

Award No. 5467
Docket No. 5245
2-C&NW-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

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

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Machinist Joseph Sterkowicz was unjustly dealt with and dismissed from the service of the carrier on August 5, 1965, and discharged on August 9, 1965, at Chicago, Illinois.

2. That accordingly the Carrier be ordered to restore claimant to service with seniority rights unimpaired; compensate him for all time lost, plus 6 per cent interest; make whole for all vacation rights; premiums paid for all hospital, surgical and medical benefits; pay premiums for Group Life Insurance, which would have accrued had he not been so unjustly dealt with and subsequently discharged.

EMPLOYEES' STATEMENT OF FACTS: Machinist Joseph Sterkowicz, hereinafter referred to as the claimant, was employed by the Chicago and North Western Railway Company, hereinafter referred to as the carrier, in April, 1928, at Chicago, Illinois, and remained in the service of the carrier until dismissed August 5, 1965, a period of 37 years. During this 37 years claimant had a discipline free record with the carrier.

At the time of dismissal claimant held a regular assignment as an operator of Boring Mill, at the carrier's locomotive shops in Building M-6-A, Chicago, Illinois, under the supervision of Foreman Nelson.

Following conference with General Foreman Mittmann on August 5, 1965, claimant was given notice to appear for investigation on August 6, 1965, under the signature of General Master Mechanic A. A. Enders (submitted as employees' Exhibit A).

a clear and present danger in complying with the instructions. Complying with the General Foreman's instructions to take a physical examination did not involve any clear and present danger to the claimant, nor did the employees contend at the investigation or at anytime during the handling on the property that compliance with such instructions involved any danger to life or limb. The General Master Mechanic's refusal to permit testimony at the investigation concerning grievances which were not relevant or material to the investigation did not deprive the claimant of a fair hearing.

In any event, even if there were any support for the claim in this case, it will be noted that there is no support in the agreement for that portion of the claim for six per cent interest and fringe benefits. It will be noted that Rule 35 of the applicable agreement provides in pertinent part:

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

In Second Division Award No. 1638, this Division held that in computing "regular time lost", outside earnings while out of service should be deducted. The request for payment of interest plus premiums for health and welfare benefits is, in effect, a request for a new rule, which this Board has no jurisdiction to allow.

The claim should be dismissed on the basis that it is barred by the time limit rule. In any event, there is no support for the claim, and it should be denied.

All information contained herein previously has been submitted to the employees during the course of the handling of this case on the property and is hereby made a part of the particular question here in dispute.

Oral hearing before the Second Division is waived, provided the employees also waive hearing, and with the understanding that the carrier will have the opportunity to file a written reply to the employees' submission, and if a referee is appointed, the carrier will be given a hearing before the Division sitting with a referee.

(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 employee or employees involved in this dispute are respectively carrier and employee 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.

This is a discipline case, and the essential facts are not in issue. Claimant, a Boring Mill operator with thirty-seven years' seniority with the Carrier, refused to report to Carrier's Dispensary for a physical examination on August 5, 1965, pursuant to the instructions of his foreman. On the same

date, he was notified to report for an investigation on Friday, August 6, 1965, in connection with the following charge:

"Your responsibility of insubordination in your refusal to obey Direct Order given by Mr. H. Mittmann on August 5, 1965 at 8:00 A. M., DST."

Subsequent to the investigation on August 6, 1965, claimant was dismissed by Carrier on August 9, 1965. An appeal ultimately was filed on the property on October 21, 1965, which Carrier here contends was untimely under the provisions of Article V, paragraph 1(a) of the August 21, 1954 Agreement. Petitioner urges that claimant be reinstated with all rights unimpaired, and contends that claimant did not receive proper notice of the charge against him; that the investigation was neither fair nor impartial; that Carrier had no authority to order claimant to take a physical examination; and that the penalty imposed was unduly harsh and excessive even if claimant is found guilty as charged by Carrier.

Initially, Carrier urges that the claim is barred under the time limit rule (Article V of the August 21, 1954 Agreement) since no claim for claimant's reinstatement was presented within 60 days on the property when the claim was originally denied by Carrier's General Master Mechanic, but was not raised again during subsequent proceedings on the property. In view of the foregoing, we must conclude that Carrier's failure to reiterate this procedural objection throughout consideration on the property constitutes waiver, and the merits of the dispute are properly before us.

Petitioner contends that the investigation was neither fair nor impartial because (1) the notice of charges was vague and indefinite; (2) a single company official signed the notice of investigation as well as the notice of discipline, and also served as the hearing officer; and (3) Petitioner was not permitted to introduce evidence concerning the alleged need of a machinist helper to assist the claimant on the Boring Mill.

Analysis of the record reveals that the notice received by the claimant was sufficiently explicit to advise claimant of the charges against him; that no rule of the agreement prohibits the use of a single Carrier official in several capacities as in this case when such official is not a principal witness against the accused, and his demeanor and conduct of the investigation do not prejudice the rights of the accused; and, finally, that the exclusion of certain evidence offered by the Petitioner at the investigation on the grounds of relevancy does not in this constitute reversible error. The charge was insubordination, and we find no evidence of prejudice or bias which would warrant a finding that the investigation was other than fair and impartial.

As to the merits of the dispute, Claimant was dismissed from service for refusing to comply with Carrier's direction that he report for a physical examination. He refused to do so on the theory that Carrier had no authority to require him to report for such a physical examination. Regardless of the merits of his contention, claimant was obligated to comply with Carrier's direction and invoke appropriate recourse under applicable provisions of the controlling Agreement. Awards 1459 and 4782. Under the circumstances, Claimant's disobedience amounted to insubordination as alleged by Carrier.

Although claimant's refusal to comply with the instructions of his supervisor constitutes a serious offense in the absence of any evidence that compliance would have jeopardized his health or safety, the imposition of the ultimate penalty of dismissal in this case for a single act of disobedience was unreasonable, arbitrary and capricious.

Claimant was not advised that his refusal to comply with the instructions might result in dismissal from service, and his initial reaction to the disputed instructions might have been anticipated by Carrier in view of the events which immediately preceded Carrier's direction that claimant take a physical examination. Furthermore, the record reveals that claimant apparently had an unblemished record prior to the instant dispute over a period of thirty-seven years, which Carrier should have considered when imposing discipline. Consequently, we find a valid basis here for substituting our judgment for the unwarranted and excessive disciplinary action taken by Carrier.

Petitioner seeks Claimant's reinstatement with seniority rights unimpaired and compensation for all time lost from the date of discharge as well as 6 per cent interest on such back pay; accrued vacation benefits; accrued premiums paid for all hospitalization, surgical and medical benefits; and payment of accrued premiums for group life insurance. Under the particularly circumstances of this case and prior awards of this Division concerning compensation payments, we will confine the applicable remedy to reinstatement with seniority rights unimpaired and compensation for net wage loss, if any, from the date of Claimant's dismissal from service.

AWARD

Claim sustained to the extent stated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June, 1968.