



Award No. 6232
Docket No. 6049
2-SLSF-EW-'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. 22, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the St. Louis-San Francisco Railway Company violated the current agreement when it unjustifiably removed System Communications Gang No. 12 Groundman, Virgil D. Wayman from the service of the carrier on or about June 11, 1969.

2. That accordingly, the St. Louis-San Francisco Railway Company be ordered to restore Groundman Virgil D. Wayman to the service of the carrier with pay for all time lost, seniority rights unimpaired, and all other contractual rights as afforded other employees such as vacations, insurance and etc.

EMPLOYEES' STATEMENT OF FACTS: Systems Communication Gang No. 12 Groundman Virgil D. Wayman, hereinafter referred to as claimant, was regularly employed by the St. Louis-San Francisco Railway Company, hereinafter referred to as carrier, and regularly assigned as Groundman to Systems Communication Gang No. 12 of the carrier Communications Department.

The system communication gangs of the carrier are used for reconstruction of the communication pole lines along the right of way over the system, the pole lines being owned by the Western Union telegraph company. Under contract with the carrier, the maintenance of the pole lines is performed by railroad personnel, with Western Union furnishing the material, and, in this instant case, also a Foreman.

On or about April 10, 1969, at Springdale, Arkansas, on account of carrier having erred in advising the gang employees of the train movement lineup, claimant injured himself by having to move and lift in a hasty manner as circumstances required with one other employe a heavy motor car and also a push car off the track at a crossing to avoid having the motor car and push car hit by a train, said lifting of the motor car constituting a dead lift of up to five hundred pounds and a minimum of three hundred pounds as

Notwithstanding the carrier's position as set forth in the preceding paragraph concerning the justification of carrier's action, claim as presented to your Board requests that the carrier "be ordered to restore Groundman Virgil D. Wayman to the service of the carrier with pay for all time lost, seniority rights unimpaired, and all other contractual rights as afforded other employes such as vacations, insurance and etc." As pointed out in carrier's letter of January 15, 1970, the submitted claim is at variance with that part of Rule 16 of the governing agreement which provides:

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

On the basis of the whole record and all the evidence, the Board is respectfully requested to find that Carrier's action in discharging the claimant did not violate the Agreement between the parties, and to deny the claim in its entirety.

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 was advised by Carrier on May 28, 1969 as follows:

"You are hereby notified to report for investigation at the Frisco General Office Building, Room 319, 9:00 A.M., June 5, 1969 to determine the facts in connection with your alleged violation of Maintenance of Way & Structures Rule 725, that part which reads: 'If physically able an employe injured on duty must report the injury to his foreman or other supervisory officer before leaving company premises. A report must be made of every injury, regardless of how slight.' This relating to your alleged personal injury on April 10, 1969 at Springdale, Arkansas."

Claimant received an alleged injury (hernia) on April 10, 1969 at Springdale, Arkansas, while helping set a push car and motor car off of the main line by hand in order to avoid being struck by the northbound local.

As a result of the investigation Claimant was dismissed from Carrier's service for violation of Rule 725 of the Agreement, failure to report an injury to his foreman.

The Organization is contending that Carrier violated Rule 16 of the Agreement when it failed to give Claimant a fair and impartial investigation; that Carrier did not have Claimant's accuser, Gang Foreman Bruce, present at the hearing for cross-examination; that Carrier ordered the investigation

of Claimant because he did not report the injury to office clerks or fellow employees (the Agreement does not provide that an employee report an injury other than to supervisory personnel); that inasmuch as a foreman would be subject to discipline for failure to report an injury, thus it is understandable that Carrier would be able to solicit a favorable statement from a foreman, particularly after an investigation had been ordered; that Claimant injured himself while lifting a motor car off of the track to avoid being struck by a train; that though the instant pain to Claimant subsided, Claimant reported the injury to his foreman during the noon hour, but that the foreman concluded that the injury was insignificant and saved himself the paper work and trouble of reporting it to higher officials; that it is logical to assume that the injury did occur on April 10, and, being a strain-type of injury, did not show up again until April 13, 1969, while Claimant was lifting a rabbit hutch.

Carrier's position is that Claimant's failure to report the injury not only violated Maintenance of Way & Structures Rule 725, but also Rule 23 of the Agreement, because of his failure to report the alleged on-duty injury either prior to or when he was in the office of the General Superintendent Communications and Signals on Tuesday, April 15, 1969, arranging for a leave of absence; that on the basis of the whole record and all the evidence, Carrier's action in dismissing Claimant from its service was justified; that the claim as presented is in variance with Rule 16 of the Agreement in regard to damages asked for the claim.

We are confronted in this dispute with the issue as to whether or not Claimant reported his injury allegedly suffered while on duty for Carrier on April 10, 1969 to Carrier's foreman, G. L. Bruce, as required by Rule 725 which, in part, provides:

"If physically able an employee injured on duty must report the injury to his foreman or other supervisory officer before leaving company premises. A report must be made of every injury, regardless of how slight."

The Organization contends that Rules 16, 17 and 23 of the Agreement were violated.

Rule 16 concerns an employee being entitled to a fair and impartial investigation. The Organization's position is that Claimant was not afforded a fair and impartial investigation because of Carrier's failure to produce Foreman Bruce, and that Claimant was deprived of his right to cross-examine Mr. Bruce. Carrier produced and entered into evidence a written statement from Mr. Bruce at the hearing.

A number of decisions of the Third Division, National Railroad Adjustment Board, have held that written statements are admissible in investigations without the writer being present. See Award Nos. 15981 and 16308. As was said in Award No. 16308:

"No prohibition is found against the use of written statements nor is there any requirement that a witness who submits a statement must be available for cross-examination. Numerous awards of this Board have held that written statements of witnesses not present at an investigation are admissible in the absence of contractual prohibition. Awards 10596, 9624, 9311, 8504 and others."

Finding no rule in the Agreement prohibiting the use of a written statement at an investigation hearing, we find the Organization's contention in this regard to be without merit and must therefore be denied.

Concerning the merits, the sole issues to be determined are whether Claimant did violate the terms of Rule 725 as to the giving of notice of injury to his foreman on the date of the alleged injury and whether the penalty of dismissal assessed against Claimant was arbitrary or capricious. The record shows conflicting testimony. Claimant testified that he mentioned his injury to his foreman on the date in question. Claimant was very vague and indefinite in his explanation as to when and where he was when he told Foreman Bruce that he had injured himself, and as to who was present, if anyone, when he mentioned his injury to Mr. Bruce.

Foreman Bruce made a written statement in which he stated that Claimant did not say anything to him about a personal injury on April 10, 1969. Claimant offered no corroborating evidence supporting his own testimony and offered no evidence that refutes the written statement of Foreman Bruce. Thus, we feel that Carrier met its burden of proving by substantial evidence that Claimant violated the terms of Rule 725. Claimant attempts to show that the strain injury did not show up until several days after the incident in question. However, employe Jack O. Evans, secretary to the General Superintendent of Communications & Signals, testified that Claimant told him that he had first noticed the trouble on Sunday as he was helping his daughter lift a rabbit hutch, and he felt pain in the lower part of his stomach.

Concerning the discipline assessed, we find that Claimant has a bad record of absenteeism, and, therefore, we cannot conclude that Carrier's action in terminating Claimant's employment with Carrier was arbitrary or capricious, and we must thus 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 3rd day of December, 1971.

DISSENT OF LABOR MEMBERS TO AWARD NO. 6232

The majority in their findings prove that they did not understand the issue before them, as they ruled on the issue as to whether a written statement is admissible in an investigation or not. The following appears on page 3 of the Award:

"Rule 16 concerns an employe being entitled to a fair and impartial investigation. The Organization's position is that Claimant was not afforded a fair and impartial investigation because of Carrier's

failure to produce Foreman Bruce, and that Claimant was deprived of his right to cross-examine Mr. Bruce. Carrier produced and entered into evidence a written statement from Mr. Bruce at the hearing.

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The issue was, did the Carrier give the Claimant a fair and impartial investigation when they refused to bring his accuser into the investigation, as the following appears in the Employees' Submission on pages 5 and 7.

"The investigation was held on June 9, 1969, and the Investigation Transcript (Exhibit H) and the entire record reveals that claimant did report his injury to his foreman on the date in question, that carrier furnished only a written statement from the foreman to the effect that he did not, that the Carrier made no effort whatsoever to have the Gang 12 Foreman present at the investigation though the representative objected to this (see pp. 12 and 13, Exhibit H), . . .

Rule 16 of the Agreement as quoted earlier specifically provides that an employee is entitled to a fair and impartial investigation.

However, the carrier declined to have claimant's accuser present so that he could be questioned on the premise that they did not have the power of subpoena, though they did not even request him."

Therefore, the Award is erroneous, as the referee should have followed his own principles as outlined in Award No. 6225, which reads, in part:

"We find that the hearing officer in this instance had prejudged Claimant's guilt so as not to afford claimant a fair and impartial hearing. This is clearly seen by the hearing officer's testimony, when asked a question by claimant's representative at the hearing, Mr. Ward, which question and answer are as follows:

'Ward: Mr. Rhea, did you notify Mr. Rogers on the 24th that the door was missing on the subject car so he could issue a defect card just in case that the door was missing when it arrived from the PC? Did you wire or call him in

regards to that or did anybody else at Flat Rock, do you recall?

Rhea: Mr. Rogers was charged with negligence in failing to perform his duty and he is a car inspector at Delta charged with inspecting these cars. I am not answering any policy of the DT&I Railroad. My statement to you and Mr. Rogers is that he failed in his job.' (Emphasis ours.)

We are of the opinion that the hearing officer in this instant dispute showed substantial bias toward claimant before the hearing was completed so as to prevent claimant from receiving a fair and impartial hearing. As was said in First Division Award No. 21046:

'After studying the transcript of the investigation the Division is persuaded that petitioner's position is valid. At this late date there is little excuse for the managerial personnel of a carrier to ignore the principle that in a discipline case carrier is essentially, and must conduct itself like, a trial court. Among several things this means that the carrier official who conducts an investigation of a charge made by a carrier against an employe (1) should not normally have been involved in the occurrences leading up to the leveling of the charge and (2) should comport himself at the investigation, in his questioning of all witnesses (managerial as well as employe), in a truly objective and aloof manner, just as would an outside judge. If, as here, the evidence shows that the investigating officer did not so behave, then this Division, as a court of appeals, must find the trial court subject to procedural error and reversal.'"

Daniel S. Anderson
E. J. Haesaert
O. L. Wertz
E. J. McDermott
R. E. Stenzinger