

Award No. 4242
Docket No. 4170
2-B&O-EW-'63

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Electrical Workers)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That, under the current Agreement, the Baltimore and Ohio Railroad Company unjustly dismissed Electrician Peter Bochonok from the service on August 29, 1960.

2. That accordingly, the Baltimore and Ohio Railroad Company be ordered to reinstate Electrician Peter Bochonok to service with seniority unimpaired.

EMPLOYEES' STATEMENT OF FACTS: On July 21, 1960, claimant with the assistance of regular electrician apprentice, R. P. Tibai was engaged in removing a set of storage batteries from diesel unit No. 5491 at the carriers' backshop, Glenwood, Pittsburgh, Pennsylvania, during which operation he suffered a back injury. On July 25, 1960, claimant received the following notice from Superintendent of Shops, Mr. H. S. Bergman:

"You are hereby notified in accordance with the rules of the wage agreement under which you are working to report at Office of Supt. of Shops at 9 AM, DST on 7-28-60 for hearing on the following matter: in connection with alleged injury reported by you at 8 AM, DST, July 21, 1960, refusal to visit Medical Examiner at Glenwood when instructed to do so and insubordinate attitude regarding the alleged injury."

Hearing was held on July 29, 1960 and on August 29, 1960, claimant received the following notice from Supt. of Shops, H. S. Bergman:

"As a result of hearing held in this office on July 29, 1960, this is to advise you that you have been dismissed from the service of the Baltimore and Ohio Railroad Company effective as of this date.

was extremely serious. The proper measure of discipline was assessed against him.

The carrier directs this Division's attention to Rule 32 of the shop crafts' agreement, as reprinted November 1, 1952. Rule 32 reads in full:

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and the duly authorized committee will be apprized of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for his net wage loss, if any, resulting from said suspension or dismissal.

"Stenographic report will be taken of all hearings or investigations under Rules 32, 33 and 34, and the employe involved and the duly authorized committee shall each be furnished with one copy."

The petitioner in this case was given a precise charge. He had reasonable opportunity to secure the presence of necessary witnesses. He was permitted to have representation present at the hearing. In all the petitioner was afforded a fair and impartial hearing. Rule 32 was complied with to the letter.

What the committee pleads for is leniency for the petitioner. Such a plea is neither merited nor deserved. Such a plea is inconsistent with the committee's contentions, taken belatedly, as to alleged procedural defects in the holding of the hearing. While there were no such defects, by reason of its pleading alone, this committee has waived argument of that type or sort. Certainly, this Board is not a proper tribunal for extending leniency in discipline cases. The offense is very serious; the facts stand undisputed; the discipline assessed was proper and correct. There is no basis for the extension of leniency.

For example, in this Division's Award 1008, with Referee Larkin, the Board ruled in part that: "* * * This Board should not substitute its judgment for that of the management without some evidence that the action taken was arbitrary or capricious. There is no evidence to support such a claim as to whether there was cause for discharge, we must conclude that there was. If the carrier wishes to be lenient and reinstate or reemploy one who has infringed the rules * * *, that it may do. But this Board should not take it upon itself to order reinstatement."

The carrier submits the request in this case is without merit. The carrier respectfully requests that it be denied in its entirety.

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 were given due notice of hearing thereon.

About 7:00 A. M., July 21, 1960, Claimant, an Electrician, reported to his Foreman that an hour previously he had sustained an injury to his back while he and another employe were engaged in removing a battery from a Diesel unit. Claimant was directed by the Foreman to visit the Carrier's Medical Examiner which he refused to do for the assigned reasons that the Examiner was not a licensed physician and that his personal physician was the proper person for him to see. Subsequently the Superintendent of Shops also directed Claimant to visit the Medical Examiner and advised him that if he refused to do so he would be served with a formal notice and be given a hearing on account of insubordination. Claimant again refused to visit the Medical Examiner for the reasons assigned above.

An investigation was held and Claimant was dismissed from service. He asks that he be restored to service with seniority unimpaired. The Employes assert that the Carrier's action was arbitrary and capricious for the following reasons:

1. The hearing was improperly conducted because the Carrier's Superintendent of Shops acted in the inconsistent roles of prosecutor, witness and judge;
2. No rule of the Agreement required the Claimant to visit the Medical Examiner under the circumstances shown; and
3. The Medical Examiner was not a licensed physician and the Claimant was entitled to be examined and treated by a physician of his own choice.

As to the first proposition it is sufficient to say that this Board is only concerned with the question as to whether the Claimant's dismissal was reasonably justified by the facts developed at the hearing, or whether the Carrier acted arbitrarily and capriciously. It is true that there does not appear to be any specific rule in the Agreement directing that an injured employe may be required to visit the Carrier's Medical Examiner. However, Rule 41 does recognize that the Carrier may have a Medical Examiner and we think that an injured employe may be required to visit such Examiner on the Carrier's time.

It is also true that the Claimant positively stated before and at the hearing that the Carrier's Medical Examiner was not a licensed physician under the laws of the state, and we find no denial of that statement in the record. It is significant, however, that the Claimant was merely directed "to visit" the Examiner and that there was no direction that he submit himself to examination or treatment at the hands of the Examiner. Had the Claimant been directed to allow the Medical Examiner to make physical examination or to treat him the Employes' third proposition might have presented a different question. There is nothing in the record before us to indicate that

the Claimant's personal rights or privileges were in any way violated by the Carrier's order that he "visit" the Medical Examiner.

We find no valid basis for a sustaining award.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June, 1963.