

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 6995
Docket No. 6710
2-SLSW-CM-'76

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

Parties to Dispute: (System Federation No. 45, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Line unjustly suspended Temporary Carman Faye Edward Richard, Pine Bluff, Arkansas, from service on October 28, 1972 and subsequently dismissed him on January 18, 1973 in violation of the controlling agreement.
2. That Carman F. E. Richard be restored to service with seniority rights unimpaired; made whole for all vacation rights; made whole for all health and welfare and insurance benefits; made whole for pension benefits including Railroad Retirement and Unemployment Insurance and; made whole for any other benefits that he would have earned during the time he was held out of service in line with Rule 24 reading in pertinent part:

"24-1. No employee shall be disciplined without a fair hearing by a designated officer of the Carrier:

"24-4. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee 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 employee or employees involved in this dispute are respectively carrier and employee 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, Mr. Faye Edward Richard, was employed as a Temporary Carman by Carrier at Pine Bluff, Arkansas. On October 28, 1972 Claimant was notified of his suspension from service as follows:

"Mr. F.E. Richards:

Effective this date, you are being withheld from service of the St. Louis Southwestern Railway pending formal investigation. You will receive further information of date, time, and place of investigation through United States Registered Mail.

W. J. KUGLER
DCH"

Thereafter by letters dated November 2, 1972 Claimant was cited for separate investigations into two (2) charges: 1) That he failed to complete his assignment on October 24, 1972 and absented himself without permission on October 24 and 25, 1972 and 2) That he violated Rules "G" and "N" by allegedly entering Carrier property while intoxicated and abusively threatened other employees and a vocational instructor from Pines Vocation School. After several postponements by both Petitioner and Carrier the hearings went forward on January 3 and 8, 1973. Subsequently, by letter of January 18, 1973 Claimant was advised as follows:

"For your failure to complete your assignment, for absenting yourself from duty without proper authority and for your violation of rules 'G' and 'N' of the Uniform Code of Safety Rules as developed in these investigations, you are hereby dismissed from the service of this company."

The petitioning Organization on March 15, 1973 filed the instant claim on behalf of Claimant.

With reference to the first charge the undisputed record shows that Claimant was arrested at work by a deputy sheriff on October 24, 1972. The arrest was affected in the presence of Claimant's Foreman and the Assistant Terminal Superintendent and Claimant was led away in handcuffs. The record indicates that the arrest and incarceration of Claimant on October 24 and 25, 1972 was pursuant to a Bench Warrant because he had jumped bail and had not paid a fine for DWI and an improper turn traffic violation of which he had been found guilty on October 9, 1972. Claimant was in jail and did not report for work the balance of October 24 and 25. He was released on October 26 and contacted his employer and was told to report for discussion with his foreman on October 27, 1972 his regularly scheduled rest day.

When Claimant reported on October 27 he was told his foreman was not available but that Mr. Kugler, Carrier's Assistant Superintendent wished to see him. Claimant reported to Kugler who first inquired about his absences on October 24 and 25 and then asked him if he had been on Carrier property on August 21, 1972,

an evening on which an unidentified individual had disrupted and threatened a welding class of apprentice carmen and their welding instructor Mr. Jack Johnson. Claimant denied any knowledge of the incident, whereupon Kugler asked Claimant if he had any objection to being identified. Claimant agreed to participate in an identification procedure and returned to Kugler's office at which time he was identified by Johnson and all six (6) of the students from the welding class as being the individual who had come to the welding class on August 21, 1972. When the identifying witnesses left the room Kugler again asked Claimant if he had been on Company property on August 21 and Claimant denied any knowledge thereof and left. The next day, October 28, 1972 the charges cited supra were served upon Claimant.

The facts relative to the first charge of absence without authority and failure to complete assignment are set forth supra. Careful review of the record including the transcript of hearing shows that the facts relative to the second charge are in sum and substance as follows: On August 21, 1972, Claimant's regularly assigned rest day, an unidentified man appeared at a welding class of apprentice carmen at Carrier's base shop area in Pine Bluff, Arkansas. All of the students and the instructor testified that the individual had difficulty speaking and staggered when he walked. The man spoke to several of the students and tried to show them how to weld - - taking the welder's hood of one student and using his tools. That student testified that the man smelled of alcohol. All of the witnesses testified that the man had a knife which he swung about and several were threatened directly by him. Several others testified that he picked up a chipping hammer and made threatening gestures and suggested that he would strike the instructor with it. After several attempts by students and instructor to persuade the man to leave the instructor sent for authorities, whereupon the individual got into an automobile and departed. One of the students testified that he had known Claimant prior to the August 21, incident, one was equivocal on this point and all of the other participants said they did not know who he was on August 21, 1972. All of the students and the instructor, however, positively identified Claimant at the hearing as being beyond a doubt the man who appeared at the class on August 21.

Relative to August 21, 1972 Claimant testified and the record confirmed that he was that day discharged from a hospital in which he had been convalescing from personal injuries suffered in a traffic accident in early August. He testified further that he has no recall of his actions or whereabouts on August 21 or for that matter on August 22, 1972. On August 23, 1972 Claimant sought readmission to the hospital. Under cross-examination he conceded that he could have been on Carrier property on August 21 but that he has no memory whatsoever of the events of that day.

Petitioner asserts at the outset that Claimant's rights to a fair and impartial investigation under Rule 24 have been violated in several respects, to wit: no prompt hearing, deficient and imprecise notice of charges, bias and prejudgment by hearing officer. Petitioner also alleges that the October 27, 1972 identification investigation was a "clandestine hearing" held in violation of Rule

24. Several other procedural objections were raised at the Board level but being untimely will not be considered herein. We have reviewed the procedural objections with care and on balance are unable to find in these particular facts and circumstances that Claimant was denied a fair and impartial investigation. We are aware of the potential damage and likelihood of prejudice in intensive investigating techniques prior to a hearing. We do not concur in Carrier's view that its investigation in discipline cases are immune from examination in cases where rights guaranteed by the Agreement may be transgressed thereby. Against this is balanced the need for Carrier to develop sufficient information to avoid haphazard accusations of employees based upon hearsay, assumption and innuendo which similarly could violate Agreement rights. We are not persuaded on balance that the identification procedure here used was fatally prejudicial to Claimant's hearing rights. Nor does the record support the other procedural objections raised by Petitioner herein. The hearing was relatively prompt following knowledge of the incidents and two of the hearing delays were at Claimant's request, the notice was sufficiently precise under standards announced by this Board in Awards 3270, 11443, 17163 et al (Third Division) and the record does not support the allegations of bias. Notwithstanding able advocacy by the Petitioner on the property and before our Board these objections must fail.

In our considered judgment the record contains substantial evidence to support the charges against Claimant. There is some support in authorities cited by Petitioner for the view that dismissal is disproportionately severe for culpability on the first charge in the facts of this case. But in consideration of the seriousness of the proven violation on the second charge we cannot conclude that dismissal on the two charges taken together is arbitrary, unreasonable and capricious discipline. We must deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of January, 1976.