

Award No. 1157

Docket No. 1094

2-LV-MA-'46

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Sidney St. F. Thaxter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 96, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

LEHIGH VALLEY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That Amerigo F. Mangialardo was unjustly discharged on October 15, 1945, and that accordingly the carrier be ordered to reinstate him to all service rights with compensation for all time lost retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: Machinist Amerigo F. Mangialardo, hereinafter referred to as the claimant, was regularly employed by the carrier at Sayre, Pennsylvania, shops. He served his apprenticeship at this shop, and as a machinist he has a seniority date of September 28, 1936. This claimant also served those of his craft employed at this shop as a member of the duly authorized local committee of machinists.

On September 10, 1945, this claimant reported off work because of illness, and this is affirmed by a statement made by Doctor Shamel, dated March 21, 1946, copy of which is submitted and identified as Exhibit A. On October 15, 1945, this claimant reported available for duty on October 16, 1945, and upon so reporting he was informed by General Foreman Dietrich (now deceased) that he could not return to work.

On October 22, 1945, seven days after this claimant reported for duty, he received a letter dated October 15, 1945, from Mr. W. E. Lehr, shop superintendent, advising him that he was dismissed from the service. Such dismissal took place without any investigation or hearing.

The discharge of this claimant has been handled in accordance with the current agreement, effective November 1, 1942, up to and including the highest designated carrier officer to whom such matters are subject to appeal. Every reasonable effort has been made on more than one occasion to have this carrier officer adjust this dispute without success, and which is affirmed by the submitted copies of letters dated March 15 and April 3, 1946, identified as Exhibits B and B-1.

POSITION OF EMPLOYEES: It is contended that the carrier violated that part of Rule 37, reading—

"No employe shall be disciplined without a fair hearing by designated officers of the Carrier."

would be necessary for them to see Mr. Lehr. The men then left the office, and nothing further was heard from Mangialardo until October 15, when he reported to Foreman Detrich as available for work, October 16. He was then advised he could not return to service, but should see Mr. Lehr. This he again failed to do, and at no time, other than on October 1, was any known effort made by Mr. Mangialardo to get in touch with Mr. Lehr to determine the status of his case.

Affidavit of Clerk E. L. Galligan regarding the visit of Mr. Mangialardo at Sayre shop office, October 1, 1945, is submitted. This fact was disputed by the committee in conference, and they were given the benefit of the affidavit information in letter addressed to the general chairman under date of January 19, 1946.

Item 7: In view of Mangialardo's failure to report to Mr. Lehr after being instructed, October 1, when he visited the shop office, and it was apparent he had recovered from his illness for which he reported off duty September 10, and again so advised on October 15 by Foreman Detrich, a letter was addressed to Mangialardo and sent to him through the United States mail, advising of the discipline action taken in his case as a result of the occurrence in which he was involved, September 4.

Item 8: There can be no dispute about the rights enjoyed by machinists under the provisions of Rule 35 of the controlling agreement when they feel they have been unjustly dealt with or the provisions of the agreement violated. The case was handled with the carrier on appeal through the general chairman, which is the proper procedure, but the facts showed no evidence of unjust treatment or any violation of the agreement in the manner in which the investigation was conducted on the basis of the charges preferred.

Item 9: We again call attention to the statement of Mangialardo, copy of same submitted, as evidence of a fair hearing on the charges preferred against him.

Item 10: The record in this case does not show any discrimination against Mangialardo, and there was none. He was dismissed after proper hearing and consideration of the facts developed supported the charges preferred against him of insubordination and loafing during his regular working hours.

Item 11: Mangialardo was not discharged for absence on account of sickness during the period September 10 to October 15, 1945, but, instead, was dismissed "for insubordination and loafing during your regular eight-hour tour of duty."

We respectfully submit that Mangialardo was given a fair hearing and was found guilty of the charges against him, as indicated by his statement at the investigation and his conduct justified his dismissal. It was our conclusion we could not restore Mangialardo to the service without seriously affecting the discipline of the shop. It was the judgment of the responsible officers of this carrier that such actions on the part of employees as developed to be facts in this case cannot be passed without discipline.

The discipline imposed in this case was justified and consistent with the facts developed, and we respectfully ask that the Board sustain our action.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

This employe claims that he was unjustly discharged on October 15, 1945, and asks for reinstatement with compensation for all time lost.

The general rule is that the imposition of discipline is the prerogative of management and this Division will not review a decision for which there is a reasonable basis. We have not, however, hesitated to intervene when the record discloses that an employe has not had a fair and impartial hearing, or when the evidence adduced clearly does not support the charge, or when the penalty imposed is out of all reason.

The claimant on September 4, 1945, was found by Superintendent of Shops, Lehr, sitting on a can during his regularly assigned working hours and was reprimanded for loafing. An argument ensued between the two men with the result that charges were preferred by Mr. Lehr of insubordination, of failure to perform work properly, and of quitting work before regular quitting time. Apparently, the claimant's stopping work was the result of the argument. It was near the end of his day's work and the inference is that Mr. Lehr directed him to stop then and there. A hearing was scheduled for September 8th and was held. The claimant was notified at the time the charges were preferred that he was held out of service pending a hearing.

The entire hearing comprised the examination of the claimant by Mr. Lehr, who imposed the sentence of dismissal. At the hearing there was no evidence offered to support the charges unless the assertions of Mr. Lehr in attempts to frame questions can be so regarded. One example may be sufficient to illustrate: "For your information, Mr. Mangialardo, you were sitting on a can behind a girder in the Erection Shop, doing nothing." Then follows a rather irrelevant question. Almost the entire examination consisted of assertions by the examiner, and protestations by the claimant at the unfairness of the hearing. There is nothing which can be construed as an admission by the claimant of any dereliction of duty.

It is significant that after the hearing this claimant was ordered to report for duty on September 10th. He did not do so, but instead reported that he was ill. He did not return for duty until October 15th. He was not restored to duty on that date, but instead the notice of his dismissal was mailed to him.

This notice reads as follows:

"Sayre, Pa., October 15, 1945

Mr. Amerigo Mangialardo
Machinist, Sayre Loco. Shop
213 Clinton Avenue
Waverly, N. Y.

For insubordination and loafing during your regular eight hour tour of duty, you are hereby dismissed from the service of the Lehigh Valley Railroad and notation accordingly will be placed on your service record card.

After investigation was conducted you were notified to report for work pending further action. However, on September 10th you reported off sick and on Monday, October 1st, you were in the shop and stated you figured on coming to work on Wednesday, October 3rd, and were told to report to the undersigned. However, you did not do so and left the shop and nothing further has been heard from you.

Please sign one copy of this letter and return to me promptly.

/s/ W. E. Lehr
Supt. of Shops."

The carrier in its oral argument which is made a part of the record says specifically that it does not dispute the fact that the claimant was sick and unable to work from September 10th to October 15, 1945, and contends that his dismissal was not in any way influenced by his failure to report for work on September 10th. But the letter of Mr. Lehr purporting to be an impartial judgment based on supposed evidence adduced at the hearing indicates to the mind of any reasonable man this claimant's dismissal was based in part, if not altogether, on what happened after the hearing ended. As to that he has had no opportunity to be heard.

The claim in this case must be sustained for the following reasons:

FIRSTLY: There is no evidence to support the charge.

SECONDLY: The claimant was not accorded that fair hearing which under Rule 37 he was entitled to have, in that the issue involved arose out of an incident which involved Mr. Lehr, who preferred the charges, who conducted the hearing, from whose lips, though not appearing as a witness, came the only support for the charge, and who, supposedly acting as an impartial judge, imposed the sentence of dismissal.

THIRDLY: The sentence imposed was unquestionably influenced by the fact that the claimant remained off duty from September 10th to October 15th, a circumstance which had nothing to do with the charge on which he was tried.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois this 25th day of October, 1946.