

Award No. 1788

Docket No. 1650

2-GN-CM-'54

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. 101, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That under the current agreement Cutting Torch Operator in the Carmen's Craft, John J. Heinen, was unjustly dismissed from the service at 3:30 P. M. Tuesday, July 29, 1952, and that accordingly the Carrier be ordered to reinstate him in the service with pay for all time lost retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: John J. Heinen, hereinafter referred to as the claimant, was employed by the carrier at Spokane, Washington, in the carmen's craft as a cutting torch operator on the Hillyard Shop Tracks for the past fifteen years. Nevertheless, the carrier elected on May 22, 1952, to summon this claimant to stand investigation at 10:00 A. M., Tuesday, May 27, 1952, on the grounds stipulated in copy of letter submitted herewith and identified as Exhibit A, and the investigation, as scheduled therein, was held which is affirmed by copy thereof submitted herewith and identified as Exhibit B.

The carrier made the further election to discharge this claimant at 3:30 P. M. on July 29, 1952, a total of 63 days after date of his investigation and this is affirmed by copy of letter submitted herewith and identified as Exhibit C.

The agreement identified as Schedule No. 3, effective September 1, 1949 is controlling.

POSITION OF EMPLOYEES: It is respectfully submitted that Exhibits A, B and C indisputably disclose that:

"1. The Carrier's Shop Superintendent filed the charges against the Claimant, then prosecuted his charges against the Claimant at the investigation and thereupon acted as the jury and judge in the case for the purpose of assuring himself that the Claimant would be convicted and discharged from the service.

2. The Carrier's Shop Superintendent violated the "precise charge" provisions of Rule 26(e), which is clearly supported by Exhibit A and it is apparent that this occurred deliberately so that

Held on the same charges were Robert E. Weise, 36, and Rafael (Ray) Aguilar, 31, both ex-convicts, and June M. Albert 30, Tacoma, Washington. On March 16, 1953 Weise and Aguilar, pleaded guilty to burglary and were sentenced to serve not more than 15 years in the State Penitentiary at Walla Walla; June M. Albert pleaded guilty to charge of joy-riding and was given probation.

John Joseph Heinen appeared before Superior Court Judge R. E. Foley (Spokane County) on March 23, 1953 entering plea of having stolen property in possession, selling \$150.00 worth of liquor taken from a burglary of a State Liquor Store at Tekoa, Wash., Feb. 5, 1953, to the Slab Inn Tavern in Idaho and receiving a radio from Aguilar and Weise which has been stolen from an Appliance Store in Harrington, Washington, on February 1, 1953. He was sentenced to serve 30 days in the Spokane County Jail and placed on two years probation, to report monthly to the State Probation Officer.

The charges involved a safe job in Odessa, Wash., Oct. 13, 1952, \$1600.00 being taken from a safe in the Veterans of Foreign Wars Club. Also connection in safe crackings of the C&B Tavern, Spokane, on Feb. 15, 1953 when \$300.00 was taken and a safe job at an electric shop in Harrington, Wash., on Feb. 1, 1953, \$900.00 being taken in this one. Burglary of a drug store in Reardan, Wash., Feb. 17, 1953—\$3000.00 burglary of the State Liquor Store in Tekoa, Wash., on Feb. 5, 1953 and four break-ins at Latah, Wash. on Feb'y 22, 1953.

Heinen, after leaving the service of the Great Northern R.R., hired out to the Milwaukee R.R. at Spokane as a brakeman and I understand he is now on 90 day leave of absence from that company.

He was released from the Spokane County Jail on April 21, 1953 after serving his sentence and the reports come to me that he is going to make an attempt to get back to work on the Great Northern Railway.

/s/ H. A. Hollingworth"

The carrier wishes to state that the above report was read to this claimant's general chairman when this claim was discussed. Therefore, he had knowledge of it.

The carrier has shown that Claimant J. J. Heinen violated carrier's rules, therefore we hold that your Board cannot do other than deny this 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 carmen of System Federation No. 101 make this claim in behalf of Cutting Torch Operator John J. Heinen contending he was unjustly dismissed from Carrier's service on Tuesday, July 28, 1952. They ask that Claimant be reinstated with pay for all time lost.

Claimant had been employed for the past fifteen years at the Hillyard Shop Tracks of Carrier at Spokane, Washington, as a cutting torch operator.

On May 22, 1952, he was notified he was to stand investigation at 10 A. M., on Tuesday, May 27, 1952. On July 29, 1952, based on the result of the investigation, he was notified that he was being discharged as of 3:30 P. M. on July 29, 1952.

The charges on which Claimant was investigated were described in Carrier's letter of May 22, 1952, as:

"You are hereby notified to appear * * * for investigation to show cause as to why action should not be taken account your being insubordinate and abusive to your foreman and being away from your work assigned to you continually."

It is contended this charge does not meet the requirements of Rule 26(e) of the parties' Agreement which provides:

"At a reasonable time prior to the hearing, such employe and the duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure representative and the presence of necessary witnesses."

Had the question been properly raised we think it could be said the charge made did not meet the requirements of this rule. However, Claimant appeared at the investigation with his representatives and witnesses and made no objection to the charge as made. It is apparent, from the record of the hearing, they all knew what it was Claimant was being charged with and consequently had no reason to object to going ahead. This provision is to protect the employes but it is a requirement that can be waived and that is what the parties actually did by the action they took.

Rule 26(e) also provides:

"No employe shall be disciplined without a fair hearing by the Carrier."

It is contended the investigation held did not meet this requirement primarily because A. H. Malenke, Shop Superintendent, filed the charges, presided and asked questions, passed on the question of guilt, and imposed the penalty. There is nothing in the Agreement to the contrary and, in fact, the rule so contemplates for it provides the hearing shall be held by the Carrier, which naturally means an official thereof. As long as the official in charge of the investigation or hearing does not have to consider his own testimony in deciding the question of guilt, it cannot be said that such investigation or hearing has been unfair merely because an official of the Carrier is in charge thereof.

The evidence adduced is in conflict. If Carrier's witnesses are to be believed then Claimant was guilty not only of not staying on the job during his assigned working hours but also of being insubordinate and quarrelsome, the latter being contrary to Rules 16 and 18 of Carrier's "Rules and Instructions for Locomotive and Car Shop, Roundhouse, Repair Track and Maintenance of Equipment Employe", with which claimant was familiar.

It is true Claimant produced witnesses who testified to the contrary, but the question of deciding the conflict rested upon the official in charge of the investigation. There is ample evidence to support his finding.

Was the penalty imposed too severe? In the light of Claimant's past record, which Carrier had a right to consider in determining that issue, we do not think so.

In view of what we have said we do not think it can be held that Claimant was unjustly dismissed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1954.