PUBLIC LAW BOARD NO. 3785

Parties to Dispute

Railroad Yardmasters of America )
) Case No. 1
vs )
) Award No. 1
Burlington Northern Railroad )

Statement of Claim

We hereby appeal the decision of Carrier to dismiss Rick L. Norton, and request that he be reinstated with full seniority and full compensation for all time lost.

Findings

By notice dated October 6, 1983 the Claimant was advised to attend an investigation on October 12, 1983 to determine facts and place responsibility, if any, in connection with his alleged quarrelsome conduct to Company officers at the scene of a derailment site on October 4, 1984. The Claimant was also charged with driving Company vehicle 7209 in an unsafe manner when leaving that same derailment site on the same date at approximately 5:30 P.M. By letter dated October 10, 1983 the Claimant made request for postponement of the investigation until October 27, 1983. In that same letter the Claimant also requested that six (6) Carrier employees appear as witnesses on his behalf and that the Yardmaster General Chairman serve as his representative at the investigation. After granting the request for postponement the Carrier then advised by memo the six (6) employees on October 10, 1983 that the Claimant had requested that they appear as witnesses on his behalf. After the investigation was held the Claimant was sent notice on November 2, 1982 that he was dismissed from service.

A review of the record shows that the Carrier's witnesses testified that the Claimant was quarrelsome with a Carrier officer when he called Special Agent P.A. Wilson a number of explicitives at the site of the derailment of several cars of Carrier's train 131 on October 4, 1983. The incident was apparently motivated by the Claimant's

disagreement with the Roadmaster, who had instructed the Special Agent, about the proper place for the rear brakeman of train 131 to be who was on assignment while the derailment was being taken care of. That the Claimant used profanity when addressing the Special Agent is disputed in the record only by the Claimant whose testimony with respect to this issue, as well as with respect to the manner in which he was driving the Carrier's vehicle on the day in question, can be regarded as self-serving. Carrier's witnesses testified that the Claimant drove a green Burlington Northern suburban type truck away from the derailment site in what could be considered an unsafe manner after he had the verbal exchange with the Special Agent.

No one denies in the record that the Claimant was trying to correctly cover his assignment on the date in question in his attempt to expedite the departure of train 131 when the incidents at bar occured. The Trainmaster/Road Foreman at Sioux City, Iowa testified at the investigation that the Claimant was doing everything in his power to expedite clearing the crossing blocked by the derailment and to get train 131 back together again. This witness also testified that the yard at Sioux City was "congested" on the day in question which apparently added pressure to the Claimant's job on that day. In its declination letter dated January 17, 1984 the Carrier officer stated that he was appreciative of the "sincere efforts (of the Claimant) at doing" a good job on the day in question. "But", this Carrier officer adds, "there are certain limits one has to work within in order to have a smooth and efficient operation". This Board agrees. And the evidence of record shows, consistent with substantial evidence standards accepted in this industry, that the Claimant was quarrelsome with Carrier officers on the date in question when he was trying to carry out his responsibilities, and that the manner in which he drove the Carrier vehicle could be considered unsafe. On merits the record warrants the reasonable conclusion that the charges levied against the Claimant be sustained. Apparently the Claimant's enthusiasm

to properly cover his assignment turned to impatience when he was obliged to coordinate his own efforts with others in order to get his work done on the day in question.

Since the burden of proof requirements, which are on the Carrier in cases such as this (Third Division 18863, 19670), have been fulfilled only the question of the quantum of discipline must be addressed. The National Railroad Adjustment Board and various Public Law Boards under the National Mediation Board have precedentially established the principle that the role of discipline is not only punitive but, given extenuating circumstances, it should also provide corrective and training measures for employees (Second Division 6485; Third Division 5372, 19037; Public Law Board 3443, Awards 21, 22). Such forums have ruled on numerous occasions that a Claimant's work history and past record may be properly weighed in order to determine the degree of discipline (Second Division 6632, 8022, 8527; Third Division 22320, 23508). The Claimant has fourteen (14) years seniority with the Carrier and his past record may be considered in framing the instant Award since reference to it was made on property by the Carrier in its declination letter dated May 9, 1984. Since 1971 the Claimant has received suspensions on two different occasions for contravention of various Carrier Rules. While the application of the principle of progressive discipline would not warrant discharge in the instant case as being totally inappropriate, it is the position of the Board that there are sufficient extenuating circumstances to permit the reasonable conclusion that it would not be improper to give this long-term employee one last chance to prove his worth to the Carrier. This consideration rests uniquely on the evidence of record which shows that the Claimant was sincerely attempting to cover his assignment when the circumstances surrounding this case occured.

Lastly, there are a number of procedural issues raised in this case by the Organization. One is the claim that the Carrier was in violation of current Agreement Rule 22 when it did not require

that the witnesses requested by the Claimant be present at the investigation. That Rule reads, in pertinent part:

> ...(a)t such investigation, all interested parties will be notified and they will be required to be present.

The Claimant had requested that six (6) witnesses be present for the defense at the investigation and only one (1) appeared. There is insufficient evidence to justify any conclusion that the presence of these other witnesses would have materially changed substantial evidence findings by this Board. This is so because it appears that the witnesses in question would have had only indirect knowledge, at best, of the circumstances at bar and/or because any testimony they may have proffered would have had to be weighed against that presented by the Carrier's witnesses with respect to the two charges levied against the Claimant. With reference to the latter a Board such as this, by long established precedent, cannot set itself up as trier of fact to resolve conflicting testimony (Third Division 10791, 16281, 21238, 21612) and the presence or absence of these witnesses would not have effectively made any difference with respect to legal conclusions. Nevertheless, it should be noted for the record that the Carrier was in technical contravention of Rule 22 when the witnesses requested by the Claimant were not required to be present at the investigation.

A second procedural argument raised by the Organization is that the letter of discipline dated November 2, 1983 addresses issues which go beyond the charges found in the notice sent to the Claimant on October 6, 1983. Such error is not controlling given substantial evidence in the record which is sufficient to support only those two charges levied against the Claimant prior to the investigation.

A third procedural argument raised is that the hearing officer showed prejudice. The record does not support this.

There are also arguments presented in the Submissions presented to this Board which were not submitted during the handling of this case on property. Their inadmissability before a Board such

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as the instant one has been codified by Circular No. 1 and Awards of the National Railroad Adjustment Board (Third Division 20841, 21463, 22054; Fourth Division 4132, 4136, 4137) and as such they have not been considered here.

Award

The Claimant shall be reinstated on a last chance basis with seniority unimpaired but without any compensation for time lost because of the issues at bar. The Claimant shall be reinstated by the Carrier within thirty (30) days of the date of this Award.

Edward L. Suntrup, Neutral Member

D. R. Orr, Carrier Member

W. G. Hougen, Employee Member

Date: April 18, 1985