Award No. 1965
Docket No. 1794
2-UT-CM-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE UNION TERMINAL COMPANY (Dallas)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Coach Cleaner A. L. Luckie was unjustly suspended on April 29, 1954 and unjustly dismissed without a fair hearing on May 20, 1954.

2. That accordingly the Carrier be ordered to restore the aforesaid employe to service with service rights unimpaired and paid for all time lost retroactive to April 29, 1954.

EMPLOYES' STATEMENT OF FACTS: A. L. Luckie, hereinafter referred to as the claimant, was employed by The Union Terminal Company, hereinafter referred to as the carrier, as a coach cleaner on August 5, 1947 and was regularly employed, as such, until he was suspended from service on April 29, 1954. The claimant had approximately seven (7) years' service with the carrier.

Claimant's assigned hours of service were from 7:00 A. M. to 3:00 P. M. on Wednesday, 3:00 P. M. to 11:00 P. M. on Thursday, 7:00 A. M. to 3:00 P. M. on Friday, 11:00 P. M. to 7:00 A. M. on Saturday and Sunday, with rest days of Monday and Tuesday.

The carrier's mechanical foreman filed charges against the claimant under date of May 6, 1954, copy submitted herewith and identified as Exhibit A, alleging:

1. Parking your personal automobile in a restricted area on Company property . . .

2. Attempting to obtain for personal use gasoline belonging to the Company.

3. Entering into an altercation with and injuring two employes of the Company, namely: Mr. M. H. Cox and Mr. Glen Cannon.

4. Being under the influence of intoxicants.

he was not under the influence of intoxicants, he did the other three things completely sober and while he was rational and at a time when his judgment should have kept him from doing those things.

So far as the other three charges are concerned, there simply can be no question but what claimant did park his automobile in a restricted area on company property in violation of various instructions.

The investigation conclusively proved that there was no tractor out of gas, therefore, there was no earthly reason for the claimant to take gasoline from the company supply had he not intended to convert it for his own use. We have statements in our files from the tractor drivers on duty the evening of the occurrence and each of them state that they did not run out of gas and that they did not ask claimant to get gas for them.

Claimant entered into an altercation with the other two persons charged. He definitely inflicted injury on Mr. Cannon, and the ice pick which claimant was using was stuck through one of Mr. Cox's fingers.

In their statement of claim, the organization says that claimant was unjustly suspended. There can be no question but what they are completely mistaken. Claimant was suspended, but not **unjustly** suspended. It is proper under the rule to suspend an employe pending an investigation. The rule governing is the portion of Article 16 reading as follows:

> "GRIEVANCES. (a) . . . Suspension in proper cases pending an investigation, which shall be promptly held, shall not be deemed a violation of this rule."

If this was not a proper case for suspension, we can not conceive one. Thus, their contention warrants no further discussion.

We feel that the Board will readily agree that a man guilty of the acts committed by claimant could certainly not be retained in the service. If the Board should, for any reason, decide that claimant should be returned to service, it should be without pay for time lost; in any event, deduction of outside earnings should be made if the Board should erroneously return him to service with pay. We must emphasize, however, that we can not conceive the Board being so injudicious as to rule that this man should be returned to service under any circumstances. His actions have been such that it would be highly imprudent to place him back in the service of the company among the other employes where his wrongful acts were committed.

We submit that the claim herein is wholly unfounded and without merit, and respectfully request that it be denied.

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.

The parties to said dispute were given due notice of hearing thereon.

Grievant, a coach cleaner employed by The Union Terminal Company, Dallas, Texas, since 1947, was suspended from service on April 29, 1954, and discharged on May 20, 1954, after being found guilty of four charges. These four charges can be summarized as follows:

1. Parking personal automobile on a restricted area.

2. Attempting to obtain for personal use company-owned gasoline.

3. Entering into an altercation with and injuring two employes of the Company, and

4. Being under the influence of intoxicants.

The grievant attacks the dismissal upon a number of grounds but only one merits consideration, namely, that he was denied the right of witnesses. Rule 16 of the Agreement expressly gives this right to an employe at the investigation hearing. The pertinent portions of the transcript of the investigation hearing directed to this point will be set forth below. However, before doing so we identify the barred, prospective witness as Kenneth Holbert, a Dallas attorney, who represented the grievant in court proceedings which grew out of the incidents, subjects of charges two and three, supra. References are to the transcript appearing in the Carrier's submission.

"Q. Who are your witnesses?

A. Mr. Holbert.

Mr. Sayers: Now, Mr. Luckie, is Mr. Holbert an employee of the Union Terminal Company?

A. No Sir.

Q. What is his occupation?

A. He is an attorney. (Page 3)

Q. Was Mr. Holbert present at The Union Terminal Company about 9:30 P. M. April 29, 1954, when the incident occurred which we are about to investigate?

A. Not that I know of.

Q. Does Mr. Holbert represent you in legal matters?

A. He does.

Q. Has he represented you in court in any matters pertaining to the incident which happened on April 29, 1954?

A. Yes.

Q. Under those circumstances, the only evidence which Mr. Holbert could possibly give would be hearsay and would be of no value in this investigation, therefore he is requested to leave this room at this time and will not be used as a witness or in any other manner during this investigation. (p. 4)"

Further colloquy occurred between Mr. Sayer, the investigation officer, and Mr. Crumpton, the grievant's representative, who expressly protested the ruling. Mr. Holbert eventually withdrew from the hearing room. The hearing officer's initial error in refusing to permit grievant to call as his witness, Mr. Stanford, Mechanical Foreman, was only partially corrected at a subsequent point in the hearing (p. 95 et seq.) by an offer to permit questioning within a very limited scope. The offer was rejected.

The materiality of Mr. Holbert's desired testimony could not have occurred to the Hearing Officer at the time he entered his ruling. As the hearing progressed, direct conflicts occurred in respect to several material points, arising out of the testimony of Cox, the foreman, and Cannon, a

machinist, who were jointly charged and tried with Grievant Luckie upon the fight issue. Luckie testified for example, that during the course of the altercation Cannon was hollering at Cox to get his gun out of the glove compartment of his truck (p. 83, 93). Upon hearing, Cox (p. 76) and Cannon (p. 51) expressly denied that such a threatening statement was made.

Subsequent to the hearing and assessment of discipline, Mr. Holbert set forth in a letter to Mr. Crumpton a report of what occurred in the subsequent court proceedings. (Organization's Exhibit G) Much of what Mr. Holbert had to say was material and presumably he would have so testified if he had been permitted to participate in the investigation hearing as a witness. For instance, he stated that Cannon in court admitted that he yelled to Cox to get his gun; that he didn't in fact have a gun but he did it to frighten Luckie. Testimony of such character is not hearsay and it was both relevant and admissible. It would have corroborated Luckie's testimony and thrown considerable doubt on the entire testimony of both Cannon and Cox if believed by the Hearing Officer not only in respect to the altercation but also their testimony in connection with charges 2 and 4.

The foregoing is merely illustrative of the error which resulted from the Hearing Officer's well-meaning but erroneous effort, several times expressed, to confine the investigation hearing to the immediate events surrounding the altercation.

We find that Article 16 was violated by the denial to grievant of his request to call Mr. Holbert as his witness. The circumscriptions placed upon grievant's representative in his desire to call Mr. Stanford as his witness were likewise violative of said Article 16.

We cannot say what penalty would have been assessed in this case if the company's representatives had heard and considered the rejected line of testimony and for that reason it should not stand on such a speculative basis. For us to modify but to still assert a penalty on strength of the uncontroverted charge that grievant's personal automobile was parked in a restricted area, would be an arbitrary substitution of judgment upon our part which we decline to do.

By the holding in this case, we do not desire to be understood as countenancing resort to physical force in resolving controversies upon the property. However, its occurrence was not of grievant's making, or, even that of his fellow participants who it appears were acting under a blanket order to hold any offender for the arrival of a certain company official. Such assumed power has no legal or contractual basis under the circumstances here present.

Pursuant to Rule 16 (d), the grievant, A. L. Luckie, shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, dating from the suspension of April 29, 1954 until the date of his reinstatement. In making such computation we find that outside earnings are deductible under said rule. To further clarify the Award, we expressly find that vacation rights accrued as of the date of the suspension, if any, shall be honored.

AWARD

Claim sustained in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1955.

DISSENT OF CARRIER MEMBERS TO AWARD 1965

The majority of the Division, consisting of the Labor Members and Referee J. Glenn Donaldson, has ordered the reinstatement with pay of the claimant, a coach cleaner, who was discharged for, in substance, taking company gasoline for his personal use, assaulting and injuring two fellow employes, one his supervising officer, being under the influence of intoxicants, and parking his automobile in a restricted area. Claimant was found guilty of all four charges after a full and complete investigation which lasted two days.

The majority bases its ruling solely upon a procedural technicality. It does not question the claimant's guilt of each offense. Indeed, that would be impossible. The investigation developed the following facts:

About dark (8:35 p.m.) on the date in question, claimant, who was supposed to be at work putting ice in passenger cars, drove his personal automobile into a restricted area and, in violation of various company instructions, parked it by a platform near the gasoline supply at the company's passenger station in Dallas, Texas. He took a five-gallon gasoline can from the trunk of his car and filled it from the gasoline pump. As he started to walk away with the gasoline he was stopped and questioned by a machinist (Cannon) who was in charge of the pump and the dispensing of all gas. The gas, of course, was for company use only. Claimant stated he was taking the gas to a tractor being operated by a fellow employe a short way down the platform. Machinist Cannon was suspicious; he knew that standing instructions required all tractors to be filled with gas at the beginning of each shift, enough to last a full eight hours, and it was then only the middle of the second shift. He called the platform foreman (Hershey) who had charge of the tractors, and both went down the platform with claimant to "deliver" the gas, claimant driving a tractor he had been using in taking ice to passenger cars. Before they reached that part of the platform where claimant had stated the gas was needed, claimant ran his tractor off the platform into the path of an approaching train. The train was flagged to a stop short of a collision and was delayed while the tractor was jacked off the track.

During this operation, which was assisted by the coach cleaner foreman (Cox), Cannon, Cox and Hershey all smelled intoxicating liquor on claimant's breath and noted that his actions were not normal and his speech thick and unnatural to the point of intoxication. When the track was cleared, a thorough check with claimant accompanying revealed that no tractor was out of gas and no tractor driver had requested claimant or anyone else to bring gas. As Foreman Cox, claimant's supervisor, was telephoning his superior officer, Assistant to Vice President Lumpkin, to report claimant's conduct and physical condition, claimant started toward his car apparently to leave before any action could be taken. Cox instructed Cannon to tell claimant to wait. Cannon did so, and claimant, becoming enraged, pulled a knife from his pocket, opened it, and repeatedly attacked Cannon. Cannon was able to defend himself from the knife thrusts with a pair of ice tongs. Claimant dropped his knife, pulled an ice pick from a scabbard in his hip pocket and renewed the assault on Cannon. Cox ran out from the nearby room where he has been telephoning and attempted to disarm claimant. Claimant drove the ice pick through one of Cox' fingers before the ice pick was taken from him. Claimant then retrieved his knife from the ground and again attacked Cannon, who no longer had the ice tongs in his hand, and slashed one of Cannon's arms which were thrown up to protect his face and throat. Cox and Cannon, both injured and fearing further injury, backed away. Claimant jumped into his car, started to drive away from the company's property, ran into three or four other automobiles in the attempt, then jumped from his car, abandoning it, and ran off on foot. He was arrested by Dallas police a short while later and jailed on charges of theft, aggravated assault and disturbing the peace.

Claimant, Cannon and Cox were each charged with the responsibility for the altercation, claimant being also charged with the other offenses stated,

and all charges were the subject of the two-day hearing. Cannon and Cox were acquitted of the charges against them.

With this well-substantiated evidence before the Board, claimant has been ordered reinstated and paid for lost earnings on the theory that he was denied a fair hearing by the company, because during the two-day hearing he was not allowed to introduce the testimony of one Holbert. Before the testimony of Holbert was excluded it was developed that Holbert had not been at the station on the night in question, had not witnessed the incidents being investigated, and therefore had no first-hand knowledge of the affair. Holbert was a lawyer who had represented claimant in a peace bond proceeding which resulted from the occurrence and was to represent him in the pending criminal prosecution for theft, aggravated assault and disturbing the peace.

The majority concludes that Holbert could have given material testimony as to whether or not, during claimant's assault on Cannon and Cox, Cannon had yelled to Foreman Cox to get a gun, hoping to frighten claimant away. In the investigation, Cannon denied making the statement and Cox denied hearing it. But the majority finds, from a letter written by Holbert more than a month after the hearing, that Holbert would have testified at the company hearing, if permitted to do so, that Cannon had admitted in a court proceeding on the peace bond that he had called to Cox to get a gun. The nature of such testimony was not revealed to the company official conducting the hearing; claimant's general chairman merely stated that Holbert would testify as to "the abuse and the treatment that was imposed upon (claimant) shortly after this altercation occurred." (Tr. 5.) If the company hearing had been a court trial with legal rules of evidence, it would not have been error to exclude such evidence, no matter how relevant, if the nature and relevancy is not made known to the court. Further, even if the nature of Holbert's testimony had been made known to the hearing officer, under formal court rules of evidence the rejection of the testimony might have been error, but only harmless error. It would not have caused a different verdict or a different degree of discipline, and the hearing officer so advised this Board at our hearing on this case. Even with such evidence before this Board, the majority does not question claimant's guilt or the degree of discipline assessed.

The testimony of Holbert could have been admissible for only one purpose: to impeach the credibility of Cannon as a witness. It could have had no other bearing on the case. It would not have affected the credibility of Cox who well might not have heard Cannon's statement during the excitement of a life or death struggle with claimant. In any event, how could the exclusion of such testimony have been prejudicial to the claimant? The testimony of Cannon was not necessary to establish claimant's guilt of each offense charged. He admitted parking in a forbidden area (Tr. 83, 85); he admitted taking the gasoline (Tr. 82); he was unable to give any explanation for taking it except that it was requested by some other person whom he did not know and could not name (Tr. 87) for a tractor he could not shortly thereafter locate (Tr. 88)—an assertion disproved by overwhelming evidence from sources other than Cannon (Hershey, Tr. 7, 9-10, 16, 26, 29; Cox, Tr. 62, 63, 66); it is established by the strongest evidence that claimant had an altercation with Cox and Cannon and wounded them both with deadly weapons (Cox, Tr. 62, 64-66, 68, 74-76, 78-80; Cannon, Tr. 38-43, 49-51, 55-56; Hershey, Tr. 8, 11-13, 23, 25, 27-30, 32); Hershey and Cox, as well as Cannon, testified that claimant was under the influence of intoxicants (Hershey, Tr. 8, 14-16; Cox Tr. 62-64; Cannon, Tr. 38-39, 47-48); claimant admitted running his tractor off the station platform into the path of an oncoming train (Tr. 89-90) and later drove his automobile into other cars (Tr. 83)—not the conduct of a sober man.

The majority's findings indicate that claimant's general chairman also should have been permitted, when he first sought to do so, to question the mechanical foreman (Stanford) who was not present during the occurrence

but who, as the officer in charge of the department in which claimant was working, officially signed the charges against claimant. The hearing officer was reluctant to permit Stanford to testify because Stanford was assisting in conducting the hearing, and the hearing officer feared it might be error to allow a person aiding in conducting the hearing also to be a witness. Compare Third Division Award No. 6226 involving this same carrier. However any omission on this score was cured later in the hearing when claimant's representative was told that he might ask Stanford if he had been present at or within hearing distance of this occurrence, and if so then ask him any questions about it. (Tr. 96.) That offer was declined by the general chairman. There is no indication that claimant was prejudiced by limiting the questioning to Stanford's own knowledge of the facts and circumstances under investigation, and excluding opinion and hearsay.

The majority's finding that the company and its officials and employes had no right to "hold" claimant after he was caught taking the gas, was unable to account for doing so, and was smelling and acting intoxicated, even to the point of driving a tractor off the platform into the path of a train, is not only irrelevant to any issue in this case but is dictum contrary to law. First, whether or not claimant was "held" has no bearing on either his guilt or innocence of the offenses charged or on the fairness of the hearing. Second, there was no effort to place physical restraint on claimant; he was merely told to wait for the arrival or instructions of a superior officer (Lumpkin)—the right of any employer particularly when the employe is on duty and under pay. Third, the right of "citizen arrest" is recognized not only in Texas but in every other state and country of the English-speaking world. It is the legal right and moral duty of any person to arrest and detain, forcibly if necessary, another he catches in the act of committing what appears to be a criminal offense. In Texas, where this case arose, this right is made statutory by Article 212 of the Texas Code of Criminal Procedure as follows:

> "A peace officer or **any other person,** may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an offense against the public peace."

Intoxication in a public place, as this union passenger station was, is an "offense against the public peace" under this statute. Morgan v. State, Tex. Crim. App., 262 S.W. 2d 713. Article 325 of the Texas Code of Criminal Procedure reads:

> "**All persons** have a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay."

While the altercation was going on, Hershey was in fact trying to call the police and therefore witnessed only a part of the altercation. (Tr. 8, 11-13, 25, 32-33.)

In this case the majority with Referee Donaldson, has completely ignored the well-recognized legal authority of this Board. It is not our function to substitute our judgment for that of a carrier in disciplinary cases. Only if the action of a carrier is so patently unreasonable and unfair to the employe as manifestly to stem from prejudice or caprice instead of sound judgment may we set aside discipline. The carrier is required only to determine from a fair investigation (with formal charge and hearing, if required by the labor agreement) whether the alleged improper conduct of its employe reasonably appears to have occurred, and if so to assess that discipline it deems appropriate. As stated by this Division in the Findings to Award No. 1979, Docket No. 1763:

"Such hearing is not analogous to a criminal proceeding, requiring 'irrefragible evidence' of guilt, as urged by employes. We properly determine only whether there appears to be decision without prejudice and penalty without caprice. A careful review of the evidence in the record before us convinces that carrier representative decided fairly upon substantial evidence. * * * Carrier's statement as to past record is not disputed and indicates that claimant had become careless in his work and indifferent to the obligations of his employment so as to make the penalty of dismissal not capricious."

In this case the carrier was completely fair to the claimant. He was represented by persons of his choice, his general chairman and three other representatives of his organization who did their best to prolong the hearing and confuse the issues. His rights were scrupulously accorded by the company. His guilt of each of the charges was established by substantial evidence and in the considered judgment of both the investigating and reviewing officers. Claimant's discharge was fully warranted by each of the offenses, except perhaps that regarding parking; no lesser degree of discipline would have been fair to the carrier or to other employes.

In our opinion the Findings herein are completely erroneous and the award should be deemed legally invalid.

J. A. Anderson
M. E. Somerlott
D. H. Hicks
T. F. Purcell
R. P. Johnson