Award No. 5988
Docket No. 5758
2-AT&SF-MA-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (Coast Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current controlling agreement Machinist William F. Gauvin and Machinist William D. Channel of Barstow, California, were improperly and unjustly removed from the service of the AT&SF Railway Company on November 28, 1967.

2. That accordingly the carrier be ordered to reinstate these employes to service with all seniority, service rights, all net wage loss, and payment in lieu of all other accrued contractual benefits to which otherwise entitled had they continued to remain in carrier service dating from their improper removal on November 28, 1967.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the AT&SF Railway Co., hereinafter referred to as carrier, and System Federation No. 97, Railway Employes' Department, AFL–CIO, representing among others the International Association of Machinists and Aerospace Workers, parties to this dispute, identified as "Shop Crafts Agreement", effective August 1, 1945, as subsequently amended, (reprinted January 1, 1957, to include revisions), a copy of which is on file with the Second Division, National Railroad Adjustment Board, which is controlling and is hereby referred to and made part of this dispute.

William F. Gauvin and William D. Channel, hereinafter referred to as claimants, were employed by the carrier as machinists on October 5, 1962, and September 16, 1966, respectively, at Barstow Shop which is a large diesel locomotive repair, maintenance and servicing facility employing, among many others, in excess of 350 mechanics, helpers and apprentices represented by petitioning labor organization.

Claimants were removed from carrier service on November 28, 1967, by letter notice of same date charging each with falsifying their application for

"If the final decision shall be that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with seniority rights unimpaired, and **compensated for the net wage loss,** if any, resulting from said suspension or dismissal." (Emphasis ours.)

Attention in this connection is also directed to Second Division Awards 1638, 2653, and 2811, Third Division Awards 6074 and 6362, and Fourth Division Award 637.

Particular attention is further directed to Item 2 of the employes' claim reading:

"2. That accordingly the carrier be ordered to reinstate these employes to service with all seniority, service rights, all net wage loss, and payment in lieu of all other accrued contractual benefits to which otherwise entitled had they continued to remain in carrier service dating from their improper removal on November 28, 1967."

It will be observed that Rule 33½, paragraph (d), which is quoted in the preceding paragraph, provides that if the final decision shall be that an employe has been unjustly suspended or dismissed from the carrier's service, "such employe shall be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal." Neither that rule (Rule 33½) nor any other rule of the Shop Crafts' Agreement contemplates or provides for payment of "and payment in lieu of all other accrued contractual benefits" as requested in Item 2 of the employes' claim quoted hereinabove. See in this connection Second Division Award No. 3883.

In conclusion, the carrier submits that each investigation transcript fully supports carrier's action in dismissing from its service Messrs. Channell and Gauvin account falsification of application papers. Moreover, carrier reasserts that the petitioning organization defaulted under the time limit rules when it failed to properly file claims subsequent to the date of the occurrence, i.e., January 5, 1968.

The carrier is uninformed as to the arguments the Brotherhood may advance in its ex parte submission, and accordingly reserves the right to submit such additional facts, evidence or argument as it may conclude are necessary in reply to the Brotherhood's ex parte submission or any subsequent oral argument or briefs presented by the Brotherhood in this dispute.

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.

Claimant Gauvin was employed by Carrier as a Machinist at its Barstow Shop on October 5, 1962; and, was so employed at all times material herein.

Claimant Channell was employed by Carrier as a Machinist at its Barstow Shop on September 16, 1966; and, was so employed at all times material herein.

In each of their respective employment applications the following was part thereof:

> "Have you ever been convicted of a crime? .....
> If so, give details. ....."

and

> "Do you fully understand and agree that **any false statement** or misrepresentation herein of a material nature **will justify and cause your dismissal from the service** regardless of when such fact may have been discovered by the company or any of its agents? ....." (Emphasis ours.)

The application in each instance was on form 1692. Evidently because of revision of the form occurring between 1962 and 1966 the identical quoted question was asked; but, the agreement as to cause for dismissal was Item 31 in Gauvin's application; Item 29 in Channel's. Both Claimants each answered the question in the negative.

Under date of November 28, 1967, Carrier wrote to each Claimant:

> "Effective with receipt of this letter and the receipt of the letter of notice of investigation to be held on December 7, 1967, to determine the facts and place responsibility, if any, for falsification of your application, Form 1692 Standard, you will be **removed from the service** of this Company **pending the investigation.**"

Enclosed with that letter Carrier served the following Charge and Notice of Hearing on each of the Claimants — the hearing for Gauvin at 10:00 A. M. — the hearing for Channel at 2:00 P. M. on the same date:

> "Please arrange to appear for formal investigation in my office at 10:00 A. M., December 7, 1967, to develop the facts and place responsibility, if any, in connection with your falsification of Item 19 of your employment papers with the Santa Fe Railroad on Form 1692 Standard, which reads as follows: 'Have you ever been convicted of a crime?' Item 31 of Form 1692 Standard reads as follows: 'Do you fully understand and agree that any false statement or misrepresentation herein of a material nature will justify and cause your dismissal from the service regardless of when such fact may have been discovered by the company or any of its agents?'
>
> You should arrange, if desired, representation in line with the 'Discipline' rule of the Agreement covering your working conditions. You may arrange for the presence of any witnesses you may desire to participate in your behalf.
>
> Please acknowledge receipt of this letter on the copy provided."

On motion made by the Local Chairman and granted the hearings' date was postponed to December 11, 1967.

Claimant Gauvin did not appear at the hearing. At its opening General Chairman Irwin handed Hearing Officer Hiatt a letter addressed to Superintendent of Shops bearing date of December 10, 1967, and the following colloquy and action of Organization's representative occurred:

> "At 10:05 A. M., December 11, 1967, Messrs. W. A. Irwin, M. E. Melvin, D. L. Maurer, L. W. Jackson arrived in the office of Superintendent of Shops, Barstow, California. Also present in the office at this time were Mr. Hiatt, Locomotive Maintenance Supervisor R. H. Berry and Special Agent B. A. Cannon from the Los Angeles Office.
>
> Mr. Irwin presented a letter to Mr. Hiatt, which Mr. Hiatt read.
>
> MR. HIATT: Well, Mr. Irwin, I am in receipt of your letter and as far as I am personally concerned, the investigation will go on as scheduled, recognizing that the two men, particularly Mr. Gauvin at this time, did not show up for the investigation.
>
> MR. IRWIN: Neither Mr. Gauvin this morning or Mr. Channell this afternoon, or no representative of the Organization will participate for reasons set forth.
>
> MR. HIATT: Well, in that case, then, I assume that as far as you are concerned, the investigation is over and you will not represent these men.
>
> MR. IRWIN: I take the position as I said in the letter that any investigation is not recognized since these men, since both Mr. Channell and Mr. Gauvin no longer are employes of this Carrier, they have already been removed from the service.
>
> MR. HIATT: Then as far as you are concerned, the investigation is over?
>
> MR. IRWIN: That I have no response in it. Whatever the Carrier cares to do in regard with the investigation, of course, is up to them.
>
> * * * * *
>
> Messrs. Irwin, Melvin, Maurer and Jackson left the office at 10:10 A. M."

Thereafter the hearing proceeded in the absence of Claimant or his representatives.

Claimant Channel nor his representatives did not appear at the hearing scheduled for 2:00 P. M. Again the hearing proceeded in the absence of the Claimant.

Under date of January 5, 1968, Carrier transmitted by Certified Mail its findings of guilt as charged and assessment of discipline — "dismissed from

the service." The letters addressed to each Claimant, other than for inconsequential detail, were in substance the same. The letter addressed to Claimant Gauvin reads:

> "As a result of formal investigation held in the office of Superintendent of Shops, Barstow, California, at 10:25 A. M., December 11, 1967, the investigation has developed that you falsified Item 19 of Form 1692 Standard, which is your employment application paper, and you agreed to Item 31 of Form 1692 Standard which reads as follows: 'Do you fully understand and agree that any false statement or misrepresentation herein of a material nature will justify and cause your dismissal from the service regardless of when such fact may have been discovered by the company or any of its agents?'
>
> This is to advise that you are dismissed from the service of the Santa Fe Railway."

The following excerpt from a letter addressed to General Chairman Irwin from Hearing Officer Hiatt stands uncontroverted in the record:

> "After full consideration had been given to the facts developed in the investigations, written notice dated January 5, 1968 was addressed to each Mr. Channell and Mr. Gauvin, by Certified U. S. Mail, advising them that they were being dismissed from service for falsification of application. On January 6, the Post Office notified Mr. Channel that this Certified letter was at the Post Office but he did not call for same and the letter was returned to the Company with advice that delivery was not accepted. Similar notice was sent to Mr. Gauvin by the Post Office on January 5, but notwithstanding that Mr. Gauvin received this notice, he did not accept delivery of the letter and it was likewise returned to the Company by the Post Office because delivery was not accepted."

The letter dated December 10, 1967 from General Chairman Irwin to the Superintendent of Shops which was handed by Irwin to Hearing Officer Hiatt at the opening of the Gauvin hearing and made part of the record in that hearing and also the Channel hearing reads:

> "We charge the carrier with improperly endeavoring to hold formal investigation on December 11, 1967, against ex-carrier employes Mr. William D. Channell and Mr. William F. Gauvin whom were removed from carrier service as Machinists at Barstow, California, per carrier's letter dated November 28, 1967, directed to each now ex-employe above named.
>
> As ex-employes whom by the carrier's own admission were removed from service on November 28, 1967, Mr. Channell and Mr. Gauvin, hereinafter referred to as Claimants, are **no longer subject to respond to directives and/or instructions issued by the carrier.**
>
> The belated and no longer valid formal investigation rescheduled for December 11, 1967, which the carrier is now striving to hold is a development, however improper, **after the fact** of Claimants' prior removal from carrier service on November 28, 1967.

Although Rule 33½ of the Shop Crafts' Agreement dated August 1, 1945, and subsequently amended, provides that an employe may, in proper cases, be suspended, repeat **suspended,** from service pending a formal investigation, Claimants were not, in fact, suspended from service but, on the basis of carrier's own letter dated November 28, 1967, were actually removed, repeat **removed,** from service on that date and thus separated from their employment without first being accorded a formal investigation to which they were properly entitled to receive prior to their removal from service.

In its letter of November 28, 1967, removing Claimants from service, the carrier, on basis of fact of record, has already **predetermined and prejudged these ex-employes** due to the composition of its letter above referred to which is lacking in reference by inference or otherwise to alleged, repeat **alleged,** guilt or responsibility.

Due to the foregoing we further charge the carrier with improperly and arbitrarily removing Claimants from service without first according them the benefit of a formal investigation in violation of Rule 33½ of the Shop Crafts' Agreement and in direct contravention of applicable sections of the Railway Labor Act and Laws of the State of California governing in such situations.

As a consequence of carrier's obviously improper and arbitrary action in this regard, we **ask that Claimants be exonerated of all charges preferred against them in this connection and that they be restored to carrier service** with all seniority, service rights, all net **wage loss,** and payment in lieu of all other accrued contractual benefits to which otherwise entitled had they continued to remain in carrier service subsequent to their removal therefrom.

In view of carrier's prior removal of Claimants from service, any further action taken by the carrier against these ex-employes on account of alleged and unproven charges causing rise of instant dispute **will logically be considered not only highly improper, inequitable and discriminatory, but will also constitute placing these ex-employes in double peopardy by perhaps having to again answer to the carrier in connection with alleged charges resulting in their prior and improper removal from carrier service.**

Kindly acknowledge and advise."

Discipline Rule 33½(a) provides in part: "**Suspension** in proper cases pending a hearing, which shall be promptly held, will not constitute a violation of this rule." At no time was the application of this provision attacked by the Organization as not being applicable in the discipline actions initiated by Carrier in which Claimants were made respondents. Instead, the premise of Organization's attack was addressed to the phrase in each of the letters to Claimants dated November 28, 1967: "you will be **removed** from the service of the Company **pending the investigation.**" This phrase on its face clearly communicates a "Suspension" from service "pending a hearing"; not a termination of the employer-employe relationship. Organization's attempt to distinguish "removal" from "Suspension" is a display of obtrusive semantics. We, therefore, find that the letters of November 28, 1967, did not terminate

Claimants' employment by Carrier as Organization contends; and, Claimants, consequently, continued obligated to comply with the terms of the collective bargaining agreement.

Grievances are initiated by an employe or by a representative on his behalf; discipline proceedings are initiated by the Carrier whose management prerogatives in such cases are contractually limited only to the extent prescribed in Rule 33½. Once a discipline proceeding is properly initiated by Carrier in compliance with the Rule the sole forum in which the merits of the charge can be initially attacked is in the hearing. Any attempt by the employe or his representative to introduce evidence as to the merits after the close of the hearing comes too late unless the employe can show newly founded evidence unknown to him at the time of the hearing. If the involved employe(s) is of the opinion that: (1) the employe(s) was denied due process; or, the findings made by the Hearing Officer are not supported by substantial evidence; or, discipline assessed is unreasonable, the employe(s) recourse is appeals procedure "in the usual manner" on the property; and, that procedure being satisfied the dispute may be referred by petition to this Board. See Section 3, First (i) of the Railway Labor Act. Throughout the course of the procedures the suspended (removed) employe(s) rights are fully protected in that Rule 33½(d) provides that "an employe * * * unjustly suspended or dismissed from the service * * * shall be reinstated" and made whole.

We held, in no uncertain terms in our Award 5987, involving the parties herein, that an employe, having been served with charge and notice of hearing, who absents himself from the hearing without just cause, acts at his peril in that he waives the right to make motions and objections, adduce evidence in his behalf and cross-examine Carrier's witnesses and make oral argument. Further, the findings and assessment of discipline by Carrier, under such circumstances, can be attacked on his appeal only on the basis of the record made in the hearing.

In the instant case we find that: (1) Claimants were afforded due process; (2) Carrier's findings of guilt as charged, as to both Claimants, is supported by substantial evidence; and (3) the discipline assessed was as provided for in Claimants' employment contract.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of September, 1970.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.