

Award No. 5042

Docket No. 4746

2-CRI&P-MA-'67

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. 6, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Machinists)**

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the terms of the controlling agreement, the Carrier unjustly dismissed Machinist Buddy D. Wright from service for a period of thirty (30) days, causing him to lose twenty-one (21) days' wages. Machinist Wright was dismissed from service on October 9, 1963, and reinstated November 9, 1963.
2. That accordingly the Carrier be ordered to compensate Machinist Wright for the loss of twenty-one (21) days' wages at the prevailing Machinist rate of pay \$2.7408, plus the payment of one (1) (1) month insurance premium.

EMPLOYEES' STATEMENT OF FACTS: The Chicago, Rock Island and Pacific Railroad Company, hereinafter referred to as the carrier, maintains a diesel shop at Enid, Oklahoma Machinist Buddy D. Wright, hereinafter called the claimant, was employed as a machinist at Enid. As the result of an investigation held October 3, 1963, Machinist Wright was dismissed from service effective October 9, 1963. On October 1, 1963, a "Notice of Investigation" was issued by Assistant Superintendent Mr. C. H. Gray, advising the claimant that he would be a principal in an investigation to be held in Mr. Gray's office at El Reno, Oklahoma, October 3, 1963.

This notice also contained the names of ten (10) other employees who were also to be principals. On October 2, 1963, a second notice was issued. In the second notice, the claimant was the only designated principal. The claimant was dismissed from service effective October 9, 1963, and was reinstated effective November 9, 1963.

On October 3, 1963, the claimant appeared at the office of the agent at Enid. He was accompanied by Mr. C. O. Borchers, Otis Cox and L. O. Marquardt to represent him at the investigation. These men comprise the machinist local committee at El Reno, Oklahoma, and the duly authorized representative of the claimant. However, at the start of the investigation, the claimant was

Mr. Wright to service effective November 9, 1963, under the following conditions:

His reinstatement is on a leniency basis, with seniority rights and vacation rights unimpaired.

He will be required to take such physical and rules examinations as may be designated by the division officers."

Claimant was only held out of service for one month for his rule violation—that was in no way excessive, but proper to serve the purpose of discipline.

Conclusion:

Claimant was properly disciplined for his admitted noncompliance with carrier's rule's involving the proper testing of air brakes on Diesel No. 1227 on September 26, 1963.

Carrier believes it has shown that the discipline, dismissed for only one month, was not in any way capricious, excessive, or in abuse of carrier's discretion and the employes have not presented any evidence that this discipline should not be reversed. Therefore, your board should deny the employes claim.

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 waived right of appearance at hearing thereon.

The original notice of investigation was given to eleven employes, including Claimant "to develop the facts, discover the cause and determine your responsibility, if any, in connection with the handling of Dsl 1227 dead in Train No. 98, Sept. 26, 1963 from El Reno to North Enid and at North Enid, which resulted in damage to Dsls 1227 and 537 and the North Enid Engine House and violation of operating rules and MP-141, and rules and instructions in connection therewith."

By later notice the hearing was limited to Claimant, who was handling the diesel at North Enid when it went out of control, damaging itself, the other diesel, and the engine house.

The objection is made that Claimant was not afforded a fair hearing because he was limited to only one representative. This objection is based upon Award 3845, in which this Division said:

"The Carrier's contention is that the incident here involved was a discipline investigation under Rule 34, and was not incidental to claims or grievances under Rule 32, and therefore was not within paragraph 7 of the latter rule.

"But the Employees point out that this paragraph was adopted in 1935 and retained in subsequent agreements without change, and that during all that time both the Carrier and the Organizations have recognized that the local committees were entitled to represent employees in the handling of disputes, controversies and investigations with local officials during their working hours, without loss of time. Without denial by the Carrier they cite forty such instances of discipline hearings at four points in Arkansas, Kansas and Illinois between 1941 and 1958, and state that it is only a partial list. In view of this record the claim must be sustained."

As this Division pointed out in Award 5041 three errors in Award 3845 should be noted:

"First: The reference in the first paragraph cited to 'paragraph 7' of Rule 32 is erroneous, since the rule has no such paragraph; the reference should instead have been to 'the second paragraph' of the rule.

"Second: In the first paragraph of 'Position of Employees' in Award 3845, this provision is incorrectly designated as part of Rule 35, instead of Rule 32.

"Third: The second paragraph cited from Award 3845 is too broad in finding an established recognition 'that the local committees were entitled to represent employees in the handling of disputes, controversies and investigations with local officials during their working hours, without loss of time.' What the record showed, and what the Board should have found, instead of the words above quoted, was an established recognition that 'local committeemen are entitled to attend investigations during their regular working hours without loss of pay.'

"All evidence submitted in proof of the established custom was of numerous investigations at various points on Carrier's system at which committeemen were 'present with no loss of time while attending investigation' but with no reference to representation of the employee under investigation.

"Furthermore, the claim in that case was that the committeemen 'were unjustly denied pay while attending investigation' and their right to pay, which was sustained, was the only question before the Board."

Consequently Award 3845 is not valid authority for the theory that an employee under investigation is entitled to representation by all local committeemen and cannot have a fair hearing without it.

It has seemed advisable to point out the erroneous and irrelevant reference in Award 3845 to the representation of employees under investigation. But in this case any possible objection was waived by the Claimant's statement after the exclusion of the committeemen that he was ready to proceed with the hearing, and by his representative's statement:

"I am ready to proceed with the investigation under protest regarding **loss of time to committeemen.**" (Emphasis added).

It should be noted also that the only reference in the rules to representation of employees in discipline proceedings (Rule 34) is in the singular. Re-

ardless of committeemen's right to attend investigations without loss of time, it cannot be held that their exclusion deprived Claimant of a fair hearing. We shall therefore proceed to consider the merits.

It is contended that someone was at fault in transporting the diesel dead in the train with its air brakes inoperative; but that matter is not before us. If the diesel had not been delivered to Claimant in that condition his neglect to make a proper inspection might not have resulted in damage; but that does not excuse his neglect which he admitted as follows:

"Q. Mr. Wright did you at any time endeavor to inspect your brake equipment on the ground to determine if the brakes on the locomotive would set or had set?

"Q. No."

* * * * *

"Q. Mr. Wright when were you first aware that you had no brakes on the locomotive 1227 and how was this determined?

"A. Just after the impact I got off from Dsl 1227 and inspected brakes cylinders, finding brake cylinders cut out at No. 1 and No. 2 engine trucks.

"Q. Mr. Wright did you comply fully, with Rule 24 and 71 of the M.P. 141 effective April 1, 1961?

"A. With the exception of making visual inspection from the ground on brake equipment.

"Q. Mr. Wright is this 'visual' necessary in order to determine if your brakes are functioning properly?

"A. Yes.

"Q. Mr. Wright Rule "B" of the General Rules of Form G-147 Revised reads 'Employees must have a proper understanding and working knowledge of and obey all rules and instructions in whatever form issued, applicable to or affecting their duties. If in doubt as to their meaning, employees must apply to proper officer for an explanation . . .'

"Q. Mr. Wright did you comply with this rule?

"A. Yes with the previously stated exception.

"Q. Mr. Wright this exception being your failure to make a visual inspection of these brakes?

"A. Yes."

It is objected that Claimant's loss of twenty-one days' wages constituted excessive discipline. While the amount of damage to the engine house and

the two diesels is not shown, it was apparently substantial, and in view of the fact that the results could have been even more serious, there is no basis for a conclusion that the discipline imposed was excessive.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1967.