Award No. 4102
Docket No. 3915
2-CofG-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 26, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

CENTRAL OF GEORGIA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling Agreement on April 7, 1960 when it unjustly dismissed Carman G. A. Ebberwein, Jr., from the service following investigation held March 14, 1960.

2. That accordingly he is entitled to be restored to the service with seniority unimpaired and compensated for all time lost retroactive to April 7, 1960.

EMPLOYES' STATEMENT OF FACTS: Carman G. A. Ebberwein, Jr., hereinafter referred to as the claimant, was originally employed by the Central of Georgia Railway Company, hereinafter referred to as the carrier, as a carman apprentice on January 30, 1951. On May 12, 1954 he was granted leave of absence to enter the Armed Service (U. S. Navy), subsequently he completed his tour of duty in the Navy and re-entered the service of the carrier May 14, 1956. He completed his regular apprenticeship on August 23, 1957, was placed on the carmen's seniority roster with a back-dated seniority of July 29, 1955 account military service, however he was immediately furloughed due to the fact that carmen senior to him were on furlough at that time.

Subsequently, claimant worked temporarily at Chattanooga, Tennessee and Atlanta, Georgia for carrier.

Claimant had been re-called to service as a carman in accordance with his seniority at Savannah, Georgia prior to October, 1959. Claimant worked his regular assignment — Monday through Friday, 8:00 A. M. to 4:30 P. M. — on October 22, 1959. At about 1:00 A. M., October 23, 1959, claimant was involved in a minor traffic accident with a City of Savannah truck. He was arrested by the City Police officer investigating the accident allegedly for D. U. I. (driving under the influence) and subsequently released under bond to appear in Court. Prior to his regular work time, claimant contacted his immediate foreman and obtained permission to be absent from work on October 23, 1959.

(4) In assessing the extreme discipline (dismissal), the carrier also took into consideration the personal record of claimant, which speaks for itself.

It is clear then that the action of the carrier is entirely in order, and that the claim has no merit whatsoever. Carrier strongly urges the Board to dismiss this case account of the failure of the organization to comply with Article V of the November 5, 1954 agreement; or to render a denial award.

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, G. A. Ebberwein, Jr., entered the Carrier's service as a Carman Apprentice in January, 1951. On August 16, 1956, he was charged by the police with being drunk on the street and forfeited a bond of $15.00. In August, 1957, he was furloughed due to lack of work. He was recalled to active service as a Car Inspector at the Carrier's Chattanooga (Tennessee) Shops in December, 1958, but was disqualified approximately three weeks later and again furloughed. On June 25, 1959, he was charged by the police with disorderly conduct and being drunk in an automobile. He was sentenced in court to pay a fine of $25.00 or serve 30 days in jail. He paid the fine. In September, 1959, he was recalled as a Car Inspector at the Carrier's Atlanta (Georgia) Industry Yard but was disqualified two days later. On October 1, 1959, he was re-called as a Car Repairer at the Carrier's Savannah (Georgia) Shops. While driving an automobile within the limits of the City of Savannah at about 1:00 A. M., October 23, 1959, he struck the rear of a truck which had stopped for a traffic light. The accident resulted in damage of about $7.00 to the truck and of about $350.00 to the Claimant's automobile as well as in a personal injury to a passenger in the latter. The Claimant was arrested by the police and charged with reckless driving, having an accident, causing personal injury and being drunk. On the same day, he appeared in the Savannah Police Court and was bound over to the City Court where he was tried on March 4, 1960. He pleaded **nolo contendere** and was sentenced to pay a fine of $150.00 or serve 60 days in jail for driving an automoblie while under the influence of alcohol. He paid the fine.

After a formal investigation hearing, he was dismissed from the Carrier's service, effective as of April 7, 1960. He filed the instant grievance in which he claims re-instatement with accumulated seniority rights and compensation for all time lost. For the reasons hereinafter stated, we are of the opinion that his claim is only partly justified.

1. At the outset, the following two procedural objections raised by the Carrier require disposition:

First, the Carrier argues that the Organization failed to notify, in writing, Master Mechanic McKay of its rejection of his decision declining the Claimant's grievance and that such failure was violative of Article V, (b) of the Novem-

ber 5, 1954, Agreement. The record reveals that General Chairman Bookout stated in his letter of appeal to Superintendent Perkins that a "copy (of) this letter and appeal is being furnished Mr. H. M. McKay and to advise his decision dated May 9, 1960 is not acceptable . . ." (Carrier's Exhibit "B"). A careful review of the available evidence has satisfied us that Bookout mailed said copy by ordinary mail to McKay. It is, of course, possible that the copy was lost in the mail but Article V, (b) does not require that it had to be sent by registered or certified mail.

Second, the Carrier asserts that the Organization failed to send a copy of its appeal from the decision of Superintendent Mims to the latter and that Article V, (b) was again violated. This objection was not raised by the Carrier during the processing of the instant grievance on the property. As a result, the Carrier is barred from raising it before us. See: Award 1834 of the Second Division.

In summary, we hold that the Carrier's procedural objections are without merit.

2. The Claimant was dismissed on the ground that he violated Rule 21 of the applicable labor agreement which provides, as far as pertinent, that "an employe detained from work . . . for any . . . good cause shall notify his foreman as early as possible." At the investigation hearing, the Claimant's supervisor, Chief Car Inspector Herndon, testified that the Claimant called him before the starting time of his work shift on October 23, 1959, and asked for permission to be absent from work because he had an accident and had to go to court. Herndon also stated that he granted the permission. Furthermore, after having reviewed the stenographic transcript of the investigation hearing, Superintendent Perkins conceded in a letter, dated July 6, 1960, and addressed to the Claimant's representative, that "it (the investigation) did not prove that he (the Claimant) was guilty of violating Rule 21 of the current agreement" (Carrier's ex parte submission brief, p. 8). Under these circumstances, the Carrier's continued contention that the Claimant violated Rule 21 is untenable.

3. The Claimant was dismissed for the further reason that he violated Rules G and 701 of the Operating and Maintenances Rules which read, as far as pertinent, as follows:

Rule G:

> "The use of intoxicants . . . at any time when it subjects the company to criticism or loss of good will is sufficient cause for dismissal."

Rule 701:

> "Employes will ever be mindful of the fact that the public judges the company by the appearance and conduct of its employes and they must at all times conduct themselves so as to reflect credit on themselves and the railway."

The right of the Carrier to establish and enforce reasonable operating and maintenance rules for its employes cannot be doubted, except when such rules are inconsistent with law or the terms of the applicable labor agreement. See: Award 2204 of the Second Division. A critical examination of Rules G and 701 has convinced us that they do not fall within the realm of such exceptions.

The basic question requiring decision is then whether the Claimant violated the Rules. The answer is in the affirmative.

The record shows that the Claimant ran afoul of the law in three instances involving the use of intoxicants within the period of slightly more than three years. In an effort to exonerate himself, the Claimant argues that he was not in the employ of the Carrier when the second instance occurred on June 25, 1959. The answer to this argument is that he was on furlough from the Carrier's service at that time and, therefore, an inactive employe entitled to be recalled to active service in accordance with his seniority rights.

Regarding the third instance, the Claimant argues that his conviction for driving an automobile while under the influence of alcohol cannot be held against him because he pleaded **nolo contendere** before the Georgia trial court. In support of this argument, he relies on Title 27, Section 1410 of the Statutes of the State of Georgia which provides, as far as relevant, that a "plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt, or otherwise, **or for any purpose . . .**" We are of the opinion that the Claimant's argument is without merit. (Emphasis ours.)

Congress, acting within its constitutional authority, has, in Section 3, First (i) of the Railway Labor Act, vested this Board with **exclusive** primary jurisdiction to adjudicate "the disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." See: Slocum v Delaware, Lackawanna & Western Railroad Company, 339 U. S. 239; 70 S. Ct. 577 (1950; Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company, 353 U. S. 30; 77 S. Ct. 635 (1957); Pennsylvania Railroad Company v. Day, 360 U. S. 548; 79 S. Ct. 1322 (1959). In addition, Congress has directed this Board in Section 3, First (u) of the Railway Labor Act to "adopt such rules as it deems necessary to control proceedings before the respective divisions." Congress evidently considered that centralized and specially designed procedures administered by a single federal agency were necessary to obtain uniformity in both the adjudication of grievances and the application or interpretation of labor agreements in the railroad industry. In other words, the Railway Labor Act is all-embracing and national in its scope. See: State of California v. Taylor, 353 U. S. 553, 566; 77 S. Ct. 1037, 1045, 1957). The supremacy clause of Article VI of the Constitution forbids recourse to diverse or potentially conflicting local or state procedures which could conceivably nullify the intent of Congress.

In applying the above principle to the facts underlying the case at hand, we have reached the following conclusions:

This Division has never adopted a procedural rule which would afford the Claimant the protection which he asserts here on the basis of his plea of **nolo contendere** before the Savannah City Court. Consequently, Title 27, Section 1410 of the Statutes of the State of Georgia does not preclude us from taking into account the undeniable fact that the Claimant was charged with driving an automobile while under the influence of alcohol, sentenced therefor, and paid a fine of $150.00 in lieu of serving 60 days in jail.

4. It is well established in the law of labor relations that an employe's past record cannot generally be used against him in resolving the question of whether he is guilty of an alleged offense. Yet it is also a firmly recognized principle that his past record may be taken into account in determining the

degree of a disciplinary penalty to be imposed upon him when a proved offense can properly be evaluated only in the light of his previous conduct. See: Awards 1367, 1544, and 2714 of the Second Division; see also: Arbitration Award in re Certain-Teed Products Corp., 62-1 Labor Arbitration Awards (Commerce Clearing House, Inc.) No. 8197, pp. 3769, 3772 (1962); Frank Elkouri and Edna A. Elkouri, **How Arbitration Works**, Revised Ed., Washington, D. C., BNA Incorporated, 1960, pp. 428-430 and cases cited therein.

While none of the three incidents in question, standing alone, would possibly have been sufficient conclusively to prove a violation of Rules G and 701 on the part of the Claimant, we are satisfied that the general pattern of his conduct was incompatible with the letter and spirit of said Rules. It is true, as urged by the Claimant, that the three incidents did not occur on the Carrier's property or while he was on duty. However, we do not construe the Rules so narrowly but are of the opinion that they are generally applicable when an employe comports himself in such a manner as conceivably to subject the Carrier to criticism. See: Awards 17158 and 20162 of the First Division. In summary, we hold that the Claimant was guilty of a violation of Rules G and 701.

5. The right of the Carrier to discipline the Claimant under such conditions is beyond doubt. We have consistently held that a Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Awards 3874 and 4000 of the Second Division. The evidence on the record considered as a whole has convinced us that the Claimant's dismissal was an excessive penalty and that a lesser penalty is appropriate. This is particularly true in view of the fact that one of the charges for which he was dismissed was unjustified as pointed out hereinbefore and that the three incidents involving the use of intoxicants occurred while he was off duty. Hence, we hold that the Claimant shall be re-instated to his former position with accumulated seniority rights and with compensation for all time lost since his dismissal, except that no compensation shall be made for the period from April 7, 1960, to July 6, 1960. Moreover, from the compensation due to him there shall be deducted any remuneration which he may have earned in other gainful employment from and after July 6, 1960, until his re-instatement.

AWARD

Claim partly sustained and partly denied in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December 1962.

DISSENT OF CARRIER MEMBERS TO AWARD 4102

This award, sustaining the claim as set forth in the Findings, is wrong when it modifies Carrier's action and grants leniency after finding that the evidence sustained the charges against the claimant.

The transcript of the hearing and the facts and circumstances in this docket are not persuasive that the hearing was arbitrary or biased, that the

charges were not proven, or that the discipline imposed was not reasonably related to the seriousness of the offense and to Claimant's past record.

The Carrier did not abuse its discretionary right, and interference in the Carrier's judgment is not warranted. The Claimant's rights were not abridged or prejudiced in any way, and as the Findings in this award admit, the charges against the employe were sustained. The only basis on which Claimant may be reinstated would be to decide that the charges against him were not sustained, and the majority in doing otherwise has given an erroneous award

The National Railroad Adjustment Board and the courts have recognized in many awards that it is not the legal function of this Board to judge the degree of discipline to be given and then substitute its judgment for that of the Carrier.

The erroneous action of the Board places the Carrier in the difficult position of not knowing what to do in the future in like situations. Six months prior to this award, the Third Division of this Board ruled in a similar dispute involving the same Carrier but a different organization that the action of the Carrier was not arbitrary, capricious, or in bad faith, and a denial award was issued. See Award 10566 of the Third Division.

Since employes accept employment subject to conditions outlined in the Agreement and Company rules, which are clear, how then can the action of the Carrier be set aside by this Board when it simply applied the rules which the employe agreed to when employed?

In First Division Award 16343 we read:

> "As a general rule, we are of the opinion that, in the absence of compelling evidence of abuse, for us to attempt to modify carrier-imposed discipline in particular cases like the one at hand would launch us on to an uncharted and unchartable sea. In virtually every such case we should be driven in the end to substitute our judgment for that of the carrier. This we decline to do."

In Third Division Award 9045 we read:

> "While this Referee is reluctant to sustain such extreme disciplinary action as dismissal in the case of an employe of long service, it cannot be validly said that on the basis of this record the penalty exceeds the very considerable latitude the Carrier possesses in assessing punishment. We, accordingly, are not inclined to substitute our judgment on the point for that of the Carrier. See Awards 891, 1310, 2621, 2632, and 8711."

We can only conclude that the majority in reaching the decision it did in this dispute has gone beyond its authority in setting aside the discipline imposed by the Carrier.

For the reasons stated above, we dissent.

P. R. Humphreys
H. K. Hagerman
F. P. Butler
W. B. Jones
C. H. Manoogian