

Award No. 1884

Docket No. 1741

2-N&W-CM-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Lloyd H. Bailer when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Carman G. W. Leadingham was unjustly dismissed from the service on December 2, 1953 at Portsmouth, Ohio.

2. That accordingly the Carrier be ordered to restore this employee to service with all rights unimpaired, with compensation for all time lost since December 2, 1953.

EMPLOYEES' STATEMENT OF FACTS: Carman G. W. Leadingham, hereinafter referred to as the claimant, was employed by the carrier at Portsmouth, Ohio. This claimant served the carrier for approximately twenty-eight years in the capacity as a carman helper for several years and who was then promoted to the position of a carman with the result that he was lastly regularly assigned in the Portsmouth Transportation Yard as a car inspector.

The carrier made the election to summon the claimant to the office of Mr. Robinson, master mechanic, at 8:30 A. M., Tuesday, November 10, 1953, at which time he was apprised of charges and was thereupon subjected to a question and answer procedure, and a copy of which is submitted herewith and identified as Exhibit A.

On December 2, 1953, the carrier made the election to dismiss the claimant from its service without advising him in writing of such dismissal and this is affirmed by statement dated May 7, 1954 copy of which is submitted herewith and identified as Exhibit B.

This dispute has been handled with officers of the carrier up to and including its "highest designated railroad official" with the consequence that he has declined to adjust it.

The agreement effective September 1, 1949 is controlling.

POSITION OF EMPLOYEES: It is submitted that this claimant has been unjustly dismissed from the service and thereby grossly damaged since

IN RE NAGEL 278 F. 105. And conduct involving moral turpitude, especially turpitude in an act adverse to the interest of the employer, will justify discharge. CARPENTER STEEL v. NORCROSS 204 F. 537 Ann. Cases 1916A, p. 1035.

The Board states in Award No. 3624, First Division:

"The evidence leads to the inescapable conclusion that petitioner was operating under an arrangement with a disbarred attorney, in no wise connected with or representing decedent's representative, pursuant to which he took this outsider to the scene of the accident to take photographs, which the outsider used in an effort to solicit employment by decedent's family. Such conduct has no shadow of legal right, and the Carrier was entirely within its rights in discharging petitioner."

While the facts in the said award are not identical with those in this case, the principle involved is applicable, namely, that claimant was operating under an arrangement with outside attorneys.

The general chairman of the Brotherhood Railway Carmen of America wrote the carrier on January 21, 1954, stating claimant was an official of the carmen's organization of the Portsmouth Lodge. The fact is that the carrier was advised by letter from the general chairman under date of December 9, 1950, that claimant had been appointed a committeeman, and on January 5, 1953, the general chairman again wrote the carrier he had been replaced by another employee. Although claimant may have been a committeeman at the time he called on Oscar Williams, he certainly was not when he called on Sebert D. Green subsequent to March 30, 1953, while Green was in the hospital. Claimant admits himself on page No. 4 of the investigation he was no longer an official of the organization.

Even though he may have still been an official on several of his visits with Oscar Williams, the carrier fails to see where his mission was related to any labor practice of the carrier. Claimant's responsibility as a committeeman was to represent the employees to the carrier on wages, hours and working conditions. This responsibility did not include assisting them in obtaining the services of outside attorneys, collaboration with witnesses, or suggesting damage suits for personal gain for himself and others.

Claimant's organization may claim that he had a clear record up to this investigation and that the discipline is too severe. Claimant's record was clear, but the carrier cannot permit one of its employees to engage in an organized effort to drain its finances.

The carrier insists that the dismissal of Leadingham was not capricious; neither was it arbitrary, unreasonable nor unjust. It was not in violation of the current agreement. On the other hand, his dismissal was fully warranted, and the carrier requests the discipline not be disturbed.

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 were given due notice of hearing thereon.

Claimant had been employed as a carman at carrier's Portsmouth, Ohio shops. His dismissal was effective as of December 2, 1953.

Contention is made claimant was denied a fair hearing, and pertinent agreement provision was therefore violated, because carrier did not apprise him of the charge at a reasonable time prior to the hearing. It is asserted

claimant was thus deprived of an opportunity to prepare his defense, and to secure such witnesses as might be necessary.

It is true carrier did not notify claimant beforehand of the charge being placed against him. Said charge was announced at the opening of the formal investigation. But claimant then stated he was ready to proceed. He indicated a desire to adduce testimony in his behalf from two persons who were not present but agreed to continuation of the hearing, with subsequent submission of affidavits from said witnesses.

As a former committeeman, claimant was chargeable with knowledge of his procedural rights under the agreement. He was represented at the investigation by organization's local chairman, who also agreed the hearing be continued in the absence of claimant's witnesses provided their affidavits were submitted subsequently. Said affidavits were presented to the carrier before it invoked dismissal, and are included in the record before us. In view of the foregoing, petitioner cannot now properly raise this procedural contention.

We find the evidence is sufficient to support the charge claimant had been engaged in the practice of soliciting personal injury cases among carrier's employes in behalf of outside attorneys. Claimant did not merely answer queries from such employes concerning the availability of independent counsel. He took affirmative action in this respect, and in behalf of particular attorneys.

During the early part of the period in question claimant was a committeeman, and during the latter part he continued to hold the post of treasurer, but his conduct cannot be deemed to fall within the orbit of protected activity as a collective bargaining representative of the employes. Organization does not assert such conduct is a proper function of its officers. Claimant improperly used his employment relationship for the purpose of furthering a course of action clearly inimical to the interest of his employer. Carrier is under no obligation to retain such an employe in its service.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February, 1955.

DISSENT OF LABOR MEMBERS TO AWARD NO. 1884

We are compelled to dissent from the findings of the majority for the following reasons:

1. At a reasonable time prior to the investigation (hearing) the claimant was not apprised of the charge against him.
2. Claimant was not confronted with the witnesses against him and was thereby deprived of the opportunity to cross-examine said witnesses, as is required in a fair hearing.
3. The stenographic report of the "formal investigation of charges" does not establish cause for claimant's dismissal.

We submit that for the foregoing reasons Rule 37 required an affirmative award.

(s) R. W. Blake
(s) C. E. Goodlin
(s) T. E. Losey
(s) Edward W. Wiesner
(s) George Wright