Award No. 3747
Docket No. 3686
2-C&O-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Richard F. Mitchell when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

CHESAPEAKE AND OHIO RAILWAY COMPANY (Southern Region and Hocking Division)

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Machinist W. W. Haney was unjustly discharged from service at 11 A. M., May 25, 1959.

2. That accordingly the Carrier be ordered to restore this employe to service with all seniority rights unimpaired and compensation for all time lost retroactive to 11 A. M., May 25, 1959.

EMPLOYES' STATEMENT OF FACTS: Machinist Haney, hereinafter referred to as the claimant was employed by the Chesapeake & Ohio Railroad, hereinafter referred to as the carrier, for a period of approximately 10 years, at the car shops, Raceland, Kentucky.

The carrier, represented by Mr. W. O. Bradley, Shop Superintendent, car shops, Raceland, Kentucky, notified the claimant to appear for investigation to be held May 12, 1959 on charges of insubordination for his failure to report to Chicago, Illinois at 10:00 A. M., April 21, 1959, for the trial of John J. Carpenter vs. Chesapeake & Ohio Railroad.

On April 17, 1959, claimant notified management that he was sick and unable to report for work. On April 17, Claim Agents Owen and Horgan visited the claimant's home at 3:30 P. M. and requested permission to see the claimant. Mrs. Haney, the claimant's wife, informed them that the claimant was in bed sick and could not come to the door. The same claim agents again visited the claimant on April 18 and advised him that they desired him to go to Chicago to appear at the trial of Mr. John J. Carpenter on April 21.

On April 20, Mr. Bradley wrote the claimant a letter advising him to catch Train 47, leaving Ashland, Ky., at 11:10 P. M., April 20. As the claimant was ill at the time suffering from an attack of asthma, he informed the claim agents he could not go to Chicago.

Notwithstanding the fact that Haney refused to go to Chicago to appear as witness at the request of the Railway Company, Haney had gone to Chicago earlier in April, 1959, in company with J. J. Carpenter and had given deposition to Carpenter's attorney for use in handling of the suit in Carpenter's behalf.

As information, when Haney failed to appear in Chicago, carrier was placed in the position of not being able to produce a necessary witness and, since the court would not grant a delay, carrier's attorneys were forced to make an out-of-court settlement of the case.

Haney was the only eyewitness to the personal injury sustained by Carpenter and as such, Haney's testimony was invaluable in placing before the court full facts in connection with the injury. Haney had a responsibility to carrier just the same as any employe has a responsibility to his employer. By reason of Haney's employment, Haney was bound to be loyal and faithful to carrier. His reason for not wanting to go to Chicago to testify for fear of hurting Carpenter's case and his giving of a deposition to Carpenter's attorney are conclusive evidence of Haney's disloyalty.

The shop crafts agreement contains a court attendance rule (Rule 24) which provides for the method of payment to those attending court as witnesses for the carrier. The inclusion of such a rule in the agreement gives carrier the contractual right to require the appearance of employes to provide testimony in court.

That carrier had the right to require Haney to go to Chicago and to testify and the fact that he was obligated to go has not been denied or questioned by the employes. The fact that the employe representatives agreed that Haney should have gone to Chicago as instructed by carrier is evidenced by the following statements made by Mr. C. T. Hicks, local chairman:

> "Mr. Booth: Mr. Hicks, do you have any questions?
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> "Mr. Hicks: Mr. Bradley, evidently you must have had a lot of confidence in Mr. Haney, because I came up here the day of the trial, or the day he was supposed to leave, and offered my assistance to go see if I could find Mr. Haney, and you said you had confidence in him and thought he would be there that night to catch the train.
>
> "Mr. Bradley: I did.
>
> "Mr. Hicks: You will have to give Mr. Bradley credit for being a fair man at least. He though Mr. Haney would be there, because if he hadn't thought so, he would have had somebody try to get in touch with him. What I mean by that is that I would have gone up there myself and tried to contact this brother."

The issue in this case is quite simple. Claimant Haney was instructed by his supervisor to go to Chicago to appear as witness in a personal injury suit. Haney refused. Haney was charged with insubordination, and an investigation was held. The evidence at the investigation clearly proved that Haney was guilty of the charges, and he was dismissed from carrier's service. In rendering the discipline of dismissal, carrier was not arbitrary, capricious, or unjust and the issue should be resolved by your Board in carrier's favor by declining the claim of the employes.

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 were given due notice of hearing thereon.

The claimant was the sole witness to a personal injury accident sustained by J. C. Carpenter while on duty at the carrier's Russell Car Shop on December 17, 1956. Carpenter subsequently brought suit against the carrier because of the personal injury sustained, which case was set for trial in the Circuit Court of Cook County at Chicago, Illinois on the morning of Tuesday April 21, 1959.

On Friday April 17, 1959 two of the carrier's claim agents, Owens and Horgan, went to Haney's residence at Ashland, Kentucky, for the purpose of requesting Haney to appear as a witness in the suit which was to be tried in the Circuit Court of Cook County, Chicago, Illinois at 10 A. M. on Tuesday April 21, 1959. They did not see him, his wife informing them that he was sick and asleep. She promised to give Haney the message. On Saturday April 18, 1959 the claim agents returned to Haney's home, and according to their statement, he then admitted to them that he had received the message about that he did not wish to appear as a witness against Carpenter in the suit that he did not wish to appear as a witness against Carpneter in the suit that he had brought against the C & O. It was explained to Haney that necessary expenses would be taken care of by the railroad company. Haney, according to Owen and Horgan, insisted that he would not go to Chicago to be a witness in the case as he did not want to hurt the Carpenter boy.

On Monday April 20, 1959 Car Shop superintendent Bradley wrote Haney a letter directing him to attend the trial of the Carpenter case set for 10 A. M. April 21, 1959 in the Chicago court. This letter was delivered to Haney by Bradley in company with Mr. Horgan and Car Shop assistant superintendent Duncan at about 11:14 A. M. Monday April 20. In that letter to Haney Superintendent Bradley stated, and we quote:

> "In compliance with Rule 24 of the Shop Craft Agreement, you are hereby ordered to appear as a witness in the trial of this case. Transportation for you from Ashland, Kentucky to Chicago, Illinois and return has been arranged."

Haney claimed that he was sick. We do not find it nceessary to consider the state of his health or other questions raised by him.

Did the company have the right to require Haney, against his wishes, to travel from the State of Kentucky to the State of Illinois to be a witness in a case brought against the company by an employe for personal injury, to which injuries Haney was a witness?

In the letter of April 20, 1959 to Haney signed by Supt. Bradley it refers to Rule 24 of the Shop Craft Agreement. In the memorandum submitted to the referee at the time the case was argued before him, there is this reference to Rule 24, we quote:

> "Rule 24 in the governing contract specifically comprehends the type of factual situation present here and provides for the compensation

which accrues to an employe who serves as a court witness upon request of the carrier. Thus it is apparent there is a rule in the Agreement which contemplates the performance of this type of service by the claimant."

However, in the record of the investigation of the hearing before General Master Mechanic Booth and Shop Superintendent W. O. Bradley in which Haney was charged with insubordination for failure to comply with Supt. Bradley's instructions to report as a witness at the Carpenter trial in Chicago, we find on sheet 6, Carrier's Exhibit A, the following:

"Mr. Blake: If it isn't Rule 24 then what rule has he violated to be charged with insubordination? Where is it?

"Mr. Bradley: Insubordination is not covered by any particular rule of the Agreement.

"Mr. Booth: That's right."

Thus we find that both Mr. Bradley and Mr. Booth conceded that there is no rule in the Agreement that gave the company the right to order Mr. Haney to travel from the State of Kentucky to the State of Illinois to appear as a witness in a case brought against the C & O for injuries that occurred on the property by an employe named Carpenter, the injury to Carpenter being witnessed by Haney. There is no provision in the contract that requries Haney to be a witness, nor is there any connection with the work that Haney was doing as an employe of the Carrier company with the law suit brought by Carpenter. Haney witnessed the injury but the suit had no connection with the work that Haney was performing for the company. The law provides for securing the testimony of Haney and this must have been well known by the carrier who was represented by counsel, but for some reason or other the carrier did not see fit to proceed according to the law but insisted on directing Haney to travel from one jurisdiction to another to be a witness in a case against his wishes. The carrier had no authority to order Haney to Chicago. There was no provision in the contract or anything connected with his work as an employe of the C & O that might give the carrier that right. The carrier was wrong in charging Haney with insubordination, and in discharging him from his work it acted in an arbitrary and unjust way. Haney is entitled to be reinstated with all rights protected and with back pay for the time he lost, less any sums of money which Haney received as compensation for labor performed by him during that period of time.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1961.

DISSENT OF CARRIER MEMBERS TO AWARD 3747

It was contended by the petitioner that claimant may not be discharged for refusing to appear as a witness to a suit in which the carrier was involved, because being a witness was not in the performance of duty; therefore, the charge of insubordination could not have a real meaning. The majority lift from context a statement made by Mr. Bradley, Shop Superintendent, at the investigation that "insubordination is not covered by any particular rule of the agreement" and use such statement to support their erroneous conclusions that carrier's officers have conceded that there is no rule in the agreement which gave the Company the right to order Mr. Haney to travel from the State of Kentucky to the State of Illinois to appear as a witness in a case brought against the carrier for injuries that occurred on the property by an employe named Carpenter and to which injury Haney was the sole witness.

The carrier's officers were correct in stating that insubordination is not covered by any particular rule in the agreement. A reading of the record clearly reveals that the carrier's officers did not state that claimant Haney was not charged with violation of Rule 24 as the majority infer. The letter of April 20, 1959, addressed to Haney which was referred to in the letter charging him with insubordination clearly stated that he was being instructed to attend court in compliance with Rule 24.

The evidence of record clearly reveals that Haney refused to carry out the instructions of his superior, and it is clearly indicated from the investigation that there was no misunderstanding as to what he was charged with at the investigation. If Haney believed that the carrier did not have the right to order him to go to Chicago, he should have carried out his instructions and filed grievance for handling through the proper grievance channels. This Board has held many times that an employe must carry out the instructions of his superior except in cases where the carrying out of such instructions results in serious hazard to the employe. The following Second Division awards so hold: 1459, 1544, 1547, 1548, 1789, 1848, 2118, 2134, 2466, 2685, 2715, 3001, 3310, 3364, and 3568.

It will be noted that not once during the investigation which it took twenty-nine pages to reproduce as carrier's Exhibit "A" did Haney or his representative allege that carrier did not have the right to order Haney to Chicago as a witness. In fact, the local chairman who was one of Haney's representatives at the investigation offered to assist Shop Superintendent Bradley in contacting Haney for the purpose of having him go to Chicago. There is nothing in the record to indicate that the argument that carrier did not have the right to order Haney to Chicago was ever advanced in any handling on the property. The first reference to the carrier having no right to instruct claimant to appear as a witness is made on page 3 of the employes' rebuttal. The issue in this case is not whether carrier had the right to order Haney to Chicago, but is whether the discipline rendered by carrier was unduly harsh, arbitrary or capricious. Certainly the evidence does not so prove.

One of the points raised by the employes in their defense of Haney's actions was that Haney did not realize the importance or necessity of his being in Chicago to testify as a witness. Why would such an argument be used if there were any doubt in the employes' mind as to the carrier's rights to order Haney to Chicago. Furthermore, on page 3 of the employes' initial submission the employes state — "There is nothing in our agreement which can force an employe to travel, while sick, to attend trial, * * *" Here again the employes are not arguing that carrier does not have the right to order an employe to

travel to attend court. They merely say it cannot be done if the employe is sick. It has been conclusively shown that Haney was not sick; however, the majority decided that it was not necessary to consider his state of health. Rule 24 of this carrier's agreement is of a type found in virtually all Railroad collective bargaining agreements. This is the first case in which any employe has ever taken exception to the right of the carrier to order an employe to attend court. It is not true, as the majority imply, that the carrier could not require an employe to leave the jurisdiction of one court for the purpose of testifying. If the employes' contention were true, then the carrier would be far better off to let the court subpoena its witnesses and let the employe collect the fee from the court. Rule 24 by its inclusion in the agreement specifically recognizes the right of the carrier to require employes to attend court. The rule provides for appearing as a witness. Furthermore, even if there were no rule in this respect, any court would hold that an employer whose position had been prejudiced by an employe's refusal to serve as a witness in a case in which it was involved, would be amply justified in severing the employe's relationship with the employer. Honesty and loyalty are an implied provision of every employment contract. Claimant acted in a manner inimical to the interest of the employer and in violation of his implied duty of loyalty to the employer.

An employer is entitled to demand loyalty from its employes, and disloyalty has been repeatedly held to constitute good cause for discharge when the disloyal acts affected the employer much less disastrously than does a key witness who refuses to give vital testimony. In support thereof see:

Brotherhood of Ry., etc., v. A.C.L., 154 F. Supp. 71 Affirmed, 253 F. (2) 753;

Boeing Airplane Co. v. N.L.R.B., 238 F. (2) 380,

Patterson-Sargent Co., 115 N.L.R.B. No. 255, Case No. 8-CA-1042, June 22, 1956, C.C.H. Labor Law Reports, paragraph 53,884,

Hoover Co. v. N.L.R.B., 191 F. (2) 380.

It has been recognized by decisions of all the Divisions of this Board that the carrier does have a right to discharge an employe for an act of disloyalty. In Haney's case his refusal to go to Chicago and testify was a deliberate act of disloyalty. The order was given and Haney disobeyed it and persisted in that disobedience so long that his employer was compelled to settle the case for lack of essential testimony Haney alone could give. Haney's disloyalty was all the more damaging to his employer because, although fully aware that he was the key witness and would be needed in court, he did not disclose his intention to refuse to go until it was too late to take his deposition, which, although an unsatisfactory substitute for his personal attendance in court, would have been better than no testimony at all.

Grounds for dismissal exist though not spelled out in any rule of any agreement, if they are proven and are of such consequence as to disqualify an employe from observing the terms of his contract of employment or make him unfit to do so. Stealing from the employer is a classic example. There is no rule in the controlling agreement which refers to stealing. All of the responsibilities of an employe do not necessarily arise from rules and instructions. "An employe who performs acts adverse or disloyal to his Employer commits a breach of an implied condition of the contract of employment which may warrant discharge." (See 56 Corpus Juris Secundum, page 430.) Claimant refused to follow his instructions, and the evidence in the record is substantial in supporting the carrier's action against the claimant.

Third Division with Referee John W. Yeager sitting as a member of the Division in the issues of Award 3911 found:

> "It seems that such calls as this must be considered as involving work or service to the carrier. Admittedly, had this employe failed or refused to respond to the call for the investigation he would have been subject to discipline at the hands of the carrier."

On October 23, 1952, the Third Division, with Referee Elwyn R. Shaw sitting as a member of the Division in a dispute between this carrier and signalmen found in Award 2032:

> "There can be no doubt, in fact the parties to this dispute each admit, that the claimant in this case had no choice but to attend the investigation, and it is likewise admitted that had he refused to do so he would have been guilty of insubordination and subject to discipline — perhaps even to discharge."

The majority state that the law provides for securing testimony of Haney and infer that his appearance at court was not necessary. It is well recognized that a deposition does not carry with it the weight of actual testimony from a witness, and the defense of the carrier would have been drastically weakened by use of a deposition, particularly in a case of this kind wherein claimant was the sole eye witness to the injury. The use of a deposition would deprive the carrier of a vital part of its defense in this case.

Carrier, of course, recognized that it could secure a deposition from Haney, however, there was certainly no indication that Haney would refuse to go to Chicago to attend the trial on April 21 until the morning of April 18, at which time it was then too late to secure a deposition. There was not sufficient time to have the proper legal notices served, get the deposition taken and have it at Chicago by 10:00 A. M., April 20. Furthermore, even had the notices been waived and Haney had agreed to give a statement, which he probably would not have done in his belligerent condition, it would then have been necessary for carrier's attorney to travel from Chicago to Ashland, Kentucky, over the weekend to secure the deposition and return to Chicago or have the deposition taken by an attorney at Ashland, Kentucky, who was not familiar with the case and thus further weaken the carrier's defense .

It cannot be denied that the personal appearance of an employe in court to testify to the facts of an accident he has witnessed may be much more vital to the welfare of the employer than any services he would render if at his regular job, nor can it be denied that an employe who alone possesses knowledge of a fact essential to the defense of his employer in a damage suit proves that he is disloyal to his employer when he refuses to go to court and to give his testimony, and his only reason for refusing is his unwillingness to testify because the facts within his knowledge will or may refute the claims of a fellow employe and prevent such employe from recovering from their mutual employer damages to which he is not legally entitled.

For these reasons, the Carrier Members dissent.

P. R. Humphreys
H. K. Hagerman
D. H. Hicks
W. B. Jones
T. F. Strunck

ANSWER TO CARRIER MEMBERS DISSENT

This referee has participated over the past 20 years in hundreds of cases on the National Railroad Adjustment Board. During that time many dissents have been written by the Carrier and employes in Awards written by this referee, but in only a few cases has he found it necessary to answer a dissent. He believes in the right of an individual to express his views but, Dissents should be based upon the facts in the case. The Award is a little over two pages long. The Dissent is four pages long. It took better than six months to write the Dissent. It mistates the facts, argues issues that are not in the case, makes statements uncalled for and unfair.

There is no violation of the agreement and no one now claims there is, even the writers of this Dissent. The claim is made that Haney was not loyal to his employer, in fact, they say he was disloyal. There is no basis for such a statement, that Haney was disloyal, for Haney was not required to travel from Kentucky to Chicago under the agreement or for any other reasons. This record clearly shows that Haney was a faithful and loyal employe of this Carrier and it unbecomes the Carrier to charge him with disloyalty. Haney had an absolute right not to go to Chicago because it was not a part of his duties as an employe of the Carrier. The Dissenters say that grounds for dismissal though, it is not spelled out in the agreement and then they quote stealing from the employer is a classic example. No one claims, not even the Dissenters, that Haney was guilty of stealing.

The Dissenters quoted two Awards that are not in point and apparently the Awards were not read by the Dissenters for in both Awards cited, were cases involving investigations and were for claims by employes and attended same. It's interesting that in both Awards cited employes were allowed expenses by the board, and the claims sustained.

To me the most absurd statement in the Dissent is that they didn't have time to take the deposition of Haney. The Chicago suit was pending for better than a year and they didn't notify Haney that they were going to use him until the Friday night before the trial which started on Tuesday morning. The Carrier had a year in which to take his deposition, there was plenty of time.

There was but one question in this case, Haney lived in Kentucky. He was an eyewitness to the accident. The case was brought in Chicago. Under the law and the agreement there was no way that this Carrier could force Haney to leave Kentucky and travel to Chicago, Illinois. That is the law and this Carrier is bound by the law. Under the agreement and under the law this Carrier had no right to discharge Haney and it should have known. Frankly this referee does not believe that dissents of this kind promote good relationship between the Carrier and its employes.

Richard F. Mitchell — Referee