless, we are persuaded that to do so would place a weapon in the hands of the Carrier so powerful that sooner or later it would have a chilling effect upon an employee's function as a representative during an investigation thereby infringing upon the fundamental right of employees to have effective representation. The Carrier may avail itself of other remedies to maintain order and decorum during an investigation including, in a proper case, ejection of the offending representative from the investigation and the property. However, it may not discipline the representative as an employee for misconduct during an investigation at which the employee acts as a representative of another employee.

Accordingly, we find that the discipline must be set aside.

AWARD

Claim sustained.


William E. Fredenberger, Jr.
Chairman and Neutral Member


M. M. Connor
Carrier Member


R. A. Scardelletti
Employee Member

DATED: April 2, 1990