Award No. 4156
Docket No. 4010
2-NPTCofO-SM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Sheet Metal Workers)

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current applicable agreement Sheet Metal Worker Oral Nearing was unjustly dealt with when he was removed from service.

2. That accordingly the Carrier be ordered to compensate Mr. Nearing for all time lost account of this unjust removal from service.

EMPLOYES' STATEMENT OF FACTS: Oral Nearing was employed by the Northern Pacific Terminal Company on August 12, 1950 and hereinafter will be referred to as the claimant.

At the time of his dismissal he was regularly assigned as a journeyman Sheet Metal Worker on what is known as the third shift starting at midnight.

Under date of May 16, 1960, Master Mechanic G. E. Weakley directed a letter notifying the claimant to appear for formal hearing on certain charges.

The formal hearing was held as scheduled on May 19, 1960.

The carrier elected through its master mechanic to dismiss the claimant from the service of the carrier for a period of five days.

This dispute has been handled with the carrier up to and including the highest officer so designated by the company, with the result that he has declined to adjust it.

The Agreement effective September 1, 1949 between the Union Pacific Railroad Company and System Federation No. 105, as it has been subsequently amended, is controlling.

carrier in December 1954, yet had never read same, and testified that he had never been issued one. This clearly shows the complete disinterest of claimant in the set of rules and instructions under which he works on carrier's property. Many of these rules deal with safety and safe work methods, and claimant's lack of interest therein and knowledge thereof unquestionably contributed to his unsafe and careless manner of performing his work on the date in question.

(3) Discipline assessed claimant was not unduly severe.

In the citation of claimant to appear for formal hearing, he was told that if the charges were proven to be true, they would constitute violation of the first General Notice and Rule 700 of the Rules and Instructions of the Motive Power and Machinery Department of this company, which read respectively as follows:

> "Safety is of the first importance in the discharge of duty."
>
> "Employes who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious . . . will not be retained in the service."

As the carrier has shown, claimant was careless of his own safety and was injured through his own carelessness, then attempted to blame his fellow workers therefor. According to the foregoing rule, he should not have been kept in the service. However, the Carrier did not discharge claimant, but simply suspended him for five working days. In view of all this and the added fact that this injury cost the carrier $350.00, all of which were wholly uncalled for, carrier maintains that the discipline imposed surely was not too severe, but, on the contrary, was fully warranted and justified.

CONCLUSION: That the charges filed against claimant in letter dated May 16, 1960 were justifiable;

That hearing held May 19, 1960 was fair and in conformity with the provisions of Rule 37 of the agreement;

That the evidence adduced thereat amply and clearly sustained the aforesaid charges; and

That the discipline assessed claimant was not harsh or overly severe; have been clearly shown herein; therefore, the claim should be denied in its entirety, and the carrier respectfully so requests.

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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant's ankle was scalded by steam on April 23, 1960 and he returned to service on May 10th. On May 16th he was charged with falsifying his personal injury report and with performing his work in a careless and unsafe manner on April 23rd. Hearing was held on May 19th, and on June 3rd he was suspended for five working days. Claim is for pay for time lost on those five days.

It is admitted that claimant was negligent in the performance of his work if he did not first notify the machinists that he was going to change the gasket. Obviously also in that event he necessarily falsified his personal injury report by stating that he had so informed them.

Contention is made that the charges were indefinite in not specifying the exact falsification of his report and particularly carelessness with which he was charged. But only the one point was involved; claimant can have had no doubt concerning it, and cannot have been hampered in his defense because it was not spelled out in the charges.

It is also contended that Rule 37 was violated in that the hearing was not prompt. Rule 37 provides that no employe shall be disciplined without a fair hearing and that "suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this Rule."

In other words, one of the limitations upon suspension is that the hearing shall be prompt. But there was no suspension in this case, and the second sentence of Rule 37 is inapplicable. Furthermore, under the conditions the carrier might have been under criticism if it had scheduled the hearing before claimant's recovery. The intervals thereafter do not appear excessive, and are not shown to have been prejudicial to claimant in any way.

It was charged in Employes' Submission, that the carrier's action in obtaining written statements from the three witnesses the day before notice of the hearing "proves that the dismissal was premeditated," and that if the witnesses had not made the written statements "there is no doubt * * * that this Carrier would have charged them with insubordination". No argument nor evidence was submitted on either point. The obtaining of written statements indicated that an investigation was being made and that charges might be brought, but certainly not that the dismissal was decided upon in advance. Nor does the obtaining of written statements indicate that the Carrier was demanding perjured testimony, if that is what the objection means to suggest. It is ordinary normal procedure to obtain such statements in investigating incidents or preparing for trials or hearings, and no adverse inferences can be drawn therefrom in the absence of some improper action.

There is no indication that the investigation was not fairly and impartially conducted, and the evidence was adequate to sustain carrier's action. The record shows a direct conflict in the evidence, two machinists stating that claimant did not notify them, and claimant testifying that he did. The testimony of the machinist who was handling the valves is attacked as self-serving in that he was directly concerned; but claimant's testimony would be subject to the same criticism. That is not true concerning the testimony of the second machinist, who fully confirmed that of the first. This Board is not the trier of facts and cannot hold that the hearing officer should have believed claimant and disbelieved the two machinists.

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 February, 1963.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4156.

The majority has made erroneous statements in arriving at their decision in Award No. 4156, when they state:

> "* * * It is admitted that claimant was negligent in the performance of his work if he did not first notify the machinists that he was going to change the gasket. Obviously also in that event he necessarily falsified his personal injury report by stating that he had so informed them. * * *."

and

> "* * * The record shows a direct conflict in the evidence, two machinists stating that claimant did not notify them, and claimant testifying that he did. The testimony of the machinist who was handling the valves is attacked as self-serving in that he was directly concerned; but claimant's testimony would be subject to the same criticism. That is not true concerning the testimony of the second machinist, who fully confirmed that of the first. * * *."

After considering the above and a careful study of the Investigation Transcript it is clear the claimant in this case did not admit negligence nor does the record reflect any obvious intent to falsify the personal injury report.

The majority avoids determining proper responsibility and burden of proof by stating:

> "* * * This Board is not the trier of facts and cannot hold that the hearing office should have believed claimant and disbelieved the two machinists."

and then weigh or evaluate the statements to fit a conclusion shifting the burden of proof.

The record reveals that carrier failed to prove the specific charges lodged against Mr. Oral Nearing and therefore, this award should have been in the affirmative.

We dissent.

C. E. Bagwell
T. E. Losey
E. J. McDermott
Robert E. Stenzinger
James B. Zink

REFEREE'S REPLY TO LABOR MEMBERS' DISSENT TO AWARD 4156

The dissent misconstrues the award as saying that the claimant admitted negligence and that the record showed an obvious intent to falsify his report. On the contrary, what it said was that if he did not notify the machinists that he was going to change the gasket, he was admittedly negligent in his work, and also falsified his report by stating that he had notified them. Certainly those statements are true. The determinative question of fact was whether claimant gave the notice, and the testimony of two witnesses was sufficient evidence that he did not.

As for burden of proof, claimant's testimony cannot be held to outweigh that of the two machinists.

Howard A. Johnson