Award No. 6067
Docket No. 5936
2-N&W-MA-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it improperly discharged Machinist E. E. Harvey, Decatur, Illinois, on October 30, 1968 as a result of investigation held on October 29, 1968.

2. That accordingly the Norfolk and Western Railway Company be ordered to restore Machinist Harvey to service with all seniority, vacation, insurance and all other rights and benefits unimpaired and to properly compensate him for all wage loss retroactive to date of discharge.

EMPLOYES' STATEMENT OF FACTS: Mr. E. E. Harvey, hereinafter referred to as the claimant, entered the service of the Norfolk and Western Railway Company, hereinafter referred to as the carrier, as a machinist at the carrier's locomotive shops in Decatur, Illinois on February 22, 1968.

In a letter dated October 23, 1968 and signed by General Foreman J. R. Brewer, claimant was ordered to appear in the assistant to the master mechanic's office in Decatur, Illinois at 9:30 A.M. for formal investigation account of making accusations against a foreman on October 16, 1968, at approximately 11:00 P.M. at Decatur Diesel Mileage Shop.

In a letter dated October 30, 1968 and signed by Foreman J. M. Kepler, claimant was advised that he was dismissed from the service of the carrier as a result of investigation held on October 29, 1968.

Claim was filed with the proper officer of the carrier requesting that the claimant be restored to service under the conditions set forth in employes' claim No. 2 above. Claim was handled up to and including the highest officer of the carrier designated to handle such claims, all of whom declined to make satisfactory adjustment.

From the facts adduced in this record, the carrier is firmly convinced that:

1. Claimant was given a fair and proper hearing;
2. The record made at the hearing was sufficient to support a finding of guilt;
3. The punishment rendered was not an abuse of the carrier's discretion when weighed against the claimant's period of relatively short service with the carrier and his demonstrated poor record as an employe during that short period;
4. The organization has noted no challenges to carrier's conduct in this matter which have not been adequately and thoroughly rebutted herein; and, finally,
5. This record completely vindicates carrier's handling of this matter.

The claim should be denied in its entirety.

It would be unrealistic, and certainly not reflective of the record, to believe your Board, after consideration of the evidence presented, would render a decision favorable for the employes. However, if this claim should be sustained, compensation for wage losses can only be for the difference between what the claimant would have earned with the company and what he in fact earned in other employment during the critical period. Rule 33 states, in part:

> "* * * If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

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.

When Claimant reported for work at the start of his regular third shift on the night of October 16, 1968, he was told that he could not work because of an incident that occurred during his preceding shift. He and a committeeman went to the general foreman's office to discuss the matter. During the discussion the Claimant said, with reference to his foreman, something to the effect that "I have been looking for him all day and couldn't find him, but I am going to get him sometime." This was the remark that brought the dismissal, which was based on a charge of "making accusations against a foreman" and occurred after the employe had been allowed to return to work for four days.

The Organization contends that the charge was vague, and that there was no evidence that the Claimant made any accusation. The Carrier contends that the record of the hearing supports its finding that Claimant was guilty of making threatening accusations and that the penalty imposed was reasonable in view of the Claimant's brief service and poor record.

The Organization's contention that the charge against the Claimant was vague and imprecise cannot be accepted. The notice of hearing clearly stated the charge as "making accusations against a foreman" and listed the time and place of the incident.

At the hearing held on the property there was testimony from three witnesses: the general foreman (to whom the remark was addressed), another foreman (who was present in the same room), and the employe's own foreman (who overheard the conversation from an adjoining room). In searching the hearing transcript for evidence of any accusation, we must bear in mind the meaning of that term. Its definition is covered in a letter from the Carrier to the Organization, quoting from four dictionaries and showing that the most common definition is "a charge of wrongdoing." Nowhere in the record do we find any mention by any of the witnesses of any charge of wrongdoing made by the claimant against his foreman. Claimant's statement appears to imply that he felt his foreman was guilty of wrongdoing, but no such charge was voiced. In fact, all three witnesses stated on cross examination that they heard no accusation.

QUESTION: What did Mr. Harvey accuse Mr. Boyd of, Mr. Brewer?

GENERAL FOREMAN: Nothing. He accused him of nothing. Just threatened him. . . .

QUESTION: Mr. Schnetzler, what accusation did Mr. Harvey make about Mr. Boyd?

FOREMAN: He said he had looked for him all day.

QUESTION: What did he accuse Mr. Boyd of doing?

FOREMAN: I never heard anything. . . .

QUESTION: Mr. Boyd, was anybody accused?

EMPLOYE'S FOREMAN: No, not to me, no, sir.

Careful study of the transcript shows that the subsequent finding of the Carrier that the Claimant was guilty as charged was completely unsupported by the testimony, On the contrary, the record shows conclusively that the Claimant was not guilty of the charge placed against him. Since Rule 33 of the Agreement requires that the employe be apprised of "the precise charge", he cannot be charged with one thing and found guilty of another. "Accusation" and "threat" are by no means synonymous. The discharge, therefore, cannot be sustained.

We, therefore, order reinstatement with seniority and vacation rights unimpaired and compensation for all wages lost, less outside earnings, since

date of discharge (October 30th, 1968). This Division has consistently held that rules such as Rule No. 33 in this Agreement preclude any award with reference to insurance premiums.

AWARD

Claim sustained to the extent indicated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1970.

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