



Award No. 5491

Docket No. 5187

2-CRI&P-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Machinists)**

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

That Machinist Helpers Louis Konrath and Frank Billoti were unjustly suspended from the service of the Carrier for a period of sixty days from the 15th day of May, 1965 until July 14, 1965 as the result of an investigation held April 19, 21, 22, and 27, 1965 and that, because of the unjust suspension, Machinist Helpers Konrath and Billoti be paid for the days, Monday through Friday, for the period from May 15, 1965 to July 14, 1965 at the prevailing rate of pay for Machinist Helpers; further, that the Carrier make payment of the regular premiums to the Travelers Insurance Company for the protection of these employees as provided by the agreement between the Carrier, the Organization, and the Travelers Insurance Company; further, that the Carrier pay an additional eight hours' pay at straight time rate of pay for machinists helpers to Louis Konrath as birthday-holiday pay for his birthday on July 12, 1965 as provided for by agreement dated February 4, 1965 between the Carrier and the Organization.

EMPLOYEES' STATEMENT OF FACTS: Mr. Joseph Pollaro, the claimants' supervisory officer and a foreman well known to the employees and their representative organizations for his arbitrary arrogance and vengeful capriciousness, did, on April 7, 1965 and April 12, 1965 intimidate and coerce by means of threats of managerial retaliation Machinist Helpers Louis Konrath and Frank Billotti into laying off from work on April 8 and 13, 1965 to perform work on his recently inherited farm. The Carrier's management had prior knowledge of Mr. Pollaro's intended misuse of managerial authority but did not take any action to protect the employees involved from such coercion, and allowed them to become emeshed in a situation which led to notices of investigation being sent to Messrs. Konrath, Billoti and Pollaro. Mr. Pollaro resigned prior to the hearing, with no further action being taken against him by the Carrier. Machinist Helpers Konrath and Billoti were assessed with

The same principle has been covered in First Division Award 16266 which held:

Claimant, discharged for violation of Rule 93, contended that another employe was a fault. "With regard to claimant's second position, we conclude that it has no merit because it is generally the rule that failure of others to perform a duty, if true, would not excuse claimant or relieve him of responsibility if, as found by carrier and hereafter sustained, he violated Rule 93 and thereby contributed to or proximately caused the accident.* * *"

In any case, the discipline assessed these employes cannot, under these circumstances, be considered as capricious or arbitrary. It is, if anything, quite lenient considering the facts developed in this case. Your Board has long held it will not substitute its judgment for that of management unless there is a clear showing that such discipline was capricious, arbitrary or unjust.

Therefore, the carrier submits that this case be denied. It is hereby affirmed that all of the above has been made a matter of correspondence or is known to the Employes.

(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.

The claimants, two machinist helpers, were suspended for sixty days for "their responsibility in failing to report for work and claiming pay for time not worked on April 8 and 13, 1965." The employes claim that these suspensions were unjust (1) because of the manner in which the carrier extracted confessions from the claimants, (2) because the claimants were coerced by the claimants' foreman, and (3) because the employes were not permitted to delve into the circumstances surrounding the carrier's discovery of the claimants' misconduct.

The carrier, in addition to denying these contentions, argues that this case is not properly before this Board because a required conference was not held. Such a conference was scheduled by the carrier at the request of the employes. At this conference, the carrier's representative was not familiar with the case, and he agreed to schedule a further conference. When the carrier failed to act and the employes inquired about the conference, the carrier replied that, while it would meet as an accommodation to the employes, "the matter is now closed under the agreement."

Under these circumstances, we find that the employes had sufficiently carried the matter through the conference required by the agreement. They

were not required to participate in a meeting after the matter was considered closed and where their standing would be one of grace, not right.

At their hearing the claimants admitted that on the two days in question they had worked on their foreman's farm instead of reporting for work as they were scheduled to do. They further admitted that on each of these occasions they had signed a time card for the day they were to be at the farm and had left the card in the time rack where it could be stamped in and out the following day by someone else. The claimants contended that they had performed these acts at the direction of their foreman because they were afraid he would punish them by having them transferred or fired. They claimed that they did not intend to accept any pay from the carrier for the time they had worked on the farm.

The claimants' admissions at the hearing were confirmed by statements taken from them after they had been brought to the carrier's offices by the investigators who found them at the farm. The employees argue that in taking these statements the investigators arrested and detained the claimants in violation of their constitutional and civil rights. The question of whether the actions of the investigators exceeded the permissible control of an employer over his employees at times they are supposed to be or are on the clock is before this Board only to the extent necessary to determine whether the claimants were accorded the "fair hearing" to which they were entitled under the agreement. Beyond this, the redress of the individual civil and constitutional rights of the claimants must be sought before some other forum than this Board.

In evaluating whether the claimants were afforded a "fair hearing" the employees urge us to follow the standards laid down by the United States Supreme Court for criminal cases. In support of this contention they cite Joseph Lazar's article **Due Process on the Railroads** (Inst. of Ind. Rel., University of Cal., 1958) in which he concluded on the basis of his analysis of First Division awards that "the constitutional requirements of due process of law are fundamental prerequisites which must be observed in the administration of discipline." However, as Dr. Lazar recognized in his article, page 14, a disciplinary hearing "is not a criminal proceeding" and "strict rules of evidence do not apply." Moreover, the vindication of other constitutional rights by exclusion of evidence resulting from their violation no matter how slight the effect of such violation on the outcome of the trial is a proper consideration for the Supreme Court, but not for this Board whose jurisdiction is far more limited.

We therefore reaffirm that the Supreme Court's standards for criminal trials are not conclusive on the question of a "fair hearing" in a discipline case. As we have often stated, our inquiry in a discipline case is whether the employee has been afforded an adequate opportunity to rebut the evidence against him and to present evidence in his defense. Since in this case the claimants admitted at the hearing substantially the same facts contained in their statements, we find that the claimants' opportunity to present their case was not affected by the introduction of their statements and that it is therefore not necessary for us to determine the propriety of introducing such statements. See, e.g., Award 3-8711 (Weston).

The fact that the claimants were bullied into these acts by their foreman does not excuse these acts or estop the carrier from disciplining them for

such acts as long as the carrier did not knowingly permit the foreman to misuse the claimants. There should have been no doubt in their minds about the foreman's lack of authority to require such acts of them. In the absence of acquiescence by the carrier, it cannot be said that the discipline is so incommensurate with the admitted acts viewed in the light of the claimants' records and the role played by the foreman that it appears that the carrier was acting on the basis of personal animosity toward the claimants. E.g., Award 2-5358.

Such discipline, however, would be improper if the carrier knew of the foreman's intent to misuse the claimants and did nothing to prevent it. There is no substantial evidence on this question in the record before us. The employees, however, did make a limited attempt to develop this question at the hearing. At the hearing the employees sought to determine how the carrier knew that the claimants worked on the farm the first day, but were rebuffed by the hearing officer. They also attempted to question the investigators about why they went to the farm to look for the claimants, but were unable to elicit a definite response. The employees were entitled to pursue this question at the hearing. Considering the nature of the question and the division of the responsibility for the failure to develop it fully at the hearing, we find that this case should be remanded for a further hearing on the question of the carrier's knowledge of what the foreman was doing.

AWARD

The parties are directed to conduct a hearing in accordance with the above paragraph and to report the results of that hearing to this Board within sixty (60) days from the date of this Award.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1968.