Award No. 5159
Docket No. 4897
2-C&NW-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harry Abrahams when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 12, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Chicago and North Western Railway Company violated the collective agreement and unjustly treated Machinist J. J. Pringle when it suspended him from service on August 31, 1964, and discharged him from service on September 5, 1964.

2. That accordingly, the Chicago and North Western Railway Company be ordered to reinstate this employe with seniority rights unimpaired and compensate him at Machinist pro rata rate plus six percent (6%) interest for all wage earnings deprived of; also for fringe benefits (vacations, holidays, premiums for hospital, surgical, medical and group life insurance) deprived of since August 31, 1964, until restored to service.

EMPLOYES' STATEMENT OF FACTS: Mr. J. J. Pringle hereinafter referred to as the claimant was employed as a Machinist by the Chicago and North Western Railway Company, hereinafter referred to as the carrier, at Clinton, Iowa. The claimant has a discipline free service record with the Carrier and was first employed in 1947.

The Car Shops Superintendent Mr. R. E. Powers suspended the claimant from service at the close of his shift on August 31, 1964. On September 1, 1964, Car Shops Superintendent R. E. Powers charged the claimant as follows:

"CHARGE: Your responsibility for your failure to properly perform your duties as Machinist in the Wheel Shop, Clinton, Iowa, while assigned to work on the burnishing lathe, specifically your failure to comply with specific instructions to produce a minimum of 9 axles per hour during your tour of duty and your failure to do so on August 31, August 28, 1964, and dates prior thereto, resulting in your being suspended from service August 31, 1964."

If it is found that charges are not sustained, such employe shall be returned to service and paid for all regular time lost."

Under this rule the claimant would be entitled only to time lost less earnings in outside employment (see Second Division Award No. 1638 involving the same rule and the same parties), if he were entitled to reinstatement, which he is not. It will be noted that the rule makes no provision for payment of six percent interest or the fringe benefits referred to in the statement of claim. In this respect, the claim in this case constitutes in part a request for a new rule, which is beyond the jurisdiction of this board. The board's authority is limited to interpretation of existing rules, and does not extend to promulgating new rules under the guise of interpretation of existing rules.

In denying a similar claim in Second Division Award No. 3883, the findings stated in part:

"The claim for reimbursement of medical and hospital expense in the amount of $182, which was born by the claimant, would have been satisfied by the insurance company if the claimant's group insurance had not been cancelled when he was discharged. If this were a common law action for the recovery of consequential damages for breach of contract, and if this Board possessed general judicial powers, such medical and hospital expense, if proven, would constitute proper elements of damage. However, this Board has limited power under the law, and it is confined to the interpretation or application of the collective bargaining agreement entered into by the parties.

The contracting parties have specifically agreed that the damages for contract violation such as occurred in this case, is the amount of wages shown to have been lost, less earnings from other sources. Other elements of consequential damage have been excluded by implication. The term 'wage' in its ordinary and popular sense means payment of a specific sum for services performed. That is the sense in which the term is used in this agreement. The language of Rule 34 has been in effect since 1941, long before the contracting parties had provided for group insurance for hospital or medical expenses. The insurance program which was in effect in July 1957 was specifically declared in the 1956 agreement to be in addition to the wage adjustments therein provided. It was by the parties' own arrangement distinguished from wages. Eligibility for hospital and medical insurance protection is derived from employment status, but it is not in the usual and ordinary sense an integral part of a wage rate. We conclude that this Board lacks the power to order the carrier to reimburse the claimant for his medical and hospital expense."

The claim is without merit and should be denied.

(Exhibits not reproduced.)

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.

Employe J. J. Pringle on September 5, 1964 was discharged because he deliberately slowed down and during his tours of duty, and on August 28 and August 31, 1964 did not produce an average of 9 axles per hour over a period of 8 hours of work.

The production of 9 axles an hour as above set out did not constitute an undue work load or hardship.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April, 1967.

LABOR MEMBERS' DISSENT TO AWARD 5159

The Referee and Carrier members of this Division constituted the majority in this instant award. We contend that they are in error in their findings when they stated:

> "Employe J. J. Pringle on September 5, 1964, was discharged because he deliberately slowed down and during his tours of duty, and on August 28 and August 31, 1964, did not produce an average of nine axles per hour over a period of eight hours of work.
>
> The production of nine axles an hour as above set out did not constitute an undue workload or hardship."

The dispute and remedial action sought by the claimant before this Division was:

> "1. The Chicago & North Western Railway Company violated the collective agreement and unjustly treated Machinist J. J. Pringle when it suspended him from service on August 31, 1964, and discharged him from service on September 5, 1964.
>
> 2. That accordingly, the Chicago & North Western Railway Company be ordered to reinstate this employe with seniority rights

unimpaired and compensate him at Machinist pro-rata plus six percent (6%) interest for all wage earnings deprived of; also for fringe benefits (vacations, holidays, premiums for hospital, surgical, medical and group life insurance) deprived of since August 31, 1964, until restored to service."

We contend the Referee's conclusions are not based on facts projected in the record, agreement rules controlling and with obvious disregard to the principles of an impartial hearing and the Carrier's obligation to sustain their burden of proof insofar as the allegations and/or charges made against the instant claimant. For example:

> **"Employe J. J. Pringle on September 5, 1964, was discharged because he deliberately slowed down** and during his tours of duty, and on August 28 and August 31, 1964, did not produce an average of 9 axles per hour over a period of 8 hours of work." (Emphasis ours.)

The record as a whole before us reveals that the specific charge against the claimant (see Employes' Exhibit A) is the letter dated September 1, 1964, over the signature of Mr. R. E. Powers, the Superintendent of Cars. We quote in pertinent part:

> "Charge: Your responsibility for your failure to properly perform your duties as Machinist in Wheel Shop, Clinton, Iowa, while assigned to work on the burnishing lathe. Specifically, your failure to comply with specific instructions to produce a minimum of 9 axles per hour during your tour of duty and your failure to do so on August 31 and August 28, 1964 . . ."

After the hearing and/or investigation dealing with the above charges, we find Employes' Exhibit C, a letter addressed to Mr. J. J. Pringle dated September 5, 1964, over the signature of Mr. R. E. Powers, Superintendent of Shops, is the verdict and discipline applied (Dismissed), as follows:

> "Your responsibility for your failure to properly perform your duties as a Machinist in the Wheel Shop, Clinton, Iowa, while assigned to work on the burnishing lathe; specifically your failure to comply with specific instructions to produce a minimum of 9 axles per hour during your tour of duty and your failure to do so on August 31, August 28, 1964, and dates prior thereto resulting in your being suspended from service August 31, 1964.
>
> The following discipline has been applied; dismissed."

There was nothing in the original charge or in the letter of dismissal to the claimant alluding to or specifically stating that the employe deliberately slowed down. Therefore, the majority reached out into space to conclude such language in their findings. Added to this erroneous conclusion, they stated:

> "The production of 9 axles an hour as above set out did not constitute an undue workload or hardship."

The record is replete with statements made by Mr. Powers (the Carrier's witness), who was also an official of this Carrier as well as the moving officer in filing the charges against the claimant and suspending him from service,

such as alleged time and motion studies made by the witness and others, and historical data on production in the Wheel Shop and on this particular machine in question.

Mr. Powers gave lengthy testimony dealing with time and motion studies and personal observations on production and other things. Then, on page 5 of Employes' Exhibit B of transcript, a leading question from the Carrier was put to their witness, Mr. Powers:

"Q. Did you say that because of these observations, and because of authentic historical information which has been made a matter of record, that your instructions regarding the nine axles per hour does not place an undue workload or hardship on an employe operating this burnishing machine?

A. I did so say.

Q. From the information you have available, and your historical authentic facts, what amount of axles have been turned out on this burnishing lathe without undue hardship or workload on the employe?

A. As high as thirteen an hour eighty in an eight hour day.

Q. What was the average number on certain occasions that was turned out on this burnishing lathe without undue hardship on the employe?

A. Eleven."

At this point in the investigation, Mr. Bell, claimant's union representative, requested the following:

"(Mr. Bell asked that the question be repeated, and also asked if there was a specific date on which this happened. He also asked that this be made a part of the transcript.)"

The Carrier then directed a question to Mr. Powers as follows:

"Q. Do you have in your possession, specific times and dates regarding the output on this burnishing machine?

A. Yes, sir."

In view of the fact that the Carrier officers insist that records exist and the fact that the Union requested such records to be made available and part of the transcript and the Carrier's failure to them provide such alleged records, it is fair to conclude that there are no records at all. We contend that the defendant in this investigation was placed in an adverse position insofar as being able to observe the alleged data and question the credibility of the statements of the Carrier's witness. Therefore, the majority of this Division had no substance of fact, actual rules of the agreement or unimpeachable record before them to arrive at such an unjust decision.

There is no probative evidence in the entire record of the Carrier, including the record of transcript of the investigation, to support the allegations and

assertions of the Carrier's witnesses. This is in face of the fact that during the course of the investigative hearing, the claimant's union representative requested that the alleged evidence being testified to by the Carrier's witness be produced by said witness and made part of the record.

It may be fairly stated that this Carrier's witness (Mr. Powers) has a definite personal interest in giving such testimony as he did. As the record will reflect, the claimant was pulled out of service prior to the investigation. Therefore, a certain measure of punishment had already been administered which for all intents and purposes had to be justified by the Carrier's investigation.

This Division by action of the majority vote has exceeded its authority in making this award. They have subscribed to piece work when no such rule exists in the collective bargaining agreement and have apparently ignored the controlling rule which deals with the basic day of an employe:

> "Rule No. 1. Eight (8) hours shall constitute a day's work. All employes coming under the provisions of this schedule shall be paid on the hourly basis, except as otherwise specified."

Rule 1½, Work Week, states:

> "The expressions 'positions' and 'work' used in this rule refer to service, duties or operations necessary to be performed the specified number of days per week . . ."

There is no mention in the above rules of piece work or the like. Therefore, the Referee was improper to go outside of the agreement to insert his unqualified judgment. It is well established by the courts and the National Railroad Adjustment Board as a whole that the Board's task is to construe and apply agreements, not to rewrite them.

We dissent.

R. E. Stenzinger
E. J. McDermott
C. E. Bagwell
O. L. Wertz
D. S. Anderson

Printed in U.S.A.

Keenan Printing Co., Chicago, Ill.