

Award No. 4469
Docket No. 4002
2-IC-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

- (a) That under the current agreement car cleaner Charles Johns was unjustly dismissed from the service of the Illinois Central Railroad on May 20, 1960.
- (b) That the Illinois Central Railroad be ordered to reinstate car cleaner Charles Johns with all seniority rights unimpaired and paid for all time lost.

EMPLOYEES' STATEMENT OF FACTS: Mr. Charles Johns, hereinafter referred to as the claimant, was employed as a coach cleaner at Weldon Yards, Chicago, Illinois, on the Illinois Central Railroad, hereinafter referred to as the carrier. On May 11 and May 18, 1960, an investigation was held in connection with determining the facts relative to misuse of emergency trip pass, also the claimants conduct on train No. 1, January 13, 1960. On May 20, 1960, the claimant was advised by letter that effective that date, May 20, 1960, that he was dismissed from the service of the Illinois Central Railroad.

This dispute has been handled with all carrier officers authorized to handle disputes including an appeal to the highest designated officer with the result that he too declined to adjust it.

The agreement effective April 1, 1935 and subsequently amended is controlling.

POSITION OF EMPLOYEES: For ready reference, the governing rule in this dispute is Rule 39, as follows:

RULE 39

"No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a

Your Board held in Award No. 2996 that:

"While there was conflicting testimony adduced at the investigation of the charges against the claimant, there was substantial evidence to reasonably support the decision of the carrier. Under such circumstances we may not substitute our judgment for that of the carrier."

In Award No. 3267 your Board said:

"The Carrier has the primary right to weigh and evaluate the testimony, and if its finding is reasonably supported, this Division is loathe to disturb that finding. Awards 1109 and 2207."

Other supporting Awards are Nos. 5401 and 5861, Third Division; Nos. 1323 and 1809, Second Division; and Nos. 14552 and 16265, First Division.

This claim is without merit and should 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 waived right of appearance at hearing thereon.

The Claimant Charles Johns was employed as a car cleaner at the Carrier's Weldon Yards, Chicago, Illinois, since 1948. Under date of January 21, 1960, the Carrier charged him with having misused an emergency trip pass issued to himself, his wife, and a 16-year old daughter as well as with having conducted himself improperly on train No. 1 (The City of New Orleans) on January 13, 1960. After a formal investigation held at Chicago, he was advised by the Carrier that he was found guilty as charged and, therefore, was dismissed from the Carrier's service, effective as of May 20, 1960. He filed the instant grievance in which he contended that he was unjustly dismissed. He requested reinstatement with accumulated seniority rights and with pay for all time lost. The Carrier denied the grievance.

1. In adjudicating this case, we are confronted with serious discrepancies in the evidence. The testimony of the Claimant and his wife cannot be reconciled with that of the Carrier's chief witness (Patrolman C. A. Hankins of the Carrier's special agents' department) and with the documentary evidence submitted by the Carrier. In an effort to ascertain the objective facts underlying the grievance at hand, we have carefully analyzed and weighed the conflicting testimony as well as critically evaluated the documentary evidence. On the basis of such analysis and evaluation, we find the following facts established:

On January 12, 1960, the Claimant requested free transportation from Chicago, Illinois, to New Orleans, Louisiana, for himself, his wife, and his 16-year old, dependent daughter on account of "death of brother". The Carrier granted the request and issued an emergency trip pass to the Claimant, his wife, and his daughter.

At about 8:00 A. M., January 13, 1960, the Claimant boarded train No. 1 (The City of New Orleans) at the Chicago 63rd Street Station **without** his wife and daughter. At approximately 4:50 P. M., the telegraph operator at Woodstock, Tennessee, called the Carrier's special agent's office at Memphis, Tennessee, and stated that the conductor of train No. 1 had dropped off a message requesting that a representative of said office should meet car 2 of the train on its arrival at the Memphis Central Station. Accordingly, Patrolman Lambeth and Lieutenant Edwards of said office met car 2 as requested and were told by the conductor that a passenger in the car was drunk and had been disorderly and using profanity during the journey from Chicago to Memphis. It turned out that the passenger was the Claimant. He was still drunk and used profanity. He was removed from the train and taken to the special agent's office. He was accompanied by a female passenger with two small girls, age 5 and 3, respectively, and a 17-year old boy.

The Claimant was searched at the office and it was found that he was riding on the emergency trip pass issued to him and his family. The search also revealed that he was carrying a 3½ inch dirk in his left coat pocket. He was asked whether the female passenger, who was traveling on the emergency pass as his wife, was, in fact, his wife and he answered in the affirmative. But the female passenger denied this. The Claimant then contended that they had lived together as man and wife. Upon questioning her, it was discovered that she was Mrs. Magnolia Webb from Lyon, Mississippi, and that she was the niece of the Claimant's wife. Patrolman Hankins and special agent Lynn took a written statement from her and Hankins witnessed her signature. This statement reads, as far as pertinent, as follows:

"For the past two weeks I have been visiting my son, Robert Webb, who lives at 6212 University, Chicago, Ill. * * *

My son * * * rents a room from Charles Johns, who has an apartment * * * at 6212 University, and I stayed in my son's room while I was in Chicago. Monday, January 11th, I got a telegram from my husband, Stanford Webb, at Lyon, Miss., that my brother, Tom Allen Williams, was killed * * * I did not have enough money to get a ticket to go home * * * I told Charles Johns that my brother had got killed and I didn't have any money to get home on. He told me he could get a pass and I could come with him. He said he had to pay some to get a pass, and that I could pay him half of the whole fare; * * * He told me that he would pass me as his wife on the pass. My son * * * had enough money and bought his own ticket and we all got on the train in Chicago. * * *

I am willing to pay my fare * * * I understand this would be \$17.66 for me and \$8.83 for my child * * *.

I have * * * never lived with him (the Claimant) as man and wife * * *."

Mrs. Webb was permitted to continue her journey to Lyon via Greyhound bus. But the Claimant, who was still in a drunken condition, was turned over to officers of the Memphis police department. They charged him with disorderly conduct and with carrying a dangerous weapon. He was tried in the Memphis City Court and fined \$25.00 plus \$1.00 cost on each charge, or a total of \$52.00.

On January 14, 1960, Mrs. Webb's husband appeared in the Carrier's Clarksdale, Mississippi, office and said that his wife and 5-year old daughter had traveled with the Claimant on the pass and that he wanted to make restitution. He paid (\$17.66 plus \$8.83), or \$26.49.

2. The above findings of fact are founded upon a fair estimate of the worth of the testimony of each witness as well as of the documentary evidence if viewed in the light that the record in its entirety furnishes.

On the witness stand, the Claimant denied any wrongdoing. Apart from the self-serving purpose of his testimony, it is also contradictory, inconsistent, and inconclusive in numerous material respects. For instance, on the application form for the emergency pass, he stated "Death of Brother" (see: Carrier's Exhibit "C"). He clarified this at the investigation hearing as referring to his brother (see: Organization's Exhibit "A", p. 2). Actually Mrs. Webb's brother had died and the telegram received by her so stated. Moreover, the Claimant testified that he bought Mrs. Webb a ticket at the Chicago 63rd Street Station but did not know "what became of it" (see: Ibid., p. 3). He did not even assert that he gave her the ticket, and she had none. If he had bought a ticket for her, there would have been no need for her husband to pay for another one. Finally, the Claimant first testified "they found a knife on me" (see: Ibid., p. 5). A short while later, he testified "I didn't have no knife in my pocket" (see: Ibid., p. 13). The foregoing examples, which could easily be augmented, are sufficient to convince us that the Claimant's testimony is unworthy of belief.

His statement that he bought a ticket for Mrs. Webb at the 63rd Street Station has been corroborated by his wife Ethel who was with him at the Station but did not accompany him on the trip. It is understandable that Mrs. Johns attempted to support her husband's testimony in an effort to save his job. It is also possible that she was afraid of him because he had apparently broken her arm before he left Chicago and the Chicago police were looking for him (see: Ibid., p. 10). In any event, Mrs. Johns' testimony offered no explanation why Mrs. Webb did not have a ticket but traveled with the Claimant on his emergency pass as his wife. Under these circumstances, we have assigned no probative value to Mrs. Johns' testimony.

On the other hand, the testimony of Patrolman Hankins, the Carrier's chief witness, is consistent, logical, and precise. He had no personal interest in the matter but only testified as to what he had seen or heard in the performance of his duties as a member of the special agent's office. We are satisfied that his testimony contains a true statement of the facts testified to by him.

We also have no doubt that the facts as related in Mrs. Webb's statement are correct. Her statement is credible, frank, and logical. Moreover, her statement has partly been corroborated by the statement made by her husband at the Carrier's Clarksdale office. Furthermore, it speaks in her favor that she saw to it that the Carrier was promptly reimbursed. In short, her statement is deserving of decisive probative value.

3. The Claimant has objected to the use of Mrs. Webb's written statement on the ground that she was not present at the investigation hearing and thus could not be questioned or cross-examined by him. This objection is without merit.

The general right of an accused to be confronted with witnesses as provided in the Sixth Amendment of the Federal Constitution and in State Constitutions (see, for example: Article II, Paragraph 9 of the Constitution of the State of Illinois) only applies in criminal cases. Nevertheless "the fundamental fairness of the rule has become so ingrained in our culture that it has a considerable carry-over into the civil area." See: R. W. Fleming, **Some Problems of Due Process and Fair Procedure in Labor Arbitrations**, 13 *Stanford Law Review* 235, 245 (1961). However, there are compelling and strong reasons why, in the light of the realities of labor relations, confrontation and cross-examination are not always feasible in disciplinary proceedings of the nature here involved. Mrs. Webb was a passenger and not an employe of the Carrier. She was not at Chicago at the time of the investigation hearing and the Carrier had no power to compel her attendance by legal process. Under such conditions, there is no practical alternative but to accept and consider the testimony of a witness by written statement or affidavit, provided, of course, such statement or affidavit is genuine. See: Awards 2978, 4976, 5667, 6067, 6185, 6866, 7866, and 8503 of the Third Division; 1152 of the Fourth Division. The genuineness of Mrs. Webb's statement has not been and cannot be challenged by the Claimant. In addition, the record is barren of any evidence or indication that she was coerced, intimidated, forced or threatened with reprisal by the Carrier's special agents to take the statement from her. Furthermore, Mrs. Webb's address was known to the Claimant since she is a near relative of his wife. If he deemed it necessary to meet her face to face and to cross-examine her, he was entitled to ask for a continuance of the hearing for the purpose of securing her presence or an affidavit from her. See: Award 939 of the Fourth Division. The record does not show that he or his representatives made such a request. As a result, the Claimant cannot validly attack the admission and use of Mrs. Webb's statement. In summary, we hold that the Claimant was afforded a fair hearing in accordance with Rule 39 of the applicable labor agreement and that his rights were not violated by the use of Mrs. Webb's statement.

4. We have consistently held that a Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive, or an abuse of managerial discretion. See: Award 4358 of the Second Division and cases cited therein. We are of the opinion that the Claimant's dismissal was not based on such unreasonable grounds. On the contrary, we conclude that he is guilty as charged by the Carrier on January 21, 1960, and that his dismissal was a reasonable exercise of the Carrier's managerial discretion.

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, 1964.

DISSENT OF LABOR MEMBERS TO AWARD 4469

The only conclusion we can come to is that the majority has preferred to give a dissertation on the Federal Constitution and due process rather

than make a valid determination of the claimant's rights under the collective agreement between the Illinois Central Railroad and System Federation No. 99.

Charles Johns was dismissed allegedly for cause and was not given a fair hearing as provided in Rule 39 of the Agreement, which rule reads as follows:

"No employe shall be disciplined without a fair hearing by a designated officer 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 will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by the authorized committee. 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 the wage loss, if any, resulting from said suspension or dismissal."

Since the carrier did not afford claimant a fair hearing as required by the aforementioned rule the claim should have been sustained.

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