

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: (Clyde H. Swift
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(Terminal Railroad Association of St. Louis

Dispute: Claim of Employees:

Petitioner claims he is entitled to lost pay in the amount of \$8,780.00 being the money he would have earned in his employment with the Respondent from July 9, 1974 until November 29, 1974. Petitioner claims that he was wrongfully discharged on July 9, 1974, evidence of such discharge is a letter from Respondent to Petitioner dated July 9, 1974 and attached hereto as "Swift Exhibit B".

Petitioner was re-instated to service on November 29, 1974, a copy of the letter of re-instatement is attached hereto and marked "Swift Exhibit C". Petitioner claims that Rule 32 of the agreement between the Terminal Railroad Association of St. Louis and Petitioner's union is controlling and determinative of the issue in this case. The rule is as follows:

"No employee shall be disciplined without a fair hearing by the Carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At least forty-eight (48) hours prior to the hearing, such employee and the General Chairman of the Craft will be apprized of the precise charge against him so that they will have the opportunity of arranging for necessary witnesses. If the employee is exonerated, he shall be re-instated with seniority rights unimpaired and paid for all time lost, less any amount earned during such period of suspension or dismissal."

Petitioner further claims that Rule P of the General Operating Rules of the Terminal Railroad Association of St. Louis is unconstitutional, in violation of the contract between petitioner's union and the respondent, in violation of the Federal Civil Rights Act, and against public policy. Said Rule P provides as follows:

"The arrest of an employee by proper police or legal authority with resultant filing of charges or any act of hostility or wilful disregard of the Company's interest by the employee, is sufficient cause for discipline."

Said Rule P is vague and constitutes a general power on the part of the respondent to discipline an employee for no specific reason. In addition, Rule P does not provide for discharging an employee.

AMENDMENT TO PETITIONER'S CLAIM

Petitioner, Clyde H. Swift, amends his claim and respectfully asks the Board to award him, in addition to lost pay in the amount of \$8,780.00, the following:

1. Maximum allowable interest on the sum of \$8,780.00.
2. An order requiring the defendant, Terminal Railroad Association of St. Louis, to deposit in the railroad retirement fund the amount defendant would have deposited during the seven months period from July 9, 1974 through November 29, 1974 had defendant not wrongfully discharged Petitioner.
3. An order requiring defendant to credit Petitioner with seven months' service added to Petitioner's time served as a carman for seniority and other employment benefits.

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.

The Petitioner, Mr. Clyde Swift, was discharged on July 9, 1974, after a formal investigation conducted by the Carrier on July 5, 1974. The Petitioner contends that this discharge was wrongful. The Petitioner was reinstated on November 29, 1974; and this claim is for pay for all time lost during the period of July 9, 1974 until November 29, 1974.

The Carrier contends that the crux of the case before the Board is whether the charge preferred against the Petitioner by the Carrier in the letter dated June 24, 1974, was proven in the investigation held in connection therewith on July 5, 1974, (Carrier's submission p. 18). This letter from Master Car Repairer A. P. Schranz to Mr. Swift stated in part:

"You are hereby notified that you are suspended from the service of the Company, effective at once, charged with violation of Rule 'P' of the Carrier's current Book of Operating Rules, incident to your having been indicted on or about June 20, 1974 by the February 1974 Grand Jury in the Southern District of Illinois, for the offence or offences alleged in the indictment...." (Carrier's submission pp. 2 and 3)

Rule "P" states:

"The arrest of an employee by proper police or legal authority with resultant filing of charges, or any act of hostility or willful disregard of the company's interests by an employee, is sufficient cause for discipline."

At the fourteen minute investigation, the Carrier offered evidence to show that the Petitioner was in fact indicted and thereafter was in fact arrested. The Petitioner was questioned on this topic and agreed that he had been indicted by the Grand Jury and thereafter was arrested (Carrier's Exhibit A, p. 4). No evidence, proof or testimony whatsoever was introduced that would tend to show that the Petitioner was guilty of the indictment, that of taking three copper bars weighing 266 pounds each from a certain railroad car.

We disagree with the Carrier as to the crux of this case, as stated above. The initial question for us is whether the applied portion of Company Rule "P", "the arrest of an employee by proper police or legal authority with resultant filing of charges...is sufficient cause for discipline," is a reasonable rule? We find that it is not. We find such a rule, as applied in the instant case, to be manifestly unreasonable. Certainly the Carrier has the right to establish reasonable operating rules, but to have a rule that subjects an employee to discipline--the ultimate discipline of dismissal--on the sole basis of the employee having been arrested and charged with a crime, is contrary to reason and fundamental fairness. It is a harsh fact of life in our society that innocent persons may be erroneously arrested and charged with a crime, only to be later fully exonerated at a trial when the individuals' case(s) are fully presented before a judge and/or jury. Such is what happened in the instant case, and the Carrier based on Rule 32, is responsible to pay this fully exonerated employee for all time lost, less any amount earned during the period of dismissal.

We need not consider the Civil Rights Act aspects of the case as contended by Petitioner and the ramifications of decisions

by the EEOC and the courts on the use of an arrest without conviction against an individual in employment situations, since on its face the applied portion of Rule "P" is unreasonable. A caveat is added, however, that this case is strictly limited to the established facts: It does not involve a situation where the Carrier has met its burden of proof, having presented substantial evidence on the merits of the wrongful conduct of the employee, and thereafter a state or federal court has, for example, "continued the case without a finding."

The Amended Claim of the Petitioner is disallowed, as Rule 32 of the Agreement governs the remedy for the Petitioner. We find that all conferences concerning this claim were properly held in accordance with the Agreement rules and Section 3, First (i) and (j) of the Railway Labor Act.

A W A R D

Claim sustained as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By: Rosemarie Brasch /cc
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of September, 1976.