Award No. 4916
Docket No. 4859
2-FEC-MA-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 69, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

FLORIDA EAST COAST RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. Carrier exceeded its authority in directing Mr. W. H. Lamb to present himself at an investigation on September 3, 1963.

2. The Carrier's dismissal of Mr. Lamb on September 6, 1963, was improper, unjustifiable, unreasonable and unwarranted.

3. Carrier be required to set aside dismissal of Mr. Lamb, with his seniority and all other rights unimpaired, and that he be compensated for all wages losses as a result of his improper dismissal.

EMPLOYES' STATEMENT OF FACTS: W. H. Lamb, hereinafter referred to as the claimant, was employed by the Florida East Coast Railway Company, hereinafter referred to as the carrier, on December 5, 1941, and has remained in the employment thereof for approximately twenty-three years, thereby rendering creditable and efficient service without complaint up until January 23, 1963, at which time all employes represented by the Eleven Non-operating Unions went on strike against the Carrier. At that time picket lines were established and have been constantly maintained at various points adjacent to but not on the property of the Railway. The strike is still in progress as this submission is being prepared. One such picket line was established at entrances leading to the passenger depot at New Smyrna Beach, Florida.

On August 26, 1963, claimant was notified by letter to appear for investigation to be held at Daytona Beach at 10:00 A. M., September 3, 1963, on a charge of disloyal, repugnant and offensive conduct, unbecoming an employe of the Florida Coast East Railway Company, by willfully trespassing on the property of the Florida East Coast Railway Company, New Smyrna Beach, Florida, approximately 75 feet south of Canal Street on the west side of the old Florida East Coast Railway Depot and east of Citron Streeet at approximately 6:00 P. M., Friday, July 12, 1963, with malicious and harmful intent to cause injury and damage to the Florida East Coast Railway Company by throwing tacks, nails, staples or spikes on the property of the Railway.

former to be faithful and diligent in the performance of his service, and to obey his reasonable rules within the nature of his employment. There is no doubt here that the rule was broken; and it follows that the discharge was justifiable."

For the reasons stated herein, the claim should be dismissed or 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 juridiction over the dispute involved hererin.

Parties to said dispute were given due notice of hearing thereon.

Claimant was notified in writing that he was charged with "disloyal, repugnant and offensive conduct unbecoming an employe" of the Carrier "by willfully trespassing" on its property at a specified point "at approximately 6:00 P. M., Friday, July 12, 1963, with malicious and harmful intent to cause injury and damage" to the Carrier "by throwing tacks, nails, staples or spikes" on its property; and that he should report at the Daytona Beach Plaza at a time stated, for a formal investigation to develop the facts and responsibility in connection with the charge. The notice further stated:

"The following rules and instruction of the Railway are involved:

Operating Rules:
General Rule 'R'

Former Assistant General Manager's Circular No. 1, dated October 1, 1927:

Paragraph 13"

By a later notice this reference was amended to read as follows:

"Rule of Conduct for Employes
Rule 27"

No objection is raised to this change in reference to rules, and the sufficiency of service is not questioned.

Rule 27 of the Rules of Conduct for Employes is as follows:

"Disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetency, wilful neglect, inexcusable violation of rules resulting in endangering or destroying Company property, jeopardizing the safety of employes or public, making false statements, or concealing facts concerning matters under investigation, will, as heretofore, subject the offender to summary dismissal."

The investigation was held in accordance with the notice, Claimant not appearing nor being represented, after which Claimant was notified of his

discharge. A grievance was thereupon instituted and progressed under Rule 27 of the Agreement, during which the following issues were raised:

1. That Claimant was on a legally called strike at the time of the incident and was not subject to the continuing authority of the Carrier; and that "consequently the Carrier had no right to subject him to an investigation resulting in the above punitive action."

2. That "under recognized strike procedure" Claimant "in his status as a striking employe had no right to enter company property for this or any other reason."

3. That Rule 27 of the Carrier's Rules of Conduct for Employes was unilaterally adopted by it and therefore was of no force or effect in this case.

4. That the record is insufficient to establish a case against Claimant or to justify the action taken.

A fifth contention is made before this Board that the charge was not sufficiently precise, which we do not find in the record of the proceedings on the property. On this point it is sufficient to say that the charge as stated above was sufficiently detailed to permit Claimant to prepare a defense. It is not apparent how he could have been misled or confused by it to the prejudice of his rights; consequently the charge must be held sufficiently precise for its purpose.

A sixth objection, not raised before or at the hearing, and so far as the record shows, not made on the property during the subsequent grievance procedure, is that the Claimant could not have had a fair and impartial trial during the strike. If before the hearing a postponement had been requested on that ground and a showing made in support of it, this Division might now have been in position to consider whether a refusal was warranted; but in the absence of such request, showing and refusal the record does not disclose erroneous action by the Carrier in that respect. We shall therefore proceed to consider in the order above stated the four issues raised on the property.

1. The First Division upheld in its Award 12091, and the Third Division in its Award 13127, a carrier's right to dismiss employes for acts committed while on strike. The published report of Award 12091 does not show whether the investigation was held and the discipline imposed during the continuance of the strike; but Award 13127 shows that in that case they were. In any event, the question is now definitely settled for this Board by the decision of tthe United States Supreme Court in Cases Nos. 750, 782 and 783, Brotherhood of Railway and Steamship Clerks et al. v. Florida East Coast Railway, promulgated on May 23, 1966, (book or page data of reports not yet available), which affirmed the decision of the United States Court of Appeals, 336 F. 2d 172. It held that the regularly negotiated labor agreements were in full force and effect, subject only to such modifications by the Carrier as the court might find "reasonably necessary to effectuate its right to run its railroad under the strike condition." We must therefore hold that both Rule 27, under which the instant grievance was progressed on the property and brought here, and Rule 29, under which the hearing was held and discipline imposed, were in effect despite the strike. If that were not true this Board would be without jurisdiction of the present proceeding.

With reference to the direction to appear for the investigation, it is of course true that while on strike Claimant was not subject to Carrier's orders;

but the notice of the investigation was necessarily given him for his own protection pursuant to Rule 29, which limits his possible discipline to established cause; it entitles but does not require him to appear and be heard or represented, and his absence does not invalidate the investigation.

2. The second objection, that Claimant as a striking employe had no right to enter company property, is not applicable, since the hearing was held at the Daytona Beach Plaza Hotel, which as alleged by the Carrier and not denied by the Organization, is not company property but several miles from it.

3. The third objection, that Rule 27 of Carrier's Rules of Conduct for Employes, unilaterally adopted by it and not part of the negotiated Agreement, has no force or effect, is not seriously argued here. It is too well settled for argument that, except as forbidden by law or limited by agreement, the employer has the full right to manage its business, direct its force, and establish all reasonable rules and regulations therefor. Awards 1581, 1695, 2016, 2824, 3249.

4. The final question before us is whether the record is sufficient to establish a case against Claimant and to justify the action taken. It is well settled by the awards of all four divisions of the Board in such cases that the discipline order must stand or fall upon the record of the investigation, without reference to extraneous or subsequent information. As the Claimant neither appeared nor was represented at the investigation, no evidence was submitted on his behalf; it was not until the conference on the final step of the grievance procedure on the property that any such showing was offered, and it consisted only of R. L. Mullen's written statement that he and Claimant were assigned to picket duty at the point in question "from 6:00 P. M., July 12, 1963," and that "During this said tour of duty, I did not see Mr. W. H. Lamb throw any objects of any sort or trespass upon the F.E.C. Ry. property." That statement is not a denial of the direct evidence that Claimant did trespass and throw nails on the property; and even it if were, and if it had been submitted at the investigation, this Board, not being a weigher of evidence, could not find that it necessarily outweighed the other evidence.

Witness Stone testified that for about a month he had been employed to photograph incidents involving pickets; that immediately after arriving at an upstairs window of Carrier's old depot at about 6:00 P. M. on July 12, 1963, he photographed Claimant on the Carrier's property and in the act of throwing roofing nails on it; that from the same position he watched witness Truman make the picture hereinafter mentioned; that since his employment such incidents had caused about thirteen flat tires, one of which was completely ruined.

Witness Truman, a special agent for the Carrier, testified that on this occasion Mr. Stone telephoned that he had just observed pickets in this area throwing nails on Carrier's property; that he went directly to the location described, saw Claimant walking picket there, and observed, photographed and picked up nails which he produced at the hearing; that this was on company property; and that the picture taken by Mr. Stone showed Claimant standing on company property east of the old depot, about 75 or 100 feet south of Canal Street. He testified further than many such incidents had occurred, and that they had caused several hundred dollars of damages in the puncture of tires of the Carrier and its employes.

The witnesses identified the photographs, put them in evidence, and testified that the first showed Claimant standing on Carrier's property and in the act of throwing nails on it. Having been taken at an upstairs window against a mottled background, even though with a telephoto lens, the objects apparently coming from Claimant's hand are indistinct and undefinable; but the evidence is uncontradicted that at the time Claimant was throwing nails, and definite corroboration is not required; the other picture clearly shows large-headed nails which from their shape appear to be ordinary roofing nails.

It was also shown by documentary and oral evidence that in connection with this incident Claimant was arrested on two justice court warrant, one for trespass and one for trespass with malicious and harmful intent to cause injury and damage to the Carrier by throwing tacks, nails, staples or spikes on its property; and that by non-appearance he forfeited bonds on both charges. This in itself is not evidence of guilt, since there may be some other explanation. On this evidence, Carrier three days later notified Claimant of his dismissal from service. So far as the record shows there was not objection to the notice, the charge, or the time or place of hearing, and no request that it be postponed or held elsewere.

There is no occasion for this Division to determine whether the Claimant was guilty of the charge; but upon this record we cannot conclude that the findings or discipline complained of was not supported by the uncontroverted direct evidence.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1966.

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