



Award No. 6173
Docket No. 6033
2-PCT(NYC)-FO-'71

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Firemen & Oilers)

PENN CENTRAL TRANSPORTATION COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated the provisions of Rule No. 24 of the current agreement when they unjustly dealt with and arbitrarily removed Classified Laborer Floyd West from the service of the Carrier for allegedly striking a fellow employe and being abusive.

2. That Classified Laborer Floyd West be compensated for all wage loss since August 6, 1968 and be returned to the service of the Carrier with seniority, vacation, health and welfare and life insurance rights unimpaired and, further, in addition to the money amounts claimed herein, the Carrier shall pay Floyd West an additional amount of 6% per annum, compounded annually on the anniversary date of the claim.

EMPLOYEES' STATEMENT OF FACTS: Floyd West (hereinafter referred to as the claimant) was employed by the Penn Central Transportation Company (hereinafter referred to as the carrier) as such on July 13, 1943, having some twenty-five years of service.

In a letter dated July 31, 1968, General Foreman Passafiume advised the claimant to appear for an investigation at 9:00 A.M., August 6, 1968, on charges set forth therein. Hearing was held on August 6, 1968. In a letter dated August 13, 1968, C. Passafiume, General Foreman, advised the Claimant he was removed from the service.

This dispute was handled with carrier officials designated to handle same, who all declined to adjust the matter. The agreement effective August 15, 1952, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that the claimant was unjustly dealt with and, accordingly, the case was handled under Rule No. 24 of the current agreement, seeking settlement and having case adjusted under

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

In the application of the above rule, the phrase "net wage loss, if any" has been interpreted to permit the deduction of outside earnings in making monetary adjustment in discipline cases. This interpretation is consistent with Awards of the National Railroad Adjustment Board typified by Second Division Award 1821, in which Referee A. E. Wenke stated, in pertinent part:

"The claim is made for 'compensation for all time lost since the aforesaid date', which is December 3, 1952. This right is qualified by the language of Rule 29 which provides he shall be 'compensated for his net wage loss, if any, resulting from said dismissal.' In other words, claimant must show, before he can recover any compensation, that his dismissal has resulted in a net wage loss and, if he does, he can recover the amount of net wage loss he establishes he actually suffered as a consequence of his dismissal."

The rule has no provisions for compensation of "all wage loss" or "seniority, vacation, health and welfare and life insurance rights unimpaired." Furthermore, it is obvious that the rule has no provision for the payment of interest and, consequently, your Board is without authority to grant any such request. In this regard, Referee Claude S. Woody, in Award 15709 of the Third Division, National Railroad Adjustment Board, had the following to say:

"... Interest pendente lite is not provided for in the Agreement between the parties in the instant case and, therefore, must be denied.

Awards 2675 (2nd Division), 6962 (3rd Division), 8088 (3rd Division), 12989 (1st Division), 13098 (1st Division) and 13099 (1st Division), support and, under the doctrine of stare decisis, control our decision item (c) of the claim."

Without in any manner waiving its position stated above, the carrier further submits that the claim for interest is improperly before your Board in that such claim was never presented on the property. Your Board, in awards too numerous to cite, has dismissed claims that were not handled on the property.

For all of the above reasons, the carrier respectfully requests your Honorable Board to dismiss or deny the employes' claim in this case.

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 advised by Carrier that:

"You are charged with conduct unbecoming an Employee in that you were abusive and did allegedly strike a fellow employe, J. R. Thomas, on July 30, 1968, at approximately 8:45 A.M., Central Time, in the Employees' Locker Room, resulting in an injury to his left eye."

At the outset, Carrier raises a procedural issue, alleging that the Claim is barred for failure of Claimant to present a timely appeal from the discipline imposed by Carrier's Master Mechanic as required by Rule 24 of the Agreement, the pertinent part thereof providing as follows:

"(a) Should any employee subject to this agreement believe he has been unjustly dealt with or any provision of this agreement violated, the case shall be taken to the foreman, general foreman, master mechanic or shop superintendent (or corresponding officials where these titles are not in effect), each in respective order, by the duly authorized local committee, or its accredited representative, within 10 calendar days. * * *"

Carrier by letter dated August 13, 1968, advised Claimant through its General Foreman that he was removed from Carrier's service effective July 30, 1968. By letter dated September 23, 1968, the Local Chairman, C. Rivers, appealed the decision to terminate Claimant's employment with Carrier to Carrier's Master Mechanic, F. D. Abate. Thus, at first blush, it would appear that the Organization failed to comply with the specific requirements of said procedural Rule 24 (a) of the Agreement. However, the organization points out that Carrier did not raise said procedural objection until the claim was progressed through to Carrier's highest designated officer, N. P. Patterson, who on December 19, 1969, in his letter to the Organization's Secretary-Treasurer, C. F. Connell, stated:

"Prior to dealing with the merit of this Claim, the record indicated the time between administration of discipline and protest by the Organization exceeded 10 calendar days."

The Organization contends that said protest of Carrier in regard to said alleged procedural defect was not raised at any time on the property prior to the last step appeal to Carrier's Director of Labor Relations, N. P. Patterson, and thus comes too late. In support of its position in this regard, the Organization has cited a number of awards, namely, Awards No. 3931 and No. 5223 of this Division, and to Third Division Award No. 11570.

In said Award No. 3931, this Board held:

"The first five Carrier officials, including the Shop Superintendent, denied the Claim on its merit without any reference to defects in procedure. Not until final denial by the Assistant to Vice President was any reference made to procedural defects under the Time

Limit Rule. That objection, if valid, therefore, came too late, as has been held under similar circumstances by many awards, including Award No. 1834."

Therefore, Carrier's contention in regard to said procedural defect is without merit and must be denied.

Concerning the merits, the Organization's position is that Carrier failed to prove that Claimant actually struck Employee Thomas as charged; that witness Jankowski testified that there was no blow struck as far as he could see; that witness Stryjewski was not positive as to what took place, because he testified that he didn't see any blow struck, and then stated that "he only saw him knocked down once"; that witness Williams testified that he didn't see anybody get hit; that the hearing officer was judge and jury in determining the discipline to the Claimant.

Carrier's position is that the discipline imposed was warranted because:

- (1) All of the witnesses testified that the Claimant barged through the door of the Employees' Locker Room and grabbed Mr. Thomas by the throat;
- (2) Messrs. Jankowski and Williams testified that the Claimant did use abusive language and appeared in a hostile attitude;
- (3) Mr. Jankowski testified that he saw the Claimant poke his thumb in Mr. Thomas' eye;
- (4) None of the witnesses categorically stated that Claimant did not strike the Claimant; and
- (5) Mr. Thomas actually sustained an eye injury as a result of the occurrence.

The record clearly discloses that Claimant was abusive toward Employee Thomas. Witness Jankowski, as well as Witness Williams, testified that Claimant used profanity toward Employee Thomas; Witness Jankowski testified that Claimant appeared to be in a hostile attitude, and Witness Williams testified that in his opinion Claimant was abusive to Employee Thomas.

Therefore, we feel that Carrier met its burden of proving that Claimant was abusive toward fellow employee J. R. Thomas.

In regard to the charge of allegedly striking a fellow employee, there is no question that Claimant came flying or barging through the door to the locker room. It is further seen from the witnesses' testimony given at the hearing that Claimant did grab Employee Thomas, and Witness Jankowski testified that he believed Claimant poked his right thumb in Mr. Thomas' eye after Claimant had grabbed Thomas by the neck or collar; Witness Stryjewski testified that Claimant, after barging in the door, went straight over to Mr. Thomas, and grabbed him by the throat or shirt. Witness Stryjewski further testified that:

"The next thing I saw was that Mr. Thomas was on the floor and started to get up, hollering that his eye hurt, and all that. I didn't

see any blow struck, but he went after him. After he was getting up the second time, Mr. Jankowski got up to break it up; but Mr. Williams got up right then and broke it up."

Although none of the witnesses, with the exception of Mr. Stryjewski, testified that they saw any blows struck, yet there is no question but that Claimant was the aggressor in a fight with another fellow employe, Mr. Thomas, and in the ensuing melee Claimant, without justification, caused personal injury to the eye of the said Mr. Thomas. There is no doubt that Employee Thomas was caused to be taken down to the floor as a result of Claimant's unwarranted aggressive actions. Therefore, Carrier was justified in concluding from the evidence taken as a whole that Claimant did in fact strike fellow employe Thomas without justification. Carrier thus met its burden of proving Claimant guilty as charged in this instance.

Claimant committed a very serious act in assaulting a fellow employe. Carrier not only has the duty to protect its employes from injury inflicted by one employe on another, but also the right to expect that its employes will not physically harm fellow employes. We thus cannot conclude that Carrier acted arbitrarily, capriciously or unreasonably when it dismissed Claimant from its service. Therefore, we must deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of October, 1971.

CONCURRING OPINION OF CARRIER MEMBERS TO AWARD NO. 6173

We concur wholeheartedly in the denial of this claim.

However, we cannot agree with the Referee's findings with respect to the time limit provisions contained in Rule 24, wherein he states:

"Therefore, Carrier's contention in regard to said procedural defect (time limit) is without merit and must be denied."

The Carrier's highest designated officer raised said procedural objection in his letter dated December 19, 1969 to the organization's secretary-treasurer reading as follows:

"Prior to dealing with the merit of this claim, the record indicated the time between administration of discipline and protest by the organization exceeded 10 calendar days."

It has been held in numerous Awards of this Board and has been endorsed by the labor organizations, that if the issue of non-compliance with the requirements of time limit provisions is raised by either party with the other at any time before the filing of a notice of intent to submit the dispute to the Board, it is held to have been raised during the handling on the property.

Therefore, we dissent to the Referee's denial of the Carrier's contention with respect to this matter.

H. F. M. Braidwood
R. E. Black
P. C. Carter
E. T. Horsley
W. B. Jones

**LABOR MEMBERS' REPLY TO CARRIER MEMBERS'
CONCURRING OPINION IN AWARD NO. 6173**

We, the Labor Members, take exception to the Carrier's statement which reads:

"It has been . . . endorsed by labor organizations, that if the issue of non-compliance with the requirements of time limit provisions is raised by either party with the other at any time before the filing of a notice of intent to submit the dispute to the Board, it is held to have been raised during the handling on the property. . . ."

as the record and the findings of Award No. 6173 point out the position of the Organizations on this subject matter. These findings read in part as follows:

"At the outset Carrier raises a procedural issue, alleging that the Claim is barred for failure of Claimant to present a timely appeal from the discipline imposed by Carrier's Master Mechanic as required by Rule 24 of the Agreement, the pertinent part thereof providing as follows:

'(a) Should any employe subject to this agreement believe he has been unjustly dealt with or any provision of this agreement violated, the case shall be taken to the foreman, general foreman, master mechanic or shop superintendent (or corresponding officials where these titles are not in effect), each in respective order, by the duly authorized local committee, or its accredited representative, within 10 calendar days. * * *'

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rier did not raise said procedural objection until the claim was progressed through to Carrier's highest designated officer, N. P. Patterson, who on December 19, 1969, in his letter to the Organization's Secretary-Treasurer, C. F. Connell, stated:

'Prior to dealing with the merit of this Claim, the record indicated the time between administration of discipline and protest by the Organization exceeded 10 calendar days.'

The Organization contends that said protest of Carrier in regard to said alleged procedural defect was not raised at any time on the property prior to the last step appeal to Carrier's Director of Labor Relations, N. P. Patterson, and thus comes too late. In support of its position in this regard, the Organization has cited a number of awards, namely, Awards Nos. 3931 and No. 5223 of this Division and to Third Division Award No. 11570.

In said Award No. 3931, this Board held:

'The first five Carrier officials, including the Shop Superintendent, denied the Claim on its merit without any reference to defects in procedure. Not until final denial by the Assistant to Vice President was any reference made to procedural defects under the Time Limit Rule. That objection, if valid, therefore, came too late, as has been held under similar circumstances by many awards, including Award No. 1834.'

Therefore, Carrier's contention in regard to said procedural defect is without merit and must be denied."

Therefore, Award No. 6173, insofar as the issue of procedure is concerned in this dispute, has the agreement of the Labor Members with the above quoted part of the Award.

D. S. Anderson
Robert E. Stenzinger
E. J. McDermott
O. L. Wertz
E. J. Haesaert