

Award No. 476
Docket No. 385
2-NYC&StL-SM-'40

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 57, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (SHEET METAL WORKERS)**

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES: That the suspension given Mr. C. W. Curry, assistant water supply foreman, Frankfort, Indiana, was in violation of Rule 37 of the agreement and that Mr. Curry be compensated for the five days' pay he was forced to lose on account of said suspension.

EMPLOYEES' STATEMENT OF FACTS: On date of July 6, 1938, the water supply gang were cleaning the main shop sewer at Frankfort, Indiana; at the close of working time (4:00 P. M.) they placed the cleaning turbine on the sewer cleaning wagon; the following morning this turbine was missing and subsequently was reported by Mr. Curry to the railroad police department and also to Mr. H. F. Turnbull's (supt. of B&B) office; on date of July 29, Mr. Teegarden, water service foreman, advised Mr. Curry that he was to be given a five day suspension on account of not locking up the turbine at the close of work on night of July 6, 1938.

POSITION OF EMPLOYEES: In the agreement between the New York, Chicago & St. Louis Railroad and the Brotherhood of Maintenance of Way Employees, which was in effect prior to the current agreement held with System Federation No. 57, said agreement which included within its scope "water service men," Article IV read as follows:

"ARTICLE IV.—DISCIPLINE AND GRIEVANCES

SECTION 1. ADVICE OF CAUSE. An employe whose name is shown on the seniority roster, and who has been in the service continuously for sixty (60) days, if dismissed or disciplined, will be advised of the cause for such action in writing if a written request is made to his immediate superior within ten (10) days after the date of the dismissal or discipline.

SECTION 2. HEARING. An employe whose name is shown on the seniority roster and who has been in the service sixty (60) days, if disciplined or who feels unjustly treated, shall, upon making a written request to the immediate superior within ten (10) days from date of advice, be given a fair and impartial hearing within ten (10) days thereafter, and a decision will be rendered within twenty (20) days after completion of hearing. Such employes may select not to exceed three employes to assist at the hearing.

This claim was not received until August 11, 1938, and even if this claim had been handled under the provisions of Rule 36, instead of Rule 37, it was too late to file claim for compensation for wage loss suffered August 1, 2 and 3, 1938.

Attention of the Board is directed to the second paragraph of Rule 36, which reads:

"* * *, a joint statement will be prepared covering the facts, employee's position and Company's position, and submitted to the next higher official. * * *"

This requirement was not complied with and neither were we requested to join in the preparation of such a joint statement.

On December 28, 1938, this case was handled with the management and under date of April 13, 1939, the management replied that there was no violation of Rule 37 and declined to compensate Mr. Curry for the time lost. The management also stated that if its decision was accepted, they would be willing, in the interest of consistency with quite general practice and without prejudice to the present rules, to issue instructions that hereafter employees of the maintenance of way department working under the existing agreement with System Federation No. 57, would be given hearings before being suspended, which proposal was rejected by the employees.

THE CARRIER HOLDS:

1. That the employee has admitted that he is familiar with the rules of the company requiring him to protect company property and admitted neglect of such duty, for which neglect he was disciplined, and that no claim has been made in this case that the discipline applied was unjust.
2. That this employee was not discharged; that he was suspended for five (5) days after an oral investigation was held July 8, 1938.
3. That there is no provision in Rule 37 or in any other rule in the existing agreement which provides that an employee cannot be suspended without first giving him a formal hearing.
4. That any employee who feels that he has been unjustly treated or his agreement has been violated, has recourse, under Rule 36 which provides for hearing and appeal, but that no claim has been made in this case under the provisions of Rule 36.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 waived right of appearance at hearing thereon.

The contention of the organization is that under Rule 37 an employee may not be disciplined by suspension, but only by discharge.

The first sentence of that rule provides that an employee shall not be discharged without first being given an investigation. The second sentence provides that if it be found that he had "been unjustly discharged or dealt with," he should be reinstated and compensated for wage loss.

The carrier contends that the phrase "unjustly discharged or dealt with" embraces suspension as well as discharge.

We recently had occasion to pass on the primary question in Award 469, but that was under a different rule and involved a change in practice thereunder. It is not necessary in this case to determine whether suspension is allowable at all under this rule because admittedly if the rule does cover suspension, that portion of it requiring that it be pursuant only to an investigation first had was not complied with. But the particular point is not the right to hold a man out of service pending investigation, but the pronouncement of a specific sentence of a given number of days suspension, this before investigation had, and that was what occurred here. It is contended that if such a procedure were allowable, it would be unreasonable to suppose that a man might obtain a fair investigation since there would be a tendency to try to justify the action taken.

Since, if applicable, the rule was not complied with, the discipline must be vacated and the employee compensated for the five days' time lost.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1940.