

Award No. 5542

Docket No. 5447

2-REA-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS**

RAILWAY EXPRESS AGENCY, INC.

DISPUTE: CLAIM OF EMPLOYEES:

1. That the carrier violated the controlling agreement between International Association of Machinists and Aerospace Workers and REA Express by unjustly suspending from service Herbert E. Kriete on the date of September 17, 1966, and by continuing him under suspension since that date.

2. That accordingly, the carrier be required to return Machinist Kriete to active service and reimburse him for all lost time during his suspension, restoration of all fringe benefits, including vacation, holidays, health and welfare premiums, all paid for by the carrier, and compensation for any costs in connection with such benefits incurred during his suspension.

EMPLOYEE'S STATEMENT OF FACTS: REA Express Company herein-after referred to as the Carrier, operates a trucking facility at St. Louis, Missouri, part of which is a maintenance and repair shop where Machinist Kriete was regularly employed until the date of his suspension. A diagram of this facility is attached and identified as Exhibit "A," for the convenience of the Board.

Mr. Kriete's hours of service were from 3:00 P. M. to 11:00 P. M., Monday through Friday, Rest Days — Saturday and Sunday, and generally worked in conjunction with one other employe in his bargaining unit (Maintenance Department) on this shift, classified as a Lead Man.

Another employe referred to in the Transcript as "Ronnie Young" is also employed on this shift, but is in another bargaining unit, without working relationship nor supervisory authority over Mr. Kriete.

On September 15, 1966, Mr. Kriete who was working alone on his shift that day due to the leadman's illness worked beyond the five (5) hour period during which he would normally have taken his twenty minute lunch break. He subsequently decided to recess briefly for a cup of coffee (which was unavailable

this case. The Board has held that it has no power to do so under the circumstances present in this case. Carrier has shown that it did not violate the Agreement and has cited awards in which the Board has upheld dismissal for offenses similar to those committed by the claimant in cases where the employees involved had far more service than this claimant. Therefore, petitioner's claim for reinstatement, pay for time lost, restoration of fringe benefits, and compensation for any costs in connection with such benefits should be denied in its entirety.

While petitioner's entire claim is without merit, it is noted that request is made for restoration of health and welfare premiums and compensation for any costs in connection with such benefits incurred during claimant's suspension. The Board clearly lacks jurisdiction to grant such a request. Rule 41 of the Agreement reads as follows:

"Exoneration. If the final decision decrees that the charges against the employe were not sustained, the records shall be cleared of the charges; if suspended or dismissed the employe shall be reinstated and paid for all time lost."

The above rule provides only for payment for all time lost and not for any insurance benefits or costs in connection therewith. The Agreement between the Carrier and the petitioner providing for such insurance benefits was entered into on February 15, 1956, many years after Rule 41 was drafted, so there was clearly no intent to provide insurance benefits in event of exoneration. In **Second Division Award 3883**, Referee Carey, the Board passed upo this issue in a case arising out of loss of coverage under Travelers Insurance Company Group Policy No. GA-23000, the identical policy covering Carrier's employees represented by petitioner. The Board rejected the claim for insurance benefits in that case. In any event, while there is therefore no merit to petitioner's claim for insurance benefits, there has been no showing that Carrier violated the Agreement. Therefore, there is no basis on which the Board can substitute its judgment for that of the Carrier and this claim should be denied in its entirety.

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 employees 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 essential facts involved in this discipline case are not in dispute. Claimant left his position without authority on September 15, 1966 while working on his regular shift and used Carrier's truck, contrary to Carrier's General Rules and Instructions, to pick up coffee for himself and another employe also on duty. Soon after leaving Carrier's premises, Claimant was apprehended by local policemen, incarcerated for approximately eighteen hours and subsequently released without charge. On September 17, 1966, which was held on September 21, 1966. Thereafter, he was permanently suspended from service on September 28, 1966. Petitioner avers that Claimant

was denied due process because he was not afforded certain procedural rights under the applicable agreement, and further that the penalty imposed was arbitrary and capricious in light of extenuating circumstances surrounding Claimant's admitted violations of Carrier's General Rules and Instructions.

Carrier denied violation of any rules contained in the applicable agreement between the parties and urges that Claimant was properly dismissed from service for leaving his job without authority and using Carrier's truck for a personal errand some distance from his place of work in violation of Carrier's General Rules and Instructions.

The pertinent rules contained in Agreement between the parties provide as follows:

Rule 34 — DISCIPLINES and GRIEVANCES — INVESTIGATIONS.

"An employe who has been in the service of the Company thirty days, shall not be dismissed for incompetency nor shall an employe be disciplined, dismissed or discharged for any cause without first being given an investigation, at which investigation he may be represented by his duly accredited representative.

A written decision will be rendered within ten days after completion of the investigation, and if such a decision decrees that the employe merits discipline, such decision shall state the precise charges upon which discipline is based."

Rule 35 — HEARING.

"An employe dissatisfied with the decision shall have a fair and impartial hearing before the next proper officer provided written request is made to such officer and a copy furnished to the officer whose decision is appealed within twenty days of the date of the advice of the decision. Hearing shall be granted within twenty days thereafter and a written decision rendered within twenty days of the completion of the hearing."

In the first instance, Petitioner contends that Carrier violated Rule 34 of the Agreement between the parties by suspending Claimant pending investigation. Rule 34 provides that an employe shall not be disciplined, dismissed or discharged without an investigation, but contains no language which would prohibit withholding an employe from service pending investigation where an offense has been committed as in the instant case. Award 1659.

Petitioner also contends that Carrier violated Rule 35 of the Agreement because Claimant was not allowed to attend the second hearing provided by Rule 35, which was held on October 25, 1966. Carrier insists that Rule 35 of the Agreement merely provides for a hearing on appeal at which the Claimant's physical presence is not required if his representatives are present and participate on his behalf. Furthermore, Carrier urges that Petitioner failed to develop any additional facts subsequent to the hearing on appeal, which Carrier belatedly offered to consider to cure any possible prejudice to Claimant resulting from his being denied an opportunity to be present at the second hearing.

The pertinent language contained in Rule 35 appears in the first sentence which expressly provides as follows: "An employe dissatisfied with the deci-

sion shall have a fair and impartial hearing before the next proper officer provided written request is made to such officer and a copy furnished to the officer whose decision is appealed, within twenty days of the date of the advice of the decision. * * *

The applicable language is clear and unambiguous. Claimant was entitled to a hearing de novo on the merits of the charges upon which the discipline imposed by Carrier was based. (Implied in the guarantee of a fair and impartial hearing is the right of the accused to be present and to participate on his own behalf) if he so desires whether or not his chosen representatives also appear on his behalf. Although Claimant's presence would not be essential if he elected to waive his right to attend the hearing, Carrier was without authority to deny him an opportunity to appear and participate in the hearing provided by Rule 35 of the effective Agreement. (The denial of this contractual right also constitutes a denial of due process, which clearly implies the right of the person accused to be present before the particular tribunal which pronounces judgment and to be heard by testimony or otherwise.)

Rule 41 of the applicable agreement reads as follows:

"If the final decision decrees that the charges against the employee were not sustained, the records shall be cleared of the charges; if suspended or dismissed the employee shall be reinstated and paid for all time lost."

This rule expresses the remedy applicable in such cases. It provides only for reinstatement and pay for all time lost. Accordingly, the claim will be sustained only for all time lost from September 17, 1966, until returned to service, with seniority and vacation rights unimpaired.

AWARD

Claim sustained to the extent stated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1968.