

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISIONAward Number 4475
Referee Lamont E. Stallworth Docket Number 4443

PARTIES TO DISPUTE: Allied Services Division/Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

Boston and Maine Corporation

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (P-195) that:

1. Carrier acted in an arbitrary, capricious, unjust manner, and in violation of Rule 13, among others of the Controlling Agreement when it dismissed Mr. Robert Flaherty from its service effective April 2, 1984.
2. Carrier shall now be required to reinstate Mr. Flaherty to his former position and compensate him an amount equal to what he could have earned including, but not limited to, daily wages, overtime, and holiday pay, had he not been discharged, beginning April 2, 1984 and to continue until such time as this dispute is settled. Further, the Carrier shall restore all of Mr. Flaherty's rights and privileges unimpaired.

OPINION OF BOARD: This Claim arises out of the dismissal of the Claimant for sleeping or appearing to sleep on the job and for failure to be in his uniform. After carefully considering the Parties' Submissions, the transcript of the Hearing and the other documents in this case, the Board concludes that the Carrier was justified in finding Claimant guilty of the charges, but that the penalty of dismissal is too severe.

Claimant's discharge arose out of an incident occurring on January 21, 1984. At that time the Claimant was employed as a Special Agent on the 7:00 A.M. to 3:00 P.M. shift. Part of his assignment was to protect the Carrier's property in East Cambridge, Massachusetts, where the incident in question took place.

The charge against the Claimant is based almost exclusively on an internal investigative report filed by Police Captain S. W. Ziegler. At the Hearing Captain Ziegler appeared and expanded on some of the information in that report. Captain Ziegler testified that at about 10:30 A.M. on the date in question he made a patrol of the Piggyback Yard, did not see an Officer patrolling it, and so checked the Office trailer. After unsuccessfully checking several offices within the trailer, he came upon the office used by the U.S. Customs Service. Ziegler stated that upon opening the door to the office he saw the Claimant, with his head lying on his right arm on the desk. The Claimant allegedly woke with a start, and when Captain Ziegler asked him what he was doing he replied that he was making a telephone call. Ziegler asked him to step out of the smaller office, and when he did so, Ziegler

allegedly observed that the Claimant had red, watery eyes, and red striations on the side of his cheek matching the material on the cuffs of his jacket. Ziegler testified that he told the Claimant that he had seen him sleeping, to which Claimant allegedly replied "I did have my head down but I wasn't unconscious." Ziegler asked him why he (Ziegler) was able to walk around the office for several minutes without the Claimant knowing anyone was there, to which Claimant replied that he did know Ziegler was there. Ziegler also testified that he observed Claimant dressed in blue pants, a light blue plaid shirt, and a dark blue short jacket. According to Ziegler, when he asked Claimant where his uniform was, he merely shrugged.

On January 23, 1984 Claimant was notified that he was being charged with the following:

"(1) Neglect of duty, to wit: sleeping or assuming the attitude of sleep at 11:40 hours, Saturday, January 21, 1984, in the U.S. Customs Office while on duty 0700-1500 as a Special Agent assigned to the Piggyback Facility as outlined in Rule 13, page 12.1 of the B&M Police Department Operations Manual.

(2) Failure to follow departmental directive, to wit: not being in police uniform while on duty 0700-1500 hours Saturday, January 21, 1984, at Piggyback Facility in violation as outlined in Rule 8, page 12.21 of the B&M PD Operations Manual."

A section of the notice received by the Claimant stated that the Hearing was set for January 27, 1984. At the request of the Organization, the Hearing was postponed until March 28th. Apparently the Carrier never sent notice to the Claimant of the change in date, although he appeared and participated in the Hearing on the revised date. After the Hearing the Carrier notified the Claimant that he was being dismissed from employment.

At the Hearing the Claimant testified that he had entered the office in question in order to make a telephone call. He also testified that when Captain Ziegler saw him he had just completed that call and was sitting with his elbow on the table and his forearm in a 45 degree angle, with his hand resting against his face. He also presented some testimony that his eyes may have been irritated from a fire in the area.

The major thrust of the Organization's Claim is that the Claimant was deprived of certain procedural and due process rights in the conduct of this Investigation. The Organization contends first that the Claimant never received notice from the Carrier of the revised Hearing date, and that the Carrier intended for the Claimant not to appear. At the Hearing there was conflicting testimony over whether past practice on the property placed on the Organization the responsibility to notify a Claimant of a change in Hearing dates if it was responsible for the change. Rule 13 does not explicitly

require the Carrier to notify the Claimant of even the original Hearing date; it merely requires that he be notified of the specific charges against him. Even if it were Carrier's responsibility to provide a revised notice, the failure to do so in this case is not significant, because the Claimant actually received notice of the Hearing, he participated in it fully, and he has not stated any way in which the alleged lack of notice prejudiced his defense. The Board therefore concludes that there was no violation of due process in this regard.

The Organization also argues that the charges levied against the Claimant were not sufficiently specific, and were partially in error. For example, the Organization argues that the first charge asserts that the Claimant was assigned to guard the Piggyback Yard, when testimony at the Hearing showed that Officer Michael Morrill held that assignment. However, Officer Morrill testified that he asked the Claimant to take over his assignment briefly, shortly before the incident in question. The Claimant agreed to this arrangement, and makes no serious argument that he should not have been guarding the Piggyback Yard at that time. Another error concerning the time of the incident was quickly corrected by the Carrier.

In addition, the Organization asserts several areas of vagueness in the charges. The Board concludes that the first charge meets or exceeds the standards necessary to inform the Claimant of the nature of the charge. The charge is very specific as to time, date and place. It alleges that the Claimant was either sleeping or assuming an attitude of sleep. This charge is not too vague because it is virtually impossible for a bystander to be absolutely certain that a person is sleeping, but in either case the Claimant would have been guilty of a dereliction of duty because part of his job is to give the appearance of vigilance.

The second charge is a bit vague in that it does not describe how the Claimant was out of uniform. The testimony at the Hearing leaves some doubt as to exactly what articles of clothing constitute the proper uniform, and how much discretion the Carrier leaves its officers to deviate from the norm, especially in cold weather. However, the charge was sufficiently specific to allow the Claimant to prepare a good defense and he admitted at the Hearing that he was not in proper uniform. Furthermore, this Board presumes that the Carrier dismissed the Claimant primarily on the basis of the first charge. Therefore, defects in the second charge are not very important in the overall scope of this Claim.

The Organization also asserts that the Hearing Officer acted as a prosecutor rather than an impartial adjudicator, and that he prejudged the Claimant's guilt. It is true that the Hearing Officer's attitude towards the Organization's Representative, Mr. Bankowski, was occasionally impatient, and on one occasion perhaps a bit sarcastic. But there is no evidence that the Hearing Officer treated the Claimant in this manner, and his few negative comments to Mr. Bankowski do not demonstrate any prejudice regarding the merits of the charge. After considering the transcript of the Hearing as a whole, the Board concludes that the Hearing Officer's conduct was not so hostile as to deny the Claimant a fair and impartial Hearing.

Nor does the Board conclude that the Carrier ignored the Hearing because there is no record of formal findings by the Hearing Officer. It is true that the formal notice of dismissal came from someone other than the Hearing Officer. But that notice mentions the Hearing, and the Board concludes that his reference to it indicates that the Carrier's decision was based on the Hearing. In addition, the Carrier's later response to the Organization's appeal demonstrates a familiarity with the transcript of the Hearing.

Proceeding to the merits of the Claim, it is true that because there were no witnesses, this charge pits one man's word against another. Nevertheless the Board concludes that the Carrier was justified in considering Captain Ziegler's testimony more credible. The Claimant's testimony concerning the position of his head, hand and arm are a bit far-fetched. In addition, he totally failed to produce any evidence concerning the red marks on his face allegedly caused by lying on the cuff of his jacket. He also failed to deny specifically his alleged statement that he had had his head down but was not unconscious. The detailed nature of Captain Ziegler's report and testimony lend it credibility, just as the lack of details in the Claimant's testimony weakens it.

In a discipline case the Board may not substitute its judgment of guilt for that of the Carrier, as long as there is substantial evidence to substantiate the charges. (Fourth Division Award No. 3490.) There was substantial evidence here to find the Claimant guilty and there is no evidence of discriminatory or arbitrary conduct towards the Claimant at the hearing stage.

Our final concern is whether the penalty of dismissal was justified. Although the Claimant's neglect of his duties is a serious offense, we do not find it sufficiently serious to warrant his dismissal. Perhaps the Carrier imposed such a serious penalty because of Claimant's past record. In reaching our decision the Board also must consider that record, and we find that it does not support a discharge.

Claimant has been dismissed twice previously by the Carrier, but this Board has overturned both of those dismissals. Claimant also has been disciplined on several other occasions, only one of which appears in the record here. All of these offenses occurred more than five years ago, prior to the incident at issue here, except the most recent dismissal; the other dismissal occurred more than thirteen years earlier.

The Board also takes note that none of these prior instances of misconduct involved the type of offense charged here. Although not a model employe, Claimant does not appear to be an intractable employe, obstinately making the same mistakes over and over. A general principle of labor relations is that discipline should be progressive and should give the employe a chance to improve his behavior before being terminated. The Carrier has not pursued this course in this instance.

Because the Carrier has provided substantial evidence that the Claimant was guilty, however, some penalty is in order. Therefore, the Board will reinstate the Claimant to his former position with all rights unimpaired, but without compensation for the time lost.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

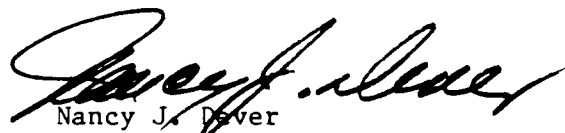
The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:


Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September 1986.