

Award No. 5594

Docket No. 5332

2-B&O-EW-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, the Baltimore and Ohio Railroad Company unjustly held out of service Electrician S. P. Kleiber from November 5, 1964 until November 22, 1964, both dates inclusive, pending and subsequent to formal hearing scheduled for November 9, 1964.

2. That accordingly, the Baltimore and Ohio Railroad Company be ordered to compensate Electrician Kleiber for time lost on November 5, 6, 9, 10, 11, 12 and 13, 1964, as a result of this suspension, as well as being made whole with respect to his vacation rights, hospitalization, medical and surgical care and group life insurance and the removal of the reprimand assessed by the Chief Mechanical Officer from his service record.

EMPLOYEES' STATEMENT OF FACTS: On April 9, 1964, Electrician S. P. Kleiber, hereinafter called the claimant, was arrested and accused of murder - voluntary manslaughter and involuntary manslaughter, and was subsequently acquitted of the charges by a jury and released from custody on or about November 3, 1964.

On November 4, 1964, a day previous to the day on which he intended to report for work, the claimant telephoned Acting General Foreman Joseph A. Yennetto, giving his foreman notice of his intent to report for duty on the second shift, November 5, 1964.

On November 5, 1964, the claimant reported for work; however, the Baltimore and Ohio Railroad Company, hereinafter called the Carrier, did not permit the claimant to resume duty, and served the following notice on him, dated November 4, 1964, by General Foreman W. P. Kelly. (Employees' Exhibit A.)

charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for his net wage loss, if any, resulting from said suspension or dismissal.

Stenographic report will be taken of all hearings or investigations under Rules 32, 33 and 34, and the employe involved and the duly authorized committee shall each be furnished with one copy."

In this case the petitioner was afforded a fair hearing by designated officer of the Carrier. He was apprized of the precise charge made against him; he was represented by counsel of his choosing. There was no pre-judgment of any sort as to the petitioner's responsibility under the rules. Both the petitioner and his representative testified that the hearing had been conducted in a fair and impartial manner and in accordance with the rules of the wage agreement. In this case the petitioner was granted his full and proper rights and privileges under an application of Rule 32 of the working agreement. There was no impropriety about the investigation procedure; there was no impropriety as to the conduct of the investigation. It is not now subject to challenge.

In a word, the Carrier submits that the petitioner was given a fair and impartial hearing and that the discipline rule in the agreement was properly complied with in the petitioner's case.

SUMMARY

In the instant case, in assessing discipline, the Carrier was confronted with direct evidence indicating that the petitioner was guilty as charged under an application of the Rules of the Shop Crafts Agreement. He was not permitted to resume service pending the hearing held in this case. The holding of this hearing was in strict accord with the proper application of Rule 32 of the Working Agreement. The facts developed at the investigation indicated the claimant's responsibility as charged.

The petitioner was properly held out of service pending the results of the investigation given him in this case. The seriousness of the total record in this case is amplified in some detail in the Carrier's Statement of Facts given herein before.

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 discipline case involves the charge against Claimant of "Unexplained absence from work from April 9, 1964 to November 6, 1964, inclusive." Claimant reported for work commencing November 5, 1964, but was not permitted to do so by Carrier, but, instead, was given formal notice of

investigation to be held November 6, 1964 in regard to the aforesaid charge. After hearing, Claimant was given notice to return to his regular job, effective November 23, 1964, and formal reprimand was placed on his service record. This claim is for pay for November 5, 6, 9, 10, 11, 12 and 13, 1964.

Carrier's position is that Claimant violated Rule 19 of the Agreement, the pertinent part thereof which provides as follows:

"ABSENCE FROM WORK.

*** * * An employe detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible either by telephone, messenger, or United States mail * * ***

Before deciding the merits of the case, we must first consider the contention of the Organization that Carrier's introductory statement of facts in its Ex Parte Submission concerning Claimant's arrest, detention and acquittal in regard to the charges of murder-voluntary manslaughter and involuntary manslaughter cannot be considered by this Board, inasmuch as said contentions as set forth in said "Statement of Facts" were not raised on the property. This Board, in numerous past awards, has consistently held that charges or contentions not raised during the handling on the property cannot be considered by the Board. Therefore, Carrier's detailed account of Claimant's arrest, trial and acquittal, as set forth in its "Statement of Facts" cannot be considered by this Board in the determination of this dispute.

It is clear from the evidence adduced at the hearing that Claimant did not present any competent evidence showing that he complied with the requirements of Rule 19 in notifying Carrier of his enforced absence from work. Claimant's assertions that his brother reported his absence to Carrier and that, while detained, Claimant wrote Carrier advising of his predicament, and Carrier replied by sending his paycheck to the County Jail in addition to Carrier sending an employe to the County Jail with forms which Claimant signed, are of no substantive value unless supported by proof. Mere uncorroborated allegations or assertions cannot be accepted as proof.

Further, the Organization contends that Carrier violated Rule 32 of the Agreement by not giving Claimant more than two days in order to prepare for the hearing. However, a review of the record discloses that Claimant did not request at any time a continuance so that he could prepare his defense to the charge. Having failed to request an adjournment for such purpose, and electing to proceed with the hearing, Claimant cannot now be heard to complain that he did not have a fair and impartial hearing.

It is the conclusion of the Board that the agreement was not violated and we must, therefore, deny the claim.

AWARD

Claim denied.

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

**ATTEST: Charles C. McCarthy
Executive Secretary**

Dated at Chicago, Illinois, this 26th day of November, 1968.

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