

Award No. 1318

Docket No. 1237

2-UP-MA-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Machinists)**

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That under the current agreement Machinist Helper F. I. McGuire was unjustly deprived of his service rights beginning on February 10 until June 24, 1947, and that accordingly the carrier be ordered to compensate this employe for all of the aforesaid time lost.

EMPLOYEES' STATEMENT OF FACTS: Mr. F. I. McGuire, hereinafter referred to as the claimant, was employed by the carrier at Los Angeles, California, as a machinist helper, and his seniority date as such is May 14, 1946, with regularly assigned hours from 12:00 midnight to 8:00 A. M.

The carrier told this claimant to appear for hearing at 9:00 A. M. February 7, 1947, due to oil plug losing out at journal box No. 1 wheel, truck No. 2, on Diesel Unit 982-A, and copy of this hearing record is submitted, identified as Exhibit A.

The carrier held another hearing beginning at 9:50 A. M., February 7, 1947, involving Mr. J. R. Wright, foreman of Diesel power units, regarding the same matter, and a copy of that hearing record is submitted, identified as Exhibit B.

The claimant was dismissed from the service on February 10, 1947, and on April 7, 1947, the carrier offered to reinstate him but without pay for time lost, which basis of settlement was not accepted. This is confirmed by the submitted copies of letters, identified as Exhibits C and C-1, respectively signed by Mr. Gogerty and Mr. Burke. However, the carrier did reinstate the claimant in the service on June 24, 1947, without prejudice to discussion and settlement of the question of pay for time lost, which is affirmed by the submitted copy of letter, identified as Exhibit C-2, from Mr. Connors to Mr. Burke, dated September 2, 1948.

The agreement effective November 1, 1934, and the superseding agreement effective May 1, 1948, are controlling.

POSITION OF EMPLOYEES: It is submitted that both hearing records of the claimant and Foreman Wright, Exhibits A and B, definitely disclose that this claimant employe was dismissed from the service on purely, as well

Mr. Sinnar: It is also evidence (presumably 'evident') this one plug was not properly tightened or it would not have lost out en route.

Mr. McGuire: That is right, yes, sir." (From page 5, carrier's Exhibit A)

The organization's local committee at Los Angeles requested carrier's master mechanic, on March 8, 1947, to reinstate Mr. McGuire on a leniency basis, without pay for time lost. (carrier's Exhibit C) The organization subsequently refused to accept a leniency offer of reinstatement without pay for time lost and asserted, as the basis for such declination, that the carrier had too long delayed in handling the matter. (carrier's Exhibit E) As shown, the request for reinstatement was made on March 8, 1947, almost a month after Claimant McGuire had been notified of his discharge from the carrier's service. On March 11, 1947, Master Mechanic Frohoff wrote division superintendent, V. W. Smith, of the California Division and Western District Superintendent, MP&M, L. L. Hoeffel, recommending leniency reinstatement. (carrier's Exhibit C-1) On April 7 carrier's general superintendent, MP&M, Mr. J. Gogerty, wrote the organization's general chairman regarding the leniency reinstatement of Claimant McGuire. It is well known to the organization that a master mechanic does not have the power or authority to reinstate a discharged employe on a leniency basis and this can only be done by the head of the department concerned. The request for the leniency offer of reinstatement was made to the master mechanic, who had to forward it to the Division superintendent and the MP&M superintendent for the Western District who in turn would forward it to the general superintendent of MP&M for consideration and appropriate action.

Machinist Helper McGuire was primarily responsible for the delay to this highly important train on February 6, 1947, in not applying holding wires to drain plugs on roller bearing boxes on any of the three units on this train. Machinist Helper McGuire admits that:

1. Had the plug been properly tightened it would not have lost out.
2. That from the evidence submitted, the wires were not properly placed in the plugs, and
3. That it is evident the plug in question was not properly tightened or it would not have lost out.

The carrier, therefore, has shown that the rules of the agreement have not been violated and the discipline administered was just, and respectfully requests the National Railroad Adjustment Board to deny the claim.

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 hearing charge upon which claimant was noticed to appear was confined to the loss of a single oil plug out of Diesel engine journal box, allegedly, because of the negligence of claimant in servicing the same at the basing station. However, from the transcript of the record we note a subsequent broadening of the charge as follows:

"Q. Sinnar (Supt. of Shops) In this particular instance, Mr. McGuire, there were no wires in any of the plugs on all three of these Power Units on arrival at Salt Lake.

A. McGuire (Claimant) They should have been, I put them in, unless somebody took them out on line."

* * * *

"Q. Mr. McGuire, for the evidence here, it is evident the wires were not properly in the plugs?

A. This is correct."

Statement by Sinnar (Supt. of Shops) "Mr. McGuire, for your failure to properly check these plugs and properly secure the plug on right No. 1 box No. 2 truck, Unit 982-A, I am going to recommend that you be removed from the service." (Emphasis supplied.)

Carrier's Exhibit B, being a letter directed by the hearing officer to claimant notifying the latter of the findings and penalty, reads, in part as follows:

".

Having carefully considered the evidence adduced at the hearing conducted February 7, 1947, to develop cause and assess responsibility for failure Train No. 2, Boulter, Utah, February 6, I find that charges that you failed to properly perform the lubricating of journal boxes locomotive 982-A have been sustained, and for your responsibility, you are being removed from the service of this company. (Emphasis supplied.)

"."

It is apparent from the foregoing that perhaps through inadvertence, claimant was tried and penalized, in part, upon matters concerning which he was not noticed to appear. It should be noted further that the work upon which the alleged negligence was premised was done the morning of the 5th, the train delay complained of occurred on the afternoon of the 6th, and claimant was that day noticed to appear for hearing at 9:00 A. M. the following morning. From the turn the hearing took, set forth above, it is obvious that claimant was not noticed of the need nor afforded sufficient time to obtain witnesses and statements from employees strung at inspection points and places of breakdown and repair, some over 700 miles distant from the place of hearing.

While we recognize the necessity for informality in procedures such as this there was obviously such a lack of due process here as to deny the accused his inherent rights to a fair trial assured to him under Rule 37, which rule we here find violated by the carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1949.

DISSENT TO AWARD No. 1318, DOCKET No. 1237.**DISSENT OF CARRIER MEMBERS.**

We dissent for the reason that the referee has, by emphasizing a few words and injecting his theory, made findings to support his award that have never been a part of the dispute on the property nor made an issue in the case before this Division. A review of his findings is here made to show how far he has misconstrued the actual records of the case to support his findings.

McGuire, the complainant, was given the following notice February 6th:

"Please report at the Office of Master Mechanic in the Mechanical Building, East Yard, Los Angeles, California, on Feb. 7th, 1947, at 9:00 o'clock A. M. for investigation and hearing on account of Diesel Power Unit 982-A losing oil plug out of journal box No. 1, wheel, No. 2 truck at Boulter, Utah, causing serious delay to train. According to the records you serviced roller bearing journal boxes on these units at Los Angeles.

The investigation and hearing will be conducted in conformity with Article 37 of the Agreement effective Nov. 1st, 1934 between the Company and the Shop Crafts represented by System Federation No. 105 and you are entitled to representation as provided in that article."

The referee alleges in his findings that it was insufficient time to obtain witnesses and statements of employees strung at inspection points and places of breakdown and repair, some over 700 miles distance from the place of hearing.

In Award 1251 of this Division, the statement of the 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 noted in that award that the referee gave no weight to the employees' contention as to the fairness of the hearing inasmuch as the question had not been raised at the investigation.

The claim was denied and the findings of the referee are pertinent to the issue here involved, though in the instant case the question of fair hearing was not raised at any time on the property or at the hearing before this Division.

The record shows that F. I. McGuire, was by his own choice represented by two local committeemen who either knew, or should have known, his rights. No objection was made that McGuire had not been properly informed of the precise nature of the charges. Nor was any motion made for a continuance so time might be had to secure witnesses, if any were necessary, before evidence was introduced and a hearing was held on the merits.

The referee who has quoted in his findings excerpts from this hearing alleges that the charges had been broadened from the original charge.

A careful reading of the record would discredit such a conclusion. The charge was responsibility "for losing oil plug out of journal box No. 1, wheel, No. 2 truck;" and while investigation develops that there were wires missing from the plugs other than that enumerated in the charge, was intended to prove that McGuire was negligent in the performance of his duties. By no stretch of the imagination could this be considered as broadening the charge nor can the emphasis placed by referee in his quotation from superintendent of shops who conducted the investigation or by master mechanic who assessed discipline be the basis for decision that McGuire was denied a fair hearing.

The first appeal to the carrier by the local committee was made March 8th, or 22 days after disciplinary action was taken (although rule requires that grievances must be taken up within 10 days, which was not an issue in this case). Letter of the local committeeman who was McGuire's representative at the hearing is herewith quoted:

"Relative hearing held February 7 at Los Angeles on charge that F. I. McGuire, Machinist Helper, was responsible for the losing out of oil plug out of journal box No. 1 wheel, No. 2 truck power unit 982-A, train No. 2, Boulter, Utah, February 6, 1947:

Mr. McGuire was removed from service February 7 for the alleged negligence of not properly securing oil plug in question. In view of the fact that he was removed from service on purely circumstantial evidence and has now been out of service over one month, I hereby request your consideration for his immediate reinstatement to active service.

McGuire was employed by the UP May 14, 1946, and has been a reliable, trustworthy employe since. This is the first job he has obtained after his discharge from the Army where he was a Japanese prisoner of war for a period of more than three years, and where he endured the brutal hardships of a prisoner in enemy hands that showed no mercy for their victims.

The above story possibly has no direct bearing upon the case; however, I believe it merits some thought and consideration from a humanitarian and rehabilitation point of view. I believe we owe this young man more consideration and tolerance than he has been shown thus far and I earnestly solicit your prompt attention and action to reinstate Mr. McGuire immediately with full seniority rights unimpaired."

Here again it will be noted that no allegation is made that the hearing was unfair. Further handling by general chairman to the higher designated officer makes no such contention. Nor is there anything in the record of the submission to this Board that contains even an inference that the hearing was not fairly conducted in accordance with the provisions of the rule.

The referee has ignored the basis on which an award was asked and has explored the realms of possibilities without due regard for the merits of the case upon which this Division was called upon to decide.

/s/: C. E. Peck
J. A. Anderson
M. W. Hassett
C. S. Cannon
A. G. Walther