

Award No. 4452

Docket No. 4329

2-B&O-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee P. M. Williams when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

THE BALTIMORE AND OHIO RAILROAD

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, Carman Carl Shaner was unjustly dealt with when removed from service through capricious and discriminatory actions by the Carrier on September 28, 1961.

2. That accordingly, the Carrier be ordered to reinstate Carl Shaner with all rights unimpaired and that he be compensated for all time lost and made whole for all other rights provided for in the Collective Bargaining Agreement.

EMPLOYEES' STATEMENT OF FACTS: On October 14, 1958, Carman B. R. Boop and Raymond Musto, employes of the Baltimore & Ohio Railroad Company, hereinafter called the carrier, were injured.

On the following day, October 15, 1958, the carrier's master mechanic conducted a hearing regarding the knowledge of Carman Carl W. Shaner, hereinafter called the claimant, about the injury to Carmen B. P. Boop and R. J. Musto. Claim agent M. D. Brickman was present.

Subsequently, Claim Agent M. D. Brickman conducted two additional hearings. The claimant was not represented at such hearings, nor was he or his committee furnished a copy of the proceedings.

In order to obtain a just settlement for their injuries, Carmen B. R. Boop and R. J. Musto sought legal help. During such legal proceedings, the claimant was summoned to testify and did so on June 23, 1961.

On September 6, 1961, after judgment was rendered against the carrier in behalf of Carmen B. R. Boop and R. J. Musto, the claimant was notified to appear at Dayton, Ohio (a distance of 76 miles from his home and 76 miles from where witnesses were present and from where the accident occurred) at 9:00 A. M. on September 13, 1961 for a hearing on the charge that he furnished false information in one or more of the statements he gave "on

related to a time when claimant was on duty. Moreover, if there were no rule in regard to dishonesty, any court would hold that an employer who has been prejudiced by perjured testimony in a case where it was involved would be amply justified in severing the relation of employer and employe. Honesty and a fair regard for truth is an implied provision of every contract of employment.

The contention is also made that the delay of three and one-half months from the time of the trial until the company made the charges vitiates the proceeding. But here the claimant was not under suspension and there is no showing whatever of prejudice. On the other hand, the offense was vicious and the consequences serious. The five-day rule is evidently mostly for the protection of suspended employes."

In Award 18269 (First Division) (Referee Walter R. Johnson) claim was made for the restoration to service of a brakeman dismissed for providing misleading and incorrect information relative to a personal injury. This claim arising on the property of the Pennsylvania Railroad was denied with the following holdings:

"There was ample evidence presented at the trial to support the charge which resulted in the dismissal of the claimant and we are unable to find that the action taken by the carrier was in any way arbitrary, malicious, or in bad faith."

In Award 2653 (First Division) (ORC v. B&O) (Referee Arthur M. Millard), request was made for the reinstatement of a conductor dismissed for similar reasons. The claim there was denied.

In Award 692 (Fourth Division) (BRT v. B&OCT) request was made for the restoration to duty with back pay of a yardmaster dismissed from the service for dishonesty in pursuing a personal injury matter. There the BRT argued "The right and authority of an individual to testify in the Courts of our land is fully set forth in numerous legal decisions, and such rights and privileges are fully protected by law, and the authority granted therein cannot be modified by other agreements. It cannot be properly held that the petitioner should have been denied such right; nevertheless, the facts and circumstances surrounding the instant dispute lead to but one inescapable conclusion—that is, (the Claimant) was dismissed for but one reason, that reason being because he elected to furnish testimony in a Civil Court case pertaining to the injury of an employe which occurred on another railroad. * * *"

The claim in its entirety in Award No. 692 was denied by the Fourth Division of this Board.

In summary the carrier submits that the offense committed by the petitioner in this case was an extremely serious offense. It was a dismissable offense. The proper measure of discipline was assessed against the petitioner.

The carrier submits that the request and claim in this case are totally without merit. The carrier respectfully requests that the request and claim be denied in their entirety. (Exhibits Not Reproduced).

Oral hearing is requested.

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.

Parties to said dispute were given due notice of hearing thereon.

Carl Shaner, the Claimant herein, was employed by the Carrier as a carman at Lima, Ohio. On October 14, 1958, two employes of the Carrier were seriously injured and since Carman Shaner was working with the injured men at the time of their accident, he was called upon to appear at the accident investigation on October 15, 1958, in company with his local chairman. Subsequently, on December 16 & 17, 1958 and again April 3 & 4, 1959, claimant was asked by the Carrier's representatives to give additional statements, which he did.

On June 23, 1961, the claimant's testimony at the trial of one of his injured co-workers was in conflict, in a material way, from statements which he had given to the Carrier's representatives on the dates mentioned in the preceding paragraph. On September 6, 1961, claimant was notified that he should appear "for hearing on the following matter: Charged that you furnished false information in one or more of the statements you gave on October 15, 1958, December 16th & 17th, 1958, April 3rd & 4th, 1959, and June 23, 1961, in connection with injury sustained by * * * on October 14, 1958, at Lima, Ohio."

As a result of the formal hearing held on September 13, 1961, claimant was dismissed from the service of the Carrier on September 28, 1961. He now is before us seeking to be reinstated with all rights unimpaired and requests that he be compensated for all time lost and made whole for all other rights provided for in the collective bargaining agreement.

It is too well established to be argued that this Board is without authority to substitute its judgment for that of the Carrier unless it is determined that the Carrier acted in an arbitrary, capricious or unreasonable manner in dealing with its employes. After a careful and complete review of the record in the instant case, we are unable to say that the Carrier was not acting within its rights in dismissing the claimant and, therefore, his claims must be denied.

By determining that the Carrier acted within its right in dismissing the claimant it is unnecessary that we resolve claimant's other contentions as to the benefits to which he would be entitled upon reinstatement. We make no determination, one way or the other, as to that portion of the claim.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST. Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1964.

DISSENT OF LABOR MEMBERS TO AWARD 4452

We think it most significant that neither the carrier or the majority in the findings identified what they considered "false information" given by the claimant. In law, "false" means something designedly untrue and deceitful and implies an intention to perpetrate some treachery. There is no evidence of such on the part of the claimant; in the first instance when he was questioned he was giving answers in reference to a general situation and when he was questioned at a later time he was answering questions in regard to a specific situation. The hearing conducted resembles a star chamber proceeding; complete testimony was not permitted on the part of the claimant and, since he had not been apprised of the so-called "false information" he supposedly had given he was hardly in a position to refute a charge which was not precise.

A course of conduct such as revealed by the facts of this case on the part of the carrier, and condoned by the majority, vitiates the protection inherent in the contractual guarantee of a fair trial prescribed in Rule 32.

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger

James B. Zink