Award No. 4255

Docket No. 4316

2-CGW-MA-'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. 66, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Machinists)

CHICAGO GREAT WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current Agreement Rules 27 and 29, Machinist Vernon R. Larkin was unjustly discharged on November 1, 1961, by his employer, the Chicago Great Western Railroad.

2. That accordingly, the Carrier be ordered to reinstate Machinist Vernon R. Larkin, compensate him for all time lost, with seniority rights unimpaired and adjustments made in all fringe benefits and/or vacation benefits which would have accrued had he not been so unjustly dealt with and subsequently dismissed.

EMPLOYES' STATEMENT OF FACTS: Vernon R. Larkin, hereinafter referred to as the claimant, was a machinist employed by the Chicago Great Western Railroad, hereinafter referred to as the carrier, at their State Street Roundhouse in St. Paul, Minnesota.

Claimant works night shift from 10:30 P. M. to 7:00 A. M. The assigned lunch period is from 2:30 A. M. to 3:00 A. M., for which period no pay is received. The claimant is the only machinist on shift, and due to service requirements, lunch period is not always taken at assigned time. There is no supervision assigned on this shift.

On October 19, 1961, the claimant was allegedly caught sleeping on or about 3:00 A. M., by several carrier officials.

The carrier served notice on claimant to appear for investigation relative to establishing evidence as to whether claimant was sleeping while on duty.

Because of short notice received by claimant and due to prior commitments on the part of the general chairman, whom claimant desired as his representative, a request was made with carrier to postpone hearing. The request was not granted and claimant appeared without representation or witnesses. Claimant informed the carrier officials that he was present under pro-

remain with his present employer, the Soo Line Railroad. If it is actually his desire to return to work for this Company, the verbal agreement of April 12, 1962, confirmed by letter of April 17, 1962, continues effective and two additional copies are attached for your signature.

"In the circumstances, it is clear that the situation would have been composed long ago if the Employes had complied with the aforementioned agreement. On the other hand, if your letter September 12, 1962 merely implies that Larkin desires reinstatement with seniority rights unimpaired, subject to passing satisfactory physical examination conducted by Company surgeon, without prejudice to the contentions of either party, and only the issue of pay for time lost be submitted to the Adjustment Board, please advise."

The employes have never replied to the above letter, which is indicative of the fact that it is they who are arbitrary and capricious, not the carrier. Claim is clearly without merit and should be denied in its entirety.

Even if this Division should be persuaded that carrier violated the collective agreement (and the record clearly shows the contrary to be true), and awards any portion of the claim for compensation, carrier should have credit for all earnings from every source received by claimant during the period of any such award of compensation.

This Division has ample precedent for the granting of carrier's request for deduction of earnings in the decisions of all courts in every jurisdiction in which the matter has received consideration. Courts are unanimous in their findings that earnings by one seeking damages for breach of contract of employment should be credited in mitigation of damages assessed for such breach.

Rule 29 of the contractual agreement contains the following:

"If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The above language has been interpreted to afford the carrier credit for earnings from every source made by an employe during a period of suspension or dismissal from carrier's service, and this has been the practice on the property. Carrier's contention on this point is fully endorsed by all Divisions of the National Railroad Adjustment Board—see Second Division Awards Nos. 1638, 2068, 3110, and 3449; Third Division Awards Nos. 4325, 5787, 5821, 5835, 7173, 6614, 6074, 8477, 8572, 8693, 8710 and 8714; First Division Awards Nos. 5862, 15765, 16408, 16558, 16576, 16854 and 16855.

In view of all the foregoing, there is no basis for claim for compensation as requested in Item 2 of employes' statement of claim and said claim must, therefore, be denied.

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.

This claim presents two issues: (1) whether it was timely filed; and (2) whether the claimant was denied a proper hearing.

On the first issue the Carrier relies on Rule 27 which stipulates that a claim "shall be taken to the foreman, general foreman, master mechanic or shop superintendent, each in their respective order . . ."; and Article V which directs that all claims shall be presented in writing "to the officer of the Carrier authorized to receive the same within 60 days from the date of the occurrence on which the claim or grievance is based".

Whether there was substantial compliance with the foregoing requirements necessitates a consideration of the chronology by virtue of which the claim was progressed. The following will suffice in that regard:

October 19, 1961, claimant was allegedly found asleep when he should have been on duty by two of Carrier's trainmasters; and on the same day the Superintendent dispatched a letter to the Claimant advising him that a disciplinary hearing would be held on October 24.

October 24, the claimant appeared at the scheduled hearing and requested a continuance which was granted and rescheduled for October 31.

October 31, a hearing was held, the claimant not being present; and on the same day the Claimant was advised by his Engine House Foreman that he was out of service.

November 1, Claimant reported for work but was escorted off the Carrier's property by one of its Special Agents.

November 9, the Carrier's Superintendent dispatched a letter to the Claimant, advising him that as a result of the hearing held on October 31 he was dismissed from service.

November 13, Claimant wrote a letter to the Engine House Foreman asserting a grievance on account of being held out of service and demanding that he be reinstated and compensated for time lost. Later, on the same day, Claimant received the Superintendent's notice of dismissal dated November 9.

The claim was subsequently progressed by the Employes' General Chairman.

Article V of the National Agreement of August 21, 1954, clearly provides that claims and grievances may be presented "by or on behalf" of the employe involved; and in view of the events set out above it seems apparent to us that the claim was properly initiated within 60 days from the occurrence on which it is predicated.

The second proposition is urged on behalf of the Employes and involves the question as to whether the hearing held on October 31, was prejudicial to the Claimant's rights. The violation of no specific rule is charged but we think it is implicit in every rule providing for a hearing and a determination of facts that the inquiry be fairly conducted and that the person charged

have a reasonable opportunity to be heard, to cross-examine the witnesses that may testify against him, and to produce evidence in his own behalf. Such is the necessary implication of the first sentence of Rule 29. We shall accordingly consider what occurred in this instance in accordance with those standards.

The initial hearing was scheduled for St. Paul where the Claimant resided and where he was employed, but when he requested a continuance it was rescheduled for a week later at Oelwein, Iowa, some 200 miles from St. Paul. Claimant's General Chairman thereupon requested that the investigation be held at the point of employment advising, also, that Claimant had no means of transportation and was short of funds. To this request the Carrier replied that the hearing was recessed "with the understanding that it would be continued at Oelwein". The only basis for the Carrier's statement that there was such an "understanding" appears in the following excerpts from the transcript of the proceeedings of October 24:

> **The Supervisor of Safety and Rules:** "Do you request that we wait until we can secure a representative and hold the investigation at Oelwein?"
>
> **The Claimant:** "It couldn't be held here?"

The hearing was thereupon recessed by the Supervisor to be resumed in the Superintendent's office at Oelwein, Iowa, at 10:00 A. M., October 31.

There was a showing that the Claimant could have ridden Carrier's train leaving St. Paul at 10:35 P. M. on October 9, and have arrived at Oelwein at 3:00 A. M. on the 10th, so as to have been available for the hearing at 10:00 A. M. on that day, and that if the hearing had been concluded in time he could have left Oelwein at 11:30 A. M. on the 10th and been back at St. Paul at 4:30 P. M. on the same day. This presupposes that the hearing would have not consumed as much as an hour and a half, otherwise Claimant would have had to spend another night away from home. The Claimant's statement that he was without funds and unable to pay the expenses of witnesses was answered by the statement **that he had no witnesses.**

As to the last point, we merely suggest that even if it be assumed that Claimant was asleep on duty yet, nevertheless, might it not have been proper for him to show, in mitigation, that his condition was due to illness, to medication or to previous loss of sleep resulting from innocent circumstance beyond his control?

Without further extending these findings we are constrained to hold that the Claimant was not accorded the fair hearing contemplated by Rule 39.

AWARD

Claim sustained, and Claimant ordered to be reinstated with seniority unimpaired and that he be compensated for time lost at his pro rata rate, less his earnings in other employment during the period he has been and may be held out of service.

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.

DISSENT OF CARRIER MEMBERS TO AWARD 4255

The docket record in this dispute, specifically the Master Mechanic's letter to the General Chairman denying the claim (reproduced at Pages 6-7 of the Carrier's ex parte submission) shows that the parties were at issue during the handling of the claim on the property on the question of whether the Claimant had properly filed his claim in the first instance with the Engine House Foreman. That being so, the Petitioner's Exhibits 1 and 2, which are offered in support of his position but were not submitted until his rebuttal submission was made, were not properly before the Division for consideration according to the Board's Rules of Procedure which are promulgated in Circular No. 1 (issued October 10, 1934), Resolution adopted by the Second Division on March 27, 1936 and Circular "A" of this Division, dated June 1, 1936. No good reason appears to justify the Petitioner's belated introduction of his documentary evidence and hence the claim should have been barred in accordance with the terms of Article V, Section 1(a) of the National Agreement of August 21, 1954 because the Petitioner failed to refute the Carrier's defense of this claim in accordance with the orderly procedure ordained by this Division.

Touching on the merits of this dispute, we see that the transcript of the minutes of each of the two hearings referred to by the Majority is a matter of record. The Majority rejected the Carrier's contention that the Claimant had agreed to the postponement of the first hearing with the understanding that it would be continued at Olwein, Iowa, the headquarters of the Mechanical Department. It did so by simply quoting the Question and Answer which appear at the top of Page 3 of the transcript. But in so doing, they failed to take into consideration that part of the transcript which immediately preceded and which shows that the Hearing Officer and the Claimant had an off-the-record discussion of the postponement of the investigation. If, as the Majority concluded, the Claimant had not agreed that the hearing would be continued at Olwein, we could have expected that he would have made his objection known at that time, since the preceding part of the transcript shows beyond question that he was aware of his rights and did not hesitate to voice them. Instead, the transcript shows that he simply replied that he would notify his General Chairman. It is likewise significant to note that he made no mention at that time that he was either short of funds or lacked transportation from St. Paul to Olwein—the two chief factors upon which the Majority relied in arriving at its conclusion that he had not been accorded a fair investigation under Rule 29.

Finally, the record shows (Page 15 of the Carrier's ex parte submission) that the Carrier offered to reinstate the Claimant even as late as September 25, 1962 without prejudice to his progressing his claim to the Second Division for pay on account of time lost. In any event, in accordance with well established rules relating to the disposition of this type of grievance, the Claimant's claim for compensation should have been terminated as of that date.

For these reasons, we believe that the Majority erred in its finding and we register our dissent.

Francis P. Butler

W. B. Jones

C. H. Manoogian

H. K. Hagerman

P. R. Humphreys