PUBLIC LAW BOARD NO. 3698

Award No. 1
Case No. 1

PARTIES TO DISPUTE: Railroad Yardmasters of America
and
Seaboard System Railroad

STATEMENT OF CLAIM: "Claim of Yardmaster W. D. Gilmer, Jr., for reinstatement to the service of the Seaboard System Railway with all rights restored, record cleared and paid for all time lost as a result of his dismissal on August 8, 1983."

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.

The agreement between the parties contains a normal disciplinary rule (Rule 12) which provides for a fair and impartial hearing prior to discipline being imposed. In addition, Rule G-1 of the L&N Rules of the Operating Department provide as follows:

> "G-1. Acts of dishonesty, disloyalty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements or concealing facts concerning matters under investigation, sleeping on duty, or lying down or being in a slouched position with eyes closed or with eyes covered or concealed, will subject the offender to disciplinary action, including dismissal."

In a letter dated July 18, 1983, the claimant herein was charged in the following fashion:

> "You are hereby charged with violation of Rule G-1, L&N Rules of the Operating Department, by failing to answer a question as directed by Office Trainmaster D. E. Strickland during an investigation being conducted in your behalf

on Thursday, July 7, 1983, in the Superintendent-Terminal's office, Tilford Yard, Atlanta, Georgia."

Following an investigation held on August 4, 1984, Carrier found claimant guilty of the charges and dismissed him from service on August 8, 1983.

This matter is derived from an earlier problem which the claimant herein was involved in. He was charged in connection with being late for his regular assignment on June 17, 1983, and attended an investigation held on July 7, 1983. The relevant portions of the testimony at the July 7 investigation, with respect to this dispute, are as follows:

"Q. Mr. Gilmer, can you identify anyone that was blocked with you on this date?

A. GILMER, SR. - I object to that. We are not here to decide other people failures or whatever.

STRICKLAND - Mr. Gilmer, your objection is noted. The question still stands and Mr. Gilmer will please answer.

A. Mr. Strickland, as you well know I am Local Chairman for all foremen and switchmen at Tilford Yard in Atlanta and I contend that it is your responsibility as a representative of the carrier to obtain the information concerning who arrived and at what time and who departs and at what time, and it is not my responsibility to furnish you information which is your job and not mine. I also say on the payroll sheet I turned in I show my hours of assignment from 3:00 p.m. to 11:00 p.m. because as stated several times earlier in this investigation I was on the property 15 minutes before my actual on duty time.

Q. Mr. Gilmer, I would not put you in a satuation to identify people by name but on this date from the period that you were blocked from 2:45 p.m. until 4:15 p.m., were there members of yard engine crews working at the bowl blocked for this entire period with you?

A. As I stated earlier, I was not the only employee, in fact, there were at least two other employees of the Seab oard System Railroad besides myself who were blocked at this crossing between 2:45 when I arrived and 4:15 when the crossing was cleared. As I also stated it is not my responsibility to inform the carrier as to who these employees are, but I will say that I know for a fact that as of today, there were at least three employees blocked at the bowl crossing from 2:45 until 4:15 and yet I was singled out and was the only one charged, and I will further state that in the last 10

years at least 150 employees of the now Seaboard System Railroad have been blocked at the bowl crossing and as a result of being blocked have neither had their pay cut nor have they been charged.

Q. Mr. Gilmer, were these three people members of a bowl engine assignment on this date?

A. GILMER, SR.-I object to that. I believe you have already asked that question earlier and received an answer.

STRICKLAND - Mr. Gilmer, Sr., I did ask the question but did not receive an answer and I am now directing Mr. Gilmer, Jr., to answer the question.

A. Mr. Strickland, as I stated only a few questions earlier when you asked me to identify who else was blocked at the bowl crossing, I am going to answer you again by saying that I was not the only one blocked at the bowl crossing between the hours of 2:45 and 4:15 p.m. on June 17, 1983. It is not my responsibility to do your work for you which should have been done prior to June 25 when I was charged for being late because I was blocked while on company property at the bowl crossing on June 17, 1983.

STRICKLAND - Let the record show that Mr. Gilmer, Jr., nas be directed to answer a question with specific information and has not."

Carrier's position with respect to this matter can best be epitomized by the following quctation from its submission:

"....Page 4 of Carrier's Exhibit 'B' (the July 7, 1983 transcript), will show that Yardmaster Gilmer, Jr., was guilty of violating Rule G-', those parts dealing with insubordination and concealing facts about matters under investigation. The question that Yardmaster Gilmer, Jr., failed to answer with specific information, was a reasonable directive and did not place him in a position of harm or jeopardy. If the question was an improper one, the representative can voice an objection, which he was allowed to do; and after complying with a reasonable directive, the matter could have been handled as a grievance. This was not the route chosen by Yardmaster Gilmer, Jr., or his representative and the result is the instant case and Yardmaster Gilmer, Jr.'s loss of employment on August 8, 1983. Carrier contended further that claimant in the course of the hearing which was the subject matter of this dispute exhibited total disregard for the procedures prescribed for developing facts concerning matters under investigation. Further Carrier characterized his attitude at that hearing as being evasive and that he was intent on not allowing matters to be properly developed in the investigation."

Petitioner takes the position that Carrier violated many principles which are generally accepted in the course of the handling of this dispute. Those alleged violations by Carrier included lack of specificity of the charges and clear bias and prejudgment on the part of the Carrier Hearing Officer. The main thrust, however, of Petitioner's position is that Carrier did not establish that claimant was guilty of the charges.

This Board believes that while Petitioner's arguments on the subject of procedure and specificity of the charges may indeed have merit, the primary interest of the parties is in the main question of whether, indeed, claimant was guilty of the charges. In the interest of brevity and clarity, and in view of the conclusions reached, the Board will deal only with the merits of this case.

There are some significant problems with respect to Carrier's logic in terms of the handling of this entire matter. First, there is serious doubt on this Board's part as to the relevance of the question propounded to claimant in the July 7 investigation with respect to other people being held up at the same location as claimant. The purpose of the earlier investigation was to determine whether, indeed, claimant was guilty of being late to work. It is, at least, a stretch of the imagination to conclude that the question of the whereabouts of other employees is relevant to this determination. However, that is not the primary concern of this Board in the matter at hand. The main thrust is: were the charges preferred by Carrier supported by the evidence? The charge is a most specific one in that claimant was charged with "failing to answer" a question directed by the Hearing Officer during the July 7 investigation. From the entire record, the particular question apparently was that which resulted in the Hearing Officer, Mr. Strickland, stating "Let the record show that Mr. Gilmer, Jr., has been directed to answer a question with specific information and has not." It is clear from the record of the July 7 investigation that Mr. Gilmer, Jr., did answer the question. Whether his answer was totally responsive is a matter of debate. It is also debatable as to the answer required by the Hearing Officer in that case. It is totally unclear as to what he was looking for, whether it was the names of the individuals or some other answer. In any event, there is absolutely no evidence that Mr. Gilmer, Jr., refused to answer the question.

More significant than the nature of the answer, however, is the right of Carrier to insist on a particular answer to a question during an investigation under the threat of future disciplinary action. From the early days of the Railway Labor Act Boards such as this have held that a fair and impartial investigation specifically denotes that a claimant would be given due process in the course of an investigative hearing. The essence of due process includes the concept that an employee or an individual must not be forced to respond in a particular manner. That principle is so well established as to require no elaboration. The answers which were given by Mr. Gilmer, Jr. did not constitute insubordination, nor did they constitute concealing facts which were relevant to the dispute under investigation. It is difficult to remember in the course of the extremes to which the parties went in this dispute that the matter under investigation in July was merely the matter of tardiness. While the claimant's attitude at the July hearing may be considered to have been impertinent by Carrier, that conclusion, however well founded, does not justify its attempt to discipline him for the manner in which a particular question was answered. To permit the disciplining of an employee for failure to answer a question in the manner desired by the Hearing Officer would make a travesty of an otherwise difficult disciplinary procedure. It is, indeed, a strain for a carrier to accord employees a fair and impartial hearing in a disciplinary matter while the conducting officer is a superior. The essence of such a hearing in terms of fairness must be the impartiality and objectivity of the hearing officer and the due process accorded the claimant. Due process alone mandates that the employee must not be forced to answer the question in the manner in which he chooses not to do. It is incumbent upon the Carrier, if it so desires to establish by its own testimony the facts which relate to the guilt

or innocence of a particular employee. It is not the employee's responsibility to provide the facts upon which the Carrier must base its conclusions. Thus, it is obvious that in the instant case Carrier has not borne its burden of proof with respect to the facts upon which its discipline was based. There is no evidence whatever that there was a violation of Rule G-1 by claimant by virtue of his answers to the questions propounded. The claim must be sustained.

AWARD

Claim sustained. Claimant will be reinstated and compensated in accordance with Rule 12(c).

ORDER

Carrier will comply with the award herein within thirty (30) days from the date hereof.

I. M. Lieberman, Neutral-Chairman

R. O. Key, Sr. Carrier Member

February 24, 1985
Jacksonville, Florida

D. R. Carver, Employee Member