

Award No. 2925
Docket No. 2740
2-SP(PL)-CM-'58

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Kiernan when the award was rendered.

PARTIES TO DISPUTE

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, AFL (Carmen)**

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES:

That under provisions of current agreement Carman John Marella was unjustly dismissed from the services of the Carrier on December 10, 1956, and that accordingly, Carrier be ordered to reinstate him with all pertinent rights of employment and compensation for all time lost retroactive to the aforementioned date of dismissal.

EMPLOYEES' STATEMENT OF FACTS: The Southern Pacific Company (Pacific Lines), hereinafter referred to as the carrier employed Carman John Marella, hereinafter called the claimant 3:15 P.M. to 12:05 A.M., second shift, at the Los Angeles General Shops, Los Angeles, California, and that claimant had been in the service of the carrier since May 5, 1942, and maintained his position satisfactorily and accordingly since date of employment.

The carrier's representative E. C. Wagner, shop superintendent, summoned the claimant to appear for formal hearing at 2:00 P.M., Tuesday, December 4, 1956, on alleged charges of absenteeism from prescribed site of his assignment, and which summon is affirmed by copy of letter dated November 28, 1956, identified as Exhibit A. Hearing was held as scheduled, and confirmed by Exhibit B, page 1, denoting contents thereof.

Carrier's shop superintendent, also at that time, made the election to summon as his witnesses at this December 4, 1956 hearing, Machinist Foreman G. W. Hutton and Special Agent C. A. McDonough, which aforementioned names are contained in Exhibit B, page 1.

The carrier, nevertheless, made election through its Los Angeles Shop Superintendent E. C. Wagner, on December 10, 1956, to dismiss claimant from services of carrier and this is affirmed by copy of letter dated December 10, 1956, which is herewith identified as Exhibit C.

A letter dated December 3, from claimant's attorney, at the suggestion of the Carmen's local chairman, was received on December 5 by carrier's shop superintendent, advising that claimant was confined to the Los Angeles County Jail for a term of 90 days. This was the first official notice carrier had regarding claimant's whereabouts since November 13. The letter stated in part, "The confinement of Mr. Marella was very unexpected on November 14th and for that reason he probably did not make necessary arrangements with your company for a leave of absence."

There is evidence that some woman called the carrier on the phone November 14, the day claimant was confined to jail, and called again on November 16, advising carrier that claimant was sick. Nothing in the record indicates claimant authorized such statements. If he did, he was untruthful, if he did not, he did not advise carrier of his anticipated absence nor did he make any request to be absent from duty.

Claimant was absent from duty without authority, serving a jail sentence on November 14 until and after November 28, the day notice was given, advising him of the charge, and setting the date for the hearing.

In his letter, claimant's attorney did not request a leave of absence for his client. The letter was a plea for leniency. The local chairman was present at the hearing, and at that time made no objections or requests and no exceptions were taken.

Claimant knew he had been found guilty in court and sentence would be pronounced on November 14, yet he made no attempt to obtain a leave of absence.

On November 28 claimant was charged with "being absent from work since November 14." He was advised of his rights as set forth in Rule 39. Hearing was held at the scheduled time and place. On December 10 claimant was advised that he was dismissed from the service of the Southern Pacific Company.

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 waived right of appearance at hearing thereon.

There is no substantive evidence that carrier violated Rule 39 of the agreement. We do not find that the rule makes the presence of the accused mandatory. Our duty in this case is (1) to determine from the entire record whether or not the carrier complied with the requirements of the discipline rules, (2) was claimant afforded a fair hearing, (3) was the verdict arbitrary, capricious or one of bad faith.

Carrier complied with the discipline, suspension and dismissal rule. In so doing, including final action of dismissal, carrier was not arbitrary, capricious, nor did it act in bad faith. We do not find 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 30th day of July, 1958.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2925

It is obvious that the majority erred in finding that the carrier complied with the rules of the controlling agreement. We are constrained to dissent from the findings and award of the majority which uphold the carrier in depriving the claimant of fundamental rights secured him under the controlling agreement.

The right of refutation to evidence adverse to one's cause is fundamental to a fair and impartial hearing. It is clear from the record that a hearing was held at a time when it was known that the claimant could not be present. This is a violation of Rule 39 which prescribes that "No employe shall be disciplined or dismissed without a fair hearing by the proper officer of the company . . ."

/s/ James B. Zink

/s/ R. W. Blake

/s/ Charles E. Goodlin

/s/ T. E. Losey

/s/ Edward W. Wiesner