

Award No. 5336

Docket No. 5145

2-C&O-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William H. Coburn when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region)**

DISPUTE: CLAIM OF EMPLOYEES:

1. Carman Roscoe Lewis, was unjustly dealt with and his service rights violated when dismissed from service of the Chesapeake and Ohio Railway Company under date of April 30, 1965.

2. That accordingly, the Chesapeake and Ohio Railway Company be ordered to restore Carman Lewis to service with full unimpaired seniority, hospital and insurance coverage for himself and family, vacation rights and all days credited as qualifying days for vacation, compensated for all time lost, including overtime he could have worked if permitted to remain in service.

EMPLOYEES' STATEMENT OF FACTS: Carman Roscoe Lewis, hereinafter referred to as the Claimant, was regularly employed as such by the Chesapeake and Ohio Railway Company, hereinafter referred to as the Carrier, in its yards at Fostoria, Ohio on the third shift, with a work week Friday through Tuesday, rest days, Wednesday and Thursday. The Carrier's Fostoria Yards is an interchange point where cars are interchanged from other roads to the C&O lines, cars are switched and repaired.

The Claimant was charged with failure to perform work on March 9 and 10, 1965, and was notified to attend investigation scheduled for March 25, 1965 at 1:30 P. M. to arrange for representatives and witnesses if desired. Due to the Claimant being confined to the hospital on March 25, 1965 the Local Chairman T. J. Reamsnyder requested postponement of the investigation. The investigation was rescheduled for April 1, 1965.

March 27, 1965 the Local Chairman requested that the investigation be rescheduled for the week of April 12th. Said request was granted and the investigation was scheduled for April 13, 1965; 1:30 P. M.

All data herein submitted in support of Carrier's position has been presented to the Employes or duly authorized representatives thereof and made a part of the question in dispute.

An oral hearing before the Board is not requested unless the Employes should request such hearing, in which event Carrier should have advance notice thereof.

(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 were given due notice of hearing thereon.

Claimant was formally charged with "... failure to perform your work on March 9th and 10th, 1965." After the investigation, he was found guilty as charged and dismissed from the service of the Carrier.

A review of the entire record, including the transcript of the aforesaid investigation, leads the Board to the conclusion that the Carrier's finding of "guilty as charged" cannot be sustained for two reasons: First, there is no substantial evidence to support the specific charge upon which Claimant was tried and found guilty, and, second, the conduct of the presiding official at the investigation was prejudicial to the Claimant's contractual right to a fair trial.

As has been noted, the charge made against Claimant was that he failed to perform his work. What the evidence establishes, however, is that while he was instructed to inspect certain cars at 11:55 P. M. on March 9th Claimant did not actually commence work on that assignment until 1:15 A. M. It is also shown that he completed the inspection at about 1:55 A. M. Manifestly, these facts cannot be held to support the charge that Claimant failed to perform his work. And it is now too well established to require citation of authority that an accused employe is answerable only to the specific charge made against him, as is the corollary principle that the burden of proving the guilt of such employe by substantial evidence supporting the charge as made is upon the carrier. That evidence is lacking here. The Board finds, therefore, that the Carrier's finding of guilty as charged in this case is not supported by the evidence and, accordingly, cannot be sustained.

Moreover, the transcript of the investigation reveals that a request timely made by a representative of the accused employe to cross-examine each Carrier witness at the conclusion of his direct testimony was denied by the official conducting the hearing. We hold that this denial prejudiced the right of the accused to a fair trial. Effective cross-examination is the best test yet devised for ascertaining the credibility of the testimony of a witness. And to be effective, cross-examination must necessarily follow immediately upon the conclu-

sion of the direct examination. As Professor Wigmore says, "... the cross-examination immediately succeeds in time the direct examination. In this way the modification or discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses, to diminish or conceal their force."¹ To deny cross-examination until after all the proponent's witnesses have testified, as was the case here is to deny the opponent of his fundamental right **effectively** to test the veracity of the witness and to elicit facts bearing upon the weight to be given his testimony by the tribunal hearing the case. We conclude therefore, that the official conducting the investigation committed prejudicial error when he refused, upon request, to permit Claimant's representative to cross-examine each of the Carrier's witnesses immediately upon conclusion of direct examination.

The Board is not unaware, however, of the fact that the Claimant's own malingering conduct was the sole and direct cause of the disciplinary action taken. The Board cannot and does not condone such conduct under any of the circumstances present here. Claimant was under the duty and obligation to respond promptly to instructions from proper authority. It is clear that he failed to do so for no valid reason. The record also establishes that this was not the first time Claimant had been found guilty for failure to comply with instructions.

In view of the foregoing, the Board finds that Claimant shall be reinstated in the service of the Carrier with seniority and vacation rights unimpaired but without compensation for time lost or any other monetary damages claimed.

AWARD

Claim disposed of in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 6th day of December, 1967.

¹Wigmore on Evidence, 3rd Ed., Sec. 1368.