

Award No. 5183

Docket No. 4960

2-C&NW-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 12, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement the Chicago & North Western Railroad unjustly dismissed Carman Robert Hart from service on January 2, 1965.

2. That accordingly the Carrier be ordered to return the aforesaid Carman to service with seniority unimpaired, with compensation for all time lost, plus vacation rights, health and welfare benefits, life insurance benefits and all other benefits due employees under the Agreement.

EMPLOYEES' STATEMENT OF FACTS: The Chicago & North Western Railroad, hereinafter referred to as the carrier, has a large car shop at Clinon, Ia. Mr. Robert Hart, hereinafter referred to as the claimant, has been employed by the carrier for approximately nine years, and for the past year, has been duly authorized financial secretary representing Brotherhood of Railway Carmen of America - Lodge No. 429.

The claimant received a notice dated December 11, 1964, from the superintendent of the car shop, R. E. Powers removing him from service effective December 11, 1964, and directing him to appear for investigation at 1:00 P. M., December 15, 1964, on the charges cited therein.

Hearing was held.

A discipline notice dated January 2, 1965, was directed to the claimant by the superintendent of the car shop, R. E. Powers, advising the claimant he was dismissed.

The dispute was handled with carrier officials designated to handle such matters who all declined to adjust the dispute.

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."

Likewise, the findings in recent Second Division Award No. 4793, *Machinists vs. Harbor Belt Line Railroad*, Referee Dudley E. Whiting, involving a claim for payment of insurance premiums, held in pertinent part:

"Rule 23 expresses the remedy applicable in such cases. It provides only for reinstatement with seniority rights unimpaired and compensation for net wage loss, if any. Other remedies claimed herein cannot be allowed within the limits of our authority."

The carrier submits that the claim in this case should 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 waived right of appearance at hearing thereon.

For our consideration here we have a claim alleging that Carrier unjustly dismissed Carman Robert Hart from service on January 2, 1965 and that Carrier should be ordered to return Claimant to service with seniority unimpaired, with compensation for all time lost, plus vacation rights, health and welfare benefits, life insurance benefits and all other benefits due employes under the Agreement.

There was an unauthorized strike at Carrier's car shop at Clinton, Iowa, on December 9, 1964. Sixty-five carmen employed on the first shift walked off the job about 1:00 P. M. As a result of the strike, operations in the Car Shop were closed down from the beginning of the second shift at 3:30 P. M., December 9, 1964 until 7:00 A. M., Monday, December 14, 1964, despite the

fact that a temporary restraining order was issued by the U. S. District Court in Davenport, Iowa on the night of December 9, 1964, and was served on various members and officers of the carmen's local lodge at Clinton, Iowa during the early morning hours of December 10, 1964. A contempt citation was issued by the Federal Court before the carmen returned to work on December 14, 1964.

Charges were placed against the 65 employes who staged the illegal walkout, and Claimant was notified on December 11, 1964 to appear for investigation in connection with charges specified as follows:

"Your responsibility for your failure to perform the duties to which you were assigned at the Clinton Car Shops on Wednesday, December 9, 1964, when without permission or authority, you quit performing work on your assignment at approximately 1:00 P.M. and failed to resume work thereon, during your tour of duty that date; and,

Your responsibility for your failure to report for and performing the duties of your assignment on Thursday, December 10th, and Friday, December 11, 1964; and,

Your responsibility for your conduct inimical to the interest of the Railway Company in interfering with and or preventing the reporting for duty and or performance of work by other employes on the above dates, resulting in a suspension of production of vital equipment at said Car Shops."

Investigation of the 65 employes, including Claimant, began December 15 and concluded December 30, 1964. The record or typed transcript of the proceedings occupies some 1100 pages, and from it one may gain a very complete account of the events connected with the illegal strike above mentioned. The portion of said transcript directly concerned with Claimant's whereabouts and activities during the days of the illegal walkout is covered by some 15 pages (Employes' Exhibit B).

During the investigation or prior to assessment of discipline of the 65 employes under charges at the investigation, five resigned. The remaining 60 employes were dismissed. However, before submission of this case to the Second Division, 44 of them, upon their own request, had been returned to service on a leniency basis. Thus, of the 60 employes who were dismissed from the service as above mentioned, only 16 have not been returned to service, and of these 16 the Claimant is the only one for whom a claim for reinstatement has been progressed.

In Carrier's submission for the record this Board is informed:

"The claim for reinstatement of Mr. Hart has been declined on the basis that the evidence brought out at the investigation clearly shows that he participated in an illegal walkout on December 9, 1964, failed to report for duty on December 10 and 11, 1964, and was one of the leaders in this illegal strike, even though he knew the walkout was illegal and unauthorized, and that a Federal Court order had been issued enjoining the continuance of the strike."

The credibility of the witnesses and the weight of their testimony was for Carrier, and they are not matters for this Board to consider or decide. As was said in Second Division Award 3676:

"It is well settled that where the record contains substantial evidence in support of the carrier's findings and there is no showing of arbitrary action, this Board will not weigh the conflicting evidence and substitute its judgment for that of the trier of facts."

Further, as to the discipline imposed we find among the authorities cited in argument the passage so often quoted from Second Division Award 1323 of Referee J. Glenn Donaldson:

"There is undoubtedly room here for differences of opinion whether in view of claimant's past record and the circumstances of this case that outright dismissal from service was dictated. Be that as it may, it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion."

And, with reference to the situation we are now considering, as was said in Award 1323, "such a case for intervention is not presently before us." Here, also, we are of the opinion that the record is adequate to support the penalty assessed. However, as Special Board of Adjustment No. 431 observed in closing: "An appeal for leniency should be addressed to the carrier."

The Board is unable to sustain this claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May, 1967.