

Award No. 1251

Docket No. 1175

2-C&O-EW-'48

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Electrical Workers)**

CHESAPEAKE AND OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Electrician John J. Justice was dismissed from service on March 21, 1947, without a fair hearing, under the current agreement, and that accordingly the carrier be ordered to reinstate him to all service rights with pay for all time lost retroactive to said date.

EMPLOYEE'S STATEMENT OF FACTS: John J. Justice, hereinafter referred to as the claimant, was employed by the carrier as an electrician at Columbus, Ohio, on July 19, 1946. However, the claimant transferred to Thurmond, West Virginia, on August 14, 1946, and remained in the service thereat on the 7 A. M. to 3 P. M. shift until discharged from the service at either about 3 P. M. on March 20, 1947, or at the conclusion of hearing the next day, March 21, 1947, beginning at 1 P. M.

Copy of the hearing transcript is submitted, identified as Exhibit A, and it is dated "March 21, 1947—1p." The charges in this record against the claimant were made known to him and Acting Committeeman Owens at the hearing. The claimant was informed of his discharge at the hearing. No other notice of the charges or the dismissal have been made available to either the claimant or Acting Committeeman Owens.

The agreement, effective June 1, 1923, as subsequently amended, particularly by Memorandum of Agreement, effective August 1, 1944, is controlling.

POSITION OF EMPLOYES: The statement of dispute calls upon this Division to determine whether or not the carrier accorded this claimant "a fair hearing," within the intent and purpose those words are used in the collective agreement. It is consequently submitted that if the management at the local point had displayed any due respect for the unambiguous provisions of revised Rule 37, reading—

"No employe will be disciplined by suspension or dismissal without a fair hearing by a designated officer of the company. Suspension in proper cases pending a hearing, which shall be prompt, and in cases not requiring discipline as severe as dismissal, shall not be deemed a violation of these rules. At a reasonable time prior to the hearing, the employe shall be apprised of the precise charge

What Justice attempted to do was to rely solely on the transcript of his trial before the Justice of the Peace for the determination of his guilt. Your Board is certainly not concerned about the matter of this employe's guilt for **criminal assault**. The question to be decided is whether in dismissing Justice, the carrier violated any rules of the agreement. **Criminal assault** contemplates a breach of the peace and is a crime against the state. When Justice was acquitted of the **criminal assault** charge, the court did not in effect say that no assault had been committed, but that no assault such as would constitute a crime against the state had been committed. There is a vast difference. Civil liability for an assault may be established by proving any wrongful laying on of the hands of the person of another, but this would not of itself constitute a **criminal assault**. Justice was acquitted of the charge of **criminal assault**—the court simply finding that he was not guilty of a **crime** in connection with the altercation with Porter.

In connection with the altercation, Justice, in addition to the assault, repeatedly cursed the general foreman as testified to by the general foreman and substantiated by Roundhouse Foreman Comer Gray, who came into Porter's office just before Justice left. In testifying Gray said:

"On his way out, Mr. Justice turned, making a few steps toward the office door and cursed Mr. Porter, then went out in the roundhouse."

CONCLUSION

The question which your Board is asked to decide is whether this carrier violated the rules of the agreement as to sufficient notice and whether the investigation was conducted according to the current agreement rules. Attention is again called to the fact that the claim does not contend Justice was not guilty as charged. It is the position of the carrier that Justice was fully apprised of the charges—that he could have asked that the investigation be postponed so as to enable him to have more time to prepare his defense, but he elected to stand investigation and in so doing admitted proper notice—that the evidence adduced at the hearing was sufficient and adequate and supports the disciplinary action taken.

The claim should be denied.

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.

The record sustains the carrier's finding that Electrician John J. Justice assaulted his General Foreman George C. Porter on March 20, 1947, and the nature of the offense justified his dismissal from the service. The question remaining is did he have a fair trial within the meaning of Rule 37 of the parties' agreement?

The hearing was held on March 21, 1947. The record shows that Justice knew on the day preceding that there was to be an immediate investigation. Also, his representative, J. D. Owens the acting local committeeman, was informed thereof the evening before. Both were actually present at the hearing. It will therefore be presumed that Justice had been adequately informed of the time and place. At the hearing Justice was represented by a representative of his own choice and evidence was introduced in his behalf.

The System Federation also contends that carrier did not comply with those provisions in Rule 37 of their agreement which required that Justice, a reasonable time prior to the hearing, be apprised of the precise charges

against him and that he be given a reasonable opportunity to secure witnesses and prepare for trial, and that, because thereof, a fair hearing was not had within the contemplation of the rule. These provisions are, of course, for the protection of the employes covered by the agreement and generally the record should show that they have been reasonably complied with. Here Justice, by his own choice, was represented by the acting local committeeman who either knew or should have known his rights. No objection was made that Justice had not been properly informed of the precise nature of the charges. Nor was any motion made for continuance so time might be had to secure witnesses and prepare for trial, but evidence was introduced and a hearing was had on the merits. It must be presumed that Justice and his representative felt they were prepared to proceed.

Justice took his chances on the outcome of the hearing on the merits and lost. Now, after he has been found guilty of the charges against him, it will be presumed that these requirements were adequately complied with to the satisfaction of Justice and his representative and Justice will not now be permitted to complain thereof because, by his conduct, he has waived any right he might have had to do so.

Justice had a fair hearing within the contemplation of Rule 37 and the record sustains the sentence imposed by the carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1948.