Award No. 1695
Docket No. 1607
2-HBL-CM-'53

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

HARBOR BELT LINE RAILROAD

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Car Inspector H. E. Polsley was unjustly dismissed from service on October 8, 1952.

2. That accordingly, the Carrier be ordered to reinstate him to all service rights and compensate him for all time lost since the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: The carrier employed H. E. Polsley, hereinafter referred to as the claimant, September 6, 1945, as a car inspector at the Wilmington, California, car department of the Harbor Belt Line Railroad. The claimant was regularly assigned 4:00 P. M. to 12 Midnight.

On September 16, 1952, a letter was directed to the claimant by Mr. H. A. Davis, master mechanic, Harbor Belt Line Railroad, Wilmington, California, advising him to be present at formal investigation scheduled for September 18, 1952 at 10:00 A. M., a copy of which is submitted herewith and identified as Exhibit A.

On September 17, 1952, the claimant directed a letter to Master Mechanic H. A. Davis, Harbor Belt Line Railroad, Wilmington, California, requesting an extension of time in which to procure eligible representation and competent witnesses, a copy of which is submitted herewith and identified as Exhibit B. He also requested that he be advised of defects that allegedly existed so that he would know of the precise charge.

Letter dated September 17, 1952 submitted herewith identified as Exhibit C from Master Mechanic H. A. Davis to the claimant granted an extension, further advising that investigation would be held in the office of general manager, Berth 90, San Pedro, California, at 10:00 A. M., September 26, 1952.

The investigation was held September 26, 1952, and submitted herewith and identified as Exhibit D is a copy of the hearing transcript.

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 carmen of System Federation No. 114 make this claim in behalf of Car Inspector Harry E. Polsley. They contend carrier unjustly dismissed him from its service on October 8, 1952. Because thereof they ask that carrier be ordered to reinstate Polsley to its service with all service rights unimpaired and that it be ordered to compensate him for all time he has lost since being dismissed.

On September 16, 1952 carrier, through Master Mechanic H. A. Davis, notified Polsley by letter that on September 18, 1952 at 10:00 A. M. there would be a formal investigation in the office of the General Manager of carrier at San Pedro in order:

> "To develop your alleged failure to properly inspect and card Box Car NYC 131160 on arrival at Harbor Belt Line Railroad Yard, Wilmington, in ATSF train No. 142, on your shift, August 30, 1952, at 7:00 P. M.
>
> For this reason you are charged with violation of Rule No. 3 of General Manager's Bulletin No. 358 of July 1, 1949 and Car Service Rule No. 14.1A of the AAR Interchange rules."

These rules, as far as here material, provide:

> "Indifference in the performance of duties will not be condoned. . . ." (Rule 3.)
>
> "Defective equipment that is not safe to run according to the Interchange Rules of the Mechanical Division except where the repairs can be made under load as per Mechanical Division Rule 2." (Rule No. 14 (1-A)).

At the request of claimant the hearing was continued to September 26, 1952. Based on the evidence adduced at the hearing, held on that date, Polsley was found guilty of the charge which had been made against him and, because thereof, he was dismissed from carrier's service as of October 8, 1952. It is from this finding, and the dismissal based thereon, that this appeal was taken.

Preliminary to a discussion of the dispute on its merits there are numerous procedural questions raised.

Carrier contends there is no dispute between carrier and its employes of the class of which claimant is a member. This is apparently on the theory that Local Chairman R. F. Lamb's letter of November 8, 1952 does not express the wishes of the employes and, since Rule 22 of the parties' agreement provides the local committee will have the right to appeal the case to the General Manager, no appeal was actually taken. The organization is legally authorized to represent the carmen, and others, employed by carrier and have a collective bargaining agreement covering their rights. At the time Lamb wrote the letter of November 8, 1952, he appears to have been the Local Chairman. The representatives of the organization are authorized, and have the right, to protect the rights of the employes they represent. In fact, it is their duty to do so. We find this contention to be without merit. If the em-

ployes are not satisfied with what those lawfully authorized to represent them are doing in their behalf, there is a proper method for them to make a change, but it is not by means of an award of this Division.

In its presentation of this matter to the Division with a referee the carrier, for the first time, raised the question that the Local Committee had not taken the appeal within the time fixed for that purpose by Rule 22 of the parties' agreement. Rule 22 provides:

> "All appeals above the foreman will be . . . within a period of fifteen days . . ."

The decision of General Manager L. L. Laughlin was rendered on October 7, 1952 and the letter of Local Chairman R. F. Lamb, appealing the matter to Laughlin, is dated November 8, 1952. However this Division does not permit new issues to be raised after it has deadlocked a dispute. But even if the matter were here it would be without merit. General Manager Laughlin is the chief operating officer of the carrier designated to handle such disputes. He entered the original decision and, in view of his position, an appeal could have been taken direct from his decision to this Division. There is no limitation in the Railway Labor Act as to the time within which that may be done. See Section 3, First (i) of the Railway Labor Act.

The organization contends claimant was not apprized of the precise charge being made against him as is required by Rule 23 of the parties' effective agreement, particularly in view of the fact that in claimant's letter to carrier dated September 17, 1952, he asked for a statement of the defects that allegedly existed when he inspected the car. Rule 23 provides:

> ". . . such employe shall, ... be apprized of the precise charge against him, . . ."

We have already set forth the charge and will not repeat it. It is the organization's thought that the charge should have set forth the defects discovered on which the complaint is based. The purpose of requiring a written statement of the precise charge being made against an employe is to inform him of what it is that he is to have a hearing on so he may prepare to defend himself against it, if he can. Here claimant was charged with having failed to properly inspect a certain car, sufficiently identified, and having failed to card it, all in violation of certain operating rules of which he was required to have knowledge. Carrier is not required to set forth in the written statement containing the charge all of the evidence it will adduce in support thereof. It is sufficient if the charge made sufficiently informs the employe of what it is he is being charged with. We think the charge here made is sufficient to meet the requirements of the rule.

In this regard it was perfectly proper for carrier to impose upon this employe the requirements of Rule No. 3 of General Manager's Bulletin No. 358 and Car Service rule No. 14.1A of the A.A.R. Interchange rules. There is nothing to prohibit a carrier from establishing reasonable operating rules to cover an employes' duties and conduct while serving it as long as they do not conflict with the provisions of its collective bargaining agreement covering them. The requirements of the rules, which it is charged claimant violated, are certainly within that category.

There is also a contention that carrier failed to comply with the following provision of Rule 23, to wit:

> ". . . such employe shall . . . be given reasonable opportunity to secure the presence of necessary witnesses . . ."

The first contention in this regard is that the written notice containing the charge did not advise claimant that he was entitled to bring his own witnesses to the hearing. This right of claimant is fixed by the rule and

carrier is under no obligation to advise him thereof. He, or his representatives, are bound to know of this right and it is apparent that they did. The hearing was continued from September 18 to 26, 1952 so there was plenty of time available in which to exercise this right. And finally, if at the hearing, because of evidence adduced by carrier which claimant could not reasonably have anticipated, it becomes evident additional time is needed in order to get witnesses to refute such evidence a motion should be made asking that the hearing be continued for that purpose. If carrier denies such motion then the matter is properly before this Division, if an appeal is taken, and we can then decide if carrier acted arbitrarily or unreasonably in denying the request.

It is further contended that the hearing was not promptly held within the meaning of Rule 23, since the incident of which complaint is made took place on August 30, 1952 and the hearing date was set for September 18, 1952. It should here be stated that the hearing date was continued to September 26, 1952 at claimant's request. Rule 23, in this regard, provides:

". . . which (hearing) shall be prompt . . ." (Insertion ours).

Here the charge was not made until September 16, 1952 because of a reasonable delay caused by a necessary check of the situation relating to the defect. There is nothing in the rule as to the time within which a charge must be made against an employe after the offense, of which he is being charged, occurred. We think the date for hearing was promptly set by carrier, within the meaning of the language of the rule, after the charge was made.

At the hearing General Manager L. L. Laughlin asked some questions and subsequently rendered the decision finding claimant responsible for failing to catch the defect and reporting it and, on the basis thereof, dismissed him from the service. The organization contends that the General Manager, thus acting in a dual capacity, prevented claimant from having a fair hearing. What we said in Award 1551 is here applicable. Therein we held:

> "The rule does not contemplate * * * that the officer presiding at the hearings may not ask the questions."

Question is raised as to the authenticity of the transcript insofar as it correctly reflects what was said at the hearing. In this regard Rule 22 provides:

> "If stenographic report of investigation is taken, the employe involved and the duly authorized committee, on request, shall be given a copy thereof."

It is apparent that a stenographic report was taken of the hearing and that the local chairman requested a copy thereof. However, the agreement does not provide that it need be certified, notarized, or authenticated in any manner. A transcript should be an exact copy of what was said and done at the hearing. There is nothing here to substantiate any charge that it is not. We find the transcript meets the requirements of the agreement.

We come then to the question of the sufficiency of the evidence adduced to support carrier's finding of guilt. The organization contends it is not sufficient.

On Saturday, August 30, 1952 claimant was on duty at carrier's Wilmington Yard at Wilmington, California as a car inspector. His regular assigned hours were from 4:00 P. M. to Midnight. About 7:00 P. M. of that day Santa Fe train No. 142 arrived at the Wilmington Yard stopping at Pier A. This train contained, in its consist, NYC car 131160. Claimant and E. Ponce, "a student car inspector," inspected the train and made Santa Fe report form 2517 thereon. They failed to detect any defects on NYC car 131160 and consequently made out no bad order card, Form 4150, covering it. The car was

allowd to go forward for loading. After it was loaded a defective condition of the car was discovered by Car Inspector H. F. Cossairt. Because of the defective condition the car had to be unloaded and the contents thereof transferred to another car at considerable expense to carrier.

The defect discovered on NYC car 131160 was a broken center sill, A and B end. The evidence shows the defect had existed for some time. In more detail it was described as:

> "Wrought iron striking plate broken in two at top, center sills drooping, rivets loose and missing in center sills, belts in tie strap loose approximately 3 inches, coupler heights loaded 30 inches B, 31¾ inches A, empty 31¼ inches B, and 32 inches A."

It was the duty of claimant and E. Ponce, who was helping him, to properly inspect all the cars of this train and if any defects were discovered thereby to properly card them. Claimant admits he inspected the train containing NYC 131160; that he did not completely fill out Santa Fe form 2517; that he failed to see the defects in this car; and that, consequently, he failed to card it bad order. It is true that he subsequently made some qualifying statements but we do not think these prevented carrier from accepting the admissions he had previously made as true. In fact we do not think he can shift his responsibility by this method. We think the evidence shows that claimant, because of his failure to discover the defect and card it, was guilty of failing to properly perform the duties of his assignment.

Carrier found both claimant and Ponce guilty of the same charge. However, it only reprimanded Ponce by cautioning and admonishing him in regard thereto. Claimant also refers to other instances when the same thing happened but carrier took no action thereon. On the basis of the foregoing it is contended claimant is the victim of discrimination. It may be that he is, but what carrier does in regard to its employes' failing to properly perform their duties when on the job is a matter for its concern, not ours. What we are concerned with is the guilt or innocence of the party charged and, if found guilty, whether or not the discipline imposed is reasonable under all of the facts established.

In this regard carrier says it is has a right to consider the past record of the employe. With that we fully agree, but the past record of an employe refers only to that with which his record has been charged. Carrier cannot take into consideration its own opinion of the employe, such as it is evident it did here for it refers to the fact that in its opinion he failed to maintain a proper attitude toward his work, that it overlooked matters that would have subjected him to discipline and that he was a constant trouble maker among his fellow employes. There is no way an employe can properly meet such contentions and they are no part of his past service record. Here the claimant's past service record with this employer is unblemished.

We come then to the question, was a dismissal reasonable under all of the facts? Neglect of duty is, of course, a serious matter and particularly so when an employe is doing important work, such as claimant was doing. But there are some extenuating circumstances here. There is evidence that the defects were of such a nature that they were hidden and not easy to discover, particularly so if the train was stretched out at the time of inspection. While there is some dispute about this the fact is claimant never had a chance to inspect the car after the defects were discovered, and before it was taken away, to determine that fact. We do not criticize the carrier for this but it is a circumstance of which we take note. Fully realizing the importance of carrier's responsibility in providing safe transportation, and only keeping men on the job who will make it possible for it to do so, nevertheless, taking into consideration everything appearing in the record we do not think a dismissal was justified. We are of the opinion that claimant should have been severely disciplined for this neglect of duty, but we think an eleven month's suspension is all the record justifies. We therefore reduce the discipline imposed to eleven months suspension.

AWARD

Claimant restored to carrier's service as of September 8, 1953 with all service rights unimpaired. Claim for compensation denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August, 1953.