Award No. 514

Docket No. MC-487-1

2-OUR&D Co.-J.-'40

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

Upon failure of the Division to agree upon its jurisdiction to hear and decide cases individually submitted, Clifford Gooch invoked the services of the National Mediation Board for the appointment of a referee to break the deadlock, as provided in Section 3, First (L) of the Railway Labor Act. Upon certification the National Mediation Board appointed Thomas F. McAllister for that purpose.

Following is the case in question, the opinion and award of the Second Division with Referee McAllister sitting as a member thereof.

PARTIES TO DISPUTE:

CLIFFORD GOOCH, PETITIONER

vs.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

DISPUTE: CLAIM OF EMPLOYES: That on February 10, 1939 Mr. Clifford Gooch reported for work about 3:30 P. M. by 'phone and stated that he would be late, but would get down soon as possible. His report was submitted to Ralph Sill, foreman, by Grandon Neal who received the 'phone call. (Foreman Sill acknowledged receipt of report from Grandon Neal to Counsel, March 6, 1939, at 12:15 P. M.) Employe claims that Mr. Gooch was unfairly discriminated against and should be compensated for the wage loss resulting from his suspension or dismissal as provided for in Rule 37 of the agreement.

EMPLOYE'S STATEMENT OF FACTS: Under date of February 10, 1939, Mr. Clifford Gooch was unavoidably detained from work, (about two hours) on account of his wife's illness. As soon as he could phone, he reported that he would be late for work; he arrived about 5:00 P. M. and inspected five or six cars when he was told to get off the job and another man put in his place. He met Mr. D. B. MacDonald, general car foreman, also Mr. R. E. Edens, sup't, who referred him back to Mr. D. B. MacDonald who stated that he would not do anything for him until he was reinstated back into the Brotherhood Railway Carmen of America. Mr. V. D. Perry, chairman of grievance committee, stated that unless dues were paid up by February 23, 1939 that he (Clifford Gooch) would be out another thirty days before he (Perry) would act.

POSITION OF EMPLOYE: Under date of March 13, 1939, Mr. R. E. Edens, sup't of Ogden Union Railway and Depot Company, acknowledged receipt of file upon appeal, (Countercharging with violation of Rule 22 of the agreement, counsel's rebuttal, statements of Grandon Neal, Edward W. Petatz and Dr. J. G. Olson supporting contention of employe's claim as well as the provisions of Rule 22 of the agreement and a copy of transcript of investigation held in office of Mr. D. B. MacDonald, and his decision) "charging absence without permission Feb. 10, 1939." Mr. Edens acknowl-

"In case an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause, shall notify his foreman as early as possible."

Gooch absented himself from his shift without permission on numerous occasions and was accorded leniency and cautioned, and no disciplinary action taken, but his persistent absences from work, and appearance for duty two hours and a half after commencement in the condition he was in on February 10, made it necessary to permanently dismiss him from the service.

As to the statement concerning the Brotherhood of Railroad Carmen, the general car foreman knows nothing about the membership or nonmembership of employes in this organization and did not make this statement to Gooch, but said that the Depot employes in his class of service were governed by an agreement between the Depot Company and the Brotherhood, and his case was one for handling by the accredited representatives of the Brotherhood and the Depot Company in accordance with the agreement.

Gooch's personal record of service is as follows:

8-22-30—Entered service as carman.
9- 6-30—Cautioned by foreman account not available for call as extra man, 10:00 P. M.
11-27-31—Record notation of responsibility for failure to detect cracked truck side on PFE 17648.
12- 1-33—Assessed 30 demerits for failure to detect chipped flanges SP 24941 and SP 28121.
1-23-35—Dismissed for failure to couple air line between helper and road engine, Train No. 28.
1-29-35—Reinstated.
6-10-35—Assessed 10 demerits for failure to comply with blue flag regulations.
2-15-39—Dismissed for absenting himself from duty without permission, February 10, 1939.

Clifford Gooch was properly dismissed for failure to report for duty February 10, 1939, after repeated cautioning and leniency consideration and his guilt and responsibility for failing to report was established in investigation conducted in accordance with the rules of the agreement between the Depot Company and the Brotherhood of Railroad Carmen.

OPINION OF THE DIVISION: Petitioner was formerly a car inspector and had been employed by the carrier in such capacity for eight years prior to February 10, 1939, at which time he was suspended. He had been ordered to report to work at 3:00 P. M. on the day in question and did not report for more than two hours later. Petitioner claims that he was delayed on account of sickness. He was ordered to report for an investigation on February 13, 1939, for being absent from duty, and not notifying his foreman.

He claims that he was denied rights accorded him under Rules 35 and 37 of the Schedule of Rules, which provide as follows:

"Rule 35. Should any employe subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken to the foreman, general foreman, master mechanic or shop superintendent, each in their respective order, by the duly authorized local committee or their representative, within ten days. If stenographic report of investigation is taken the committee shall be furnished a copy. If the result still be unsatisfactory, the duly authorized general committee, or

their representatives, shall have the right of appeal, preferably in writing, to the higher officials designated to handle such matters in their respective order and conference will be granted within ten days of application.

All conferences between local officials and local committees to be held during regular working hours without loss of time to committeemen."

"Rule 37. No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. 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."

It appears from the claim of the company that at the time of the investigation by the carrier of the charge of failing to report for duty and being absent without permission, there were present D. B. MacDonald, general car foreman, acting for the carrier, and V. D. Perry, chairman of the Brotherhood Railway Carmen of America. On this hearing it is asserted that Mr. Gooch stated that he did not desire a representative; that his excuse for failure to be on duty was that he was "just late" arriving; and that he assumed responsibility for not being on duty at that time.

It is the further claim of the company that, when the men on the shift assembled for work, claimant was absent and thereafter one of the carmen called the assistant gang foreman and told him that Gooch had phoned that he would be right down; that at 5:00 P. M., while claimant was still absent, it was necessary to call an extra carman for the shift; that at 5:30 P. M. Gooch appeared and endeavored to go to work, but that the assistant gang foreman advised him that the place had been filled by an extra carman; that claimant's gait was unsteady and that he smelled strongly of liquor and otherwise had the appearance of being drunk; that a watchman was called to see that claimant got out of the yard without injury. It is further asserted that Gooch had previously violated rules, and had absented himself from work on several other occasions without permission.

We mention the foregoing merely as the claims that are made, and consider it unnecessary to draw any conclusions as to their merit in this controversy.

Petitioner asked for a hearing before the Second Division of the National Railroad Adjustment Board; and the carrier claims that petitioner, as an employe, in his class of service was governed by an agreement between the Depot Company and System Federation No. 105, Railway Employes' Department, A. F. of L. Mechanical Section No. 1, thereof; that the case was one for handling by the accredited representative of the said Union and the Depot Company in accordance with such agreement; that there is at present no dispute, within the meaning of the Railway Labor Act, between employes and carrier; and that petitioner's responsibility for failing to report was established in an investigation conducted in accordance with the rules of the agreement between the carrier and the union.

The petition comes before the Board divested of the necessity of considering any facts, and solely upon the question of the jurisdiction of the Board to entertain such a proceeding.

It is claimed by petitioner that he has the right to petition the Board for such a hearing in his individual capacity. On the other hand, it is the

contention of the carrier that petitioner is limited to representation by the accredited representatives of the employes of the class in which petitioner was employed. It is assumed by both sides that the agreement between the Union Pacific System and System Federation No. 105, Railway Employes' Department, A. F. of L., (also called the Schedule of Rules), governs the wages and working conditions of carmen in the service of the Ogden Union Railway and Depot Company, and we are in accord with such assumption.

The general purposes of the Railway Labor Act are stated as follows:

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employes or any denial, as a condition of employment or otherwise, of the right of employes to join a labor organization; (3) to provide for the complete independence of carriers and of employes in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

It is further stated in the statute that:

"It shall be the duty of all carriers, their officers, agents and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof."

It is further provided by the statute that:

"All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference **between representatives designated and authorized so to confer, respectively, by the carriers and by the employes thereof interested in the dispute.**

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employes for the purpose of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference influence or coercion seek in any manner to prevent the designation by its employes as their representatives of those who or which are not employes of the carrier."

One of the primary purposes of the Act appears to be to provide for collective bargaining, in the following language:

"Employes shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employes shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

It is further provided:

"In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning * * * rules, or working conditions, it shall be the duty of the designated representative or representatives of the carrier * * * and of such employes * * * to confer in respect to such dispute * * *."

The provisions of the statute with regard to the consideration of disputes and collective bargaining are, by the statute itself, made a part of the contract of employment between the carrier and each employe and are binding upon such parties regardless of any other express or implied agreements between them.

With reference to disputes, between an employe or group of employes and a carrier, growing out of agreements or out of the application of agreements concerning rules or working conditions, it is provided by the statute that they "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by both of the parties or by either party to the appropriate Division of the Adjustment Board * * *."

A consideration of the foregoing clearly shows that it was the legislative intention to provide, not only for collective bargaining but also, as far as possible, to provide for the adjustment of disputes by representatives designated by the carriers and by the employes. The provision that such disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier" assumes that there is a recognized manner of handling such disputes. Rule 35 of the Schedule of Rules between the Union Pacific System and the union, which is one of the principal provisions with which this dispute is concerned, in this case justifies and makes clear this assumption when it provides that grievances shall first be taken to the foreman, general foreman, or shop superintendent "by **the duly authorized local committee of the employes or their representative,**" and thereafter to the highest designated railway official. In this case it can, therefore, be said that the usual manner of handling such a dispute, as provided by statute, is that set forth in Rule 35 of the Schedule of Rules, that the employe shall be represented, in grievance claims, by the duly authorized local committee or their representative. The foregoing indicates the usual manner in which disputes were to be handled between the employes and the carrier.

With regard to the above, it is also important, in arriving at a determination of the question involved, to keep in mind that petitioner bases his claim upon the Schedule of Rules in question which, in itself, is a duly executed contract between the union and the carrier. With regard to the employes, their rights, in so far as therein specified, are governed by the contract between the union and the carrier, and petitioner himself relies upon such contract stipulations.

But this controversy was not handled "in the usual manner," as provided by the statute. The alleged grievance was not taken before the officials of the carrier by the duly authorized local committee or their representative. Nor was any appeal to the higher officials made by the duly authorized general committee as provided in the rules. In the investigation by the carrier for violation of rules, it appears that Mr. V. D. Perry, chairman of the union grievance committee, was present; but he apparently agreed with the decision of the carrier to suspend petitioner. The fact that it is alleged by petitioner that Mr. Perry, "or the lodge," was discriminating against him because of his failure to pay dues, cannot be considered as an excuse for failure to show that petitioner's grievance was proceeded with according to the agreement between the carrier and the union. Disputes may be referred by petition to this Board only in case of failure to reach an adjustment "in the usual manner." The important point in this case is governed by the provisions of the Railway Labor Act, U. S. C. A. Title 45, Section 153 (i), which provide that disputes growing out of grievances shall be handled in the usual manner; "but, failing to reach an adjustment **in this manner,** the disputes may be referred by petition * * * to the appropriate Division of the Adjustment Board * * *." It is not every controversy between an employe and a carrier that can be reviewed, on petition, before this Board. It is only those disputes, where there has been a failure to reach an adjustment in the usual manner of handling these disputes with

the carrier. In this case, there was no compliance with the required methods of adjusting the dispute. Any employe, having a grievance against the carrier, who fails to pursue the method of presenting grievances as provided by an agreement between the carrier and the employes, entered into pursuant to the Railway Labor Act, is precluded from relief even in the courts. Wyatt v. Kansas City Southern Railway Company., 101 S. W. (2d) 1082 (Texas); Harrison v. Pullman Company (C. C. A. 8th Cir.), 66 Fed. (2d) 826. Through a collective bargaining contract an employe secures individual rights; but with exceptions hereinafter noted, he is limited in the assertion of those rights, under the statute, to the procedure outlined by the statute, and, in this case, by the terms of the agreement entered into pursuant to the statute between the carrier and the employe. The entire purport of the Railway Labor Act is to provide for agreements between carriers and organized employes; for an employe is bound by the rules and regulations governing his craft and made a part of the contract between the employes and the carrier. Matlock v. Gulf, Colorado and Santa Fe Railway Company, 99 S. W. (2d) 1056 (Texas).

In this case, if the designated committee refused to proceed with petitioner's dispute, they would be justified if, in their judgement, the claim was wholly without merit. According to Rule 35, the general committee designated to handle grievances would, after receipt of the report of the investigation, have the right of appeal on behalf of petitioner to the higher officials of the carrier, **if the result of the investigation was unsatisfactory.** According to the clear intendment of the rule, it must be considered that the committee designated to represent the employe must have some belief in the justice and merit of the grievance; and it could not be expected that such committee would appeal a determination which it was convinced was proper and in accordance with the just rights of the carrier. When a contract is entered into between a carrier and an organization of employes, it cannot be assumed that either party will deliberately act in bad faith, and every implication that arises, leads to the conclusion that, by virtue of the contract, the representation of the rights of employes is confided to the judgment and action of the employe representatives. **To hold otherwise** would be a negation of the purposes of the Railway Labor Act, the principle of employe representation, and the agreement between the parties, and fair dealing and good faith.

It may well be asked whether an employe would not be unjustly deprived of his rights in case the local representative or committee entrusted, according to the terms of contract, with representing him and proceeding with his claim before the carrier, refused arbitrarily, unjustly, or without proper motives, so to represent him, depriving him of his right to review the dispute before this Board. To such question, the answer must be that no action of the local committee or of the general committee, or of this Board could unlawfully deprive petitioner of property rights, or deny him due process of law. If he does not secure satisfaction of such rights in proceedings under the statute, he may resort to the courts; and in such instances no award of the Board is conclusive upon such rights. Any proceedings under the Act may be remedied by judicial determination, upon a showing that they are fraudulent as to a petitioner's right, arbitrary, capricious, or trespass upon or destroy the property or contractual rights of a party, or transgress the bounds of reason, or contravene public policy or the laws of the land. Norfolk and Western Railway Company v. Harris, 260 Ky. 132 (84 S. W.) (2d) 69; Mallehan v. Texas and Pacific Railway Company, 87 S. W. (2d) 771 (Texas). But the dockets of the Board are crowded with disputes properly presented in accordance with the statute and in accordance with contracts between carriers and employes. It is not the function of the Board to investigate reasons and grounds why the statute or the agreement providing for the handling of such disputes "in the usual manner" has not been complied with by petitioners, which reasons must, of necessity, be based upon collateral issues, the determination of which involves personal charges, alleged concealed motives, credibility of witnesses,

tangled facts, and disputed claims, which could only be properly sifted and tried in a court of law, and which are extraneous to a decision between an employe and a carrier.

Obviously, the determination of different cases will depend upon the varying provisions of agreements between carriers and employes. If, according to such agreement, it were provided that an employe should present his claim individually against the carrier, such a manner of presentation would be "in the usual manner," as provided by the statute. There might well be cases in which there was no provision in a contract relating to disputes; and in such a case the inquiry would necessarily be determined, upon review before this Board, on proof of what the usual manner of handling such disputes actually was; and the same would apply where there was no contract between the carrier and employes. But the only way in which disputes may be referred by petition to this Board is upon showing that they were handled with the carrier in the manner provided for by contract, or in the usual manner adopted by the carrier and its employes.

Although the case of Estes v. Union Terminal Company, 89 Fed. (2d) 768 (C. C. A. 5th Cir., 1937), has not been relied upon on behalf of petitioner, because of the question here involved, it would seem proper to comment on that decision. In that case, the court said:

> "The purpose of the Railway Labor Act (45 U. S. C. A. Section 151 et seq.) is to facilitate peaceful, orderly adjustment of disputes between railroads and their employes, to prevent strikes and other disturbances. That the legislation is valid is settled. Brotherhood of Locomotive Firemen and Enginemen v. Kenan (C. C. A. 87 F. (2d) 651, Section 3 (j) of the act, as amended by the Act of June 21, 1934, Section 3, 45 U. S. C. A. Section 153 (j), as to hearings before this Board, provides:
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> > 'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any dispute submitted to them.'
>
> Under the plain provisions of the act an employe may conduct his negotiations with his employer and the proceedings before the Board, if necessary, either personally or through a chosen representative, which may or may not be a labor organization.
>
> Apparently, the Board held that Lane was not involved in the dispute and therefore was not entitled to notice under the provisions of section 3. In this we think the Board was wrong. Conceding that while Lane was employed as assistant station master he was not covered by the provisions of the contract, when he was given the position of gateman, he became subject to it and was as much involved in the controversy before the Board, as either Estes or Felton. Furthermore, he was materially affected by the order. Section 3 is rendered somewhat ambiguous by the use of the word 'involved' instead of a more comprehensive term. But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. Lane was occupying the position of gateman. The order of the Board required his dismissal. No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employe may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. It is not necessary for an employe to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."

The foregoing excerpt of the opinion seems to sustain the contention that an individual employe may maintain his dispute in the preliminary steps with the carrier, and that he is entitled to review by this Board. It is with deference to the distinguished court rendering the above opinion that we call attention to the fact that the point here in question was not involved in the Estes case. There the question was as to whether a party, who would lose seniority rights by virtue of an award of this Board, was entitled to notice, although he was not a party to the dispute. The only question before the court was whether such party should be given notice before a determination which would destroy his seniority rights. It was unnecessary to hold that an employe could conduct his negotiations with his employer in the proceedings before the Board; and it may well have been that, if the question of the explicit provisions of a contract between a carrier and its employes, providing otherwise, had been before the court, the language used would have been more limited. In our opinion the section of the statute quoted by the court does not provide for such individual negotiations and presentation of a petition before this Board, but merely provides that, upon a hearing before the Board, the individual petitioner may be present and heard, or that any representative designated by him may be so heard. In reaching such a conclusion, we recognize a distinction between procedure for review, and what may be permitted when review is actually had before an appellate tribunal.

In order that this Board may assume jurisdiction of a dispute on petition, it must appear that the dispute has been handled in the usual manner in negotiations with the carrier as provided by the statute; and that it is only in case there has been a failure to reach an adjustment in the manner so provided that this Board will review such proceedings. In the instant case, there was no compliance with the statute on the part of petitioner. The usual manner of negotiating with the carrier was not complied with. There was no failure to reach an adjustment **in the usual manner.** Petitioner, having failed to pursue the required method of presenting his grievance, which in this case was that provided by the agreement between the carrier and the employes, this Board is without jurisdiction to pass upon petitioner's claim.

AWARD

This Board having no jurisdiction of the petition in this case, the petition is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 18th day of November, 1940.