

Award No. 5656
Docket No. 5561
2-C&EI-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

"That the Chicago and Eastern Illinois Railroad unjustly and for no due cause, discharged Carman Walter E. Dennis from the services of their Company on January 12, 1966.

That accordingly, the Carrier be ordered to return Carman Walter E. Dennis to the service of the Chicago & Eastern Illinois Railroad, pay him for all time lost, plus any benefits due him under the provisions of the working agreement."

EMPLOYEES' STATEMENT OF FACTS: The Chicago & Eastern Illinois Railroad, hereinafter referred to as the Carrier, has employed Carman Mr. Walter E. Dennis, hereinafter referred to as the Claimant, for approximately twenty years.

In a letter dated December 24, 1965, the Carrier's General Foreman H. M. Hughes sent the Claimant a letter which stated as follows:

"You are hereby suspended from service, pending investigation, which will be held at the earliest possible date. You are charged with repeated violation of Rule #14 of the current agreement, especially of November 23, 1964 and December 23, 1965."

Copy is attached and identified as Exhibit A. This same Carrier officer on December 29, 1965 notified the Claimant to report at his office to answer his charge. Copy is attached as Exhibit B.

At the hearing (Exhibit C) held on December 31, 1965, the Local Chairman, Mr. Blanton, objected to the charges made in General Foreman Hughes letters (Exhibits A & B), especially pertaining to the date of November 23, 1964 which has "been approximately 13 months" and should not have been brought into this investigation and was hardly a justifiable reason to remove a man from his position and terminate his services with the Carrier.

The record further reveals that Mr. Dennis did not perform his duties in a safe manner. Not even his fellow workers felt safe in his midst. In fact that he had a proclivity toward excessive drinking cannot be seriously questioned.

Was the carrier obligated to retain a man of Mr. Dennis' bent in its employ? We think not! In this regard, the Board's attention is respectfully directed to Second Division Award No. 1666 in a similar case wherein you held thusly:

"His record indicates an indifference to rule responsibility after several opportunities have been afforded him to correct his attitude. Under such circumstances, we cannot say that the Carrier acted arbitrarily or unreasonably in dismissing him from the service."

See, also, Second Division Award No. 2044. There the Board, in denying the claim, had this to say:

"It is our opinion that the Carrier's action should be affirmed. The claimant had been apprised of his obligation under the terms of agreement when he was previously warned for prior infractions. The Carrier is entitled to some degree of stability in its working force and it did not discriminate against the claimant in light of the claimant's record of flagrant violations of the second sentence of Rule 30."

Also, see Second Division Award No. 3933.

In view of the evidence presented herein, none of which has been refuted by the petitioner, we submit that the instant claim is void of merit and should, therefore, be declined. We respectfully request the Board to so hold.

Without prejudice to our position as set forth above, we would remind the Board that Mr. Dennis was gainfully employed from May 24, 1966 thru the month of May, 1967. We feel that the assessment of any penalty in this case would be grossly unfair, and such should certainly not take place; however, if one is erroneously assessed, the compensation Mr. Dennis earned on the outside should be deducted.

FINDINGS: The Second Division of the Adjustment Board, upon 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.

This is a discipline case. Car Inspector Dennis, claimant herein, was discharged on January 12, 1966, as stated in this claim. On September 15, 1967 he was offered and accepted reinstatement without prejudice to the rights of either party in regard to whether or not he is entitled to recover wage loss, if any, as the result of his dismissal from Carrier's service.

Carrier's position is that the issue before the Board is solely a question of what compensation, if any, is due Claimant Dennis. The Employees do not "unjustly and for no due cause".

Since the dispute puts in issue the Claimant's contention that the settlement on the property was not intended by him to compromise his right to contest the justice of and cause for his discharge, the Board will grant a full review of his claim.

Claimant Dennis was suspended from work effective December 24, 1965, pending investigation on account of an alleged failure to cover his Monday through Friday, 3:00 P.M. to 11:00 P.M., second shift assignment, Brewer Yard, Danville, Illinois, on December 23, 1965 which, as further alleged, amounted to a repeated instance of Claimant being absent without permission on November 23, 1964 in contravention of,

Rule 14
Absent from Work

"An employe wishing to be absent from work less than thirty (30) days, must obtain permission from the foreman whenever practicable to do so, and foreman will endeavor to grant same when requested.

In case an employe is unable to report for work on account of sickness or other good reason he shall promptly notify his foreman. An employe absent more than one regular shift will notify his foreman before the quitting time of his regular shift the day before he expects to return to service.

Repeated instances of absence without permission or the failure to grant leave, when possible, shall be considered in violation of this rule and are just causes for complaint."

Claimant was notified under date of December 29, 1965, to appear in the office of General Freight Car Foreman H. M. Hughes at 10:00 A.M. Friday, December 31, 1965 for investigation of his alleged failure to comply with Rule 14 on the specified dates of November 23, 1964 and December 23, 1965.

Rule 30
Discipline and Grievances

"Should any employe subject to this agreement believe he has been unjustly dealt with, or any provisions of this agreement have been violated, the case shall be taken to the foreman, general foreman, master mechanic, master car builder or shop superintendent, each in his respective order, by the duly authorized local committee or their representative, within ten (10) days. If stenographic report of the investigation is taken, the committee shall be given a copy. All local conferences between local officers of the company and local committee shall be held by appointment during regular working hours without loss of time by the committeemen.

If the result still be unsatisfactory, the duly authorized general committee, or their representative, shall have the right of appeal in writing to the duly designated officials of the company, and conference

will be granted as promptly as possible. Should the highest designated official, or his duly authorized representative, and the duly authorized representative of the employes fail to agree, the case shall be handled in accordance with the Railway Labor Act.

Prior to the assertion of grievance as herein provided, and while questions of grievances are pending, there will neither be a shutdown by the employer nor a suspension of work by the employe or employes.

An employe who has been in the service of the railroad 30 days shall not be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation.

Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise 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 the wage loss, if any, resulting from said suspension or dismissal."

The Board has considered the submissions of the parties and has reviewed the transcript of the investigation for purposes of deciding.

FIRST QUESTION: Compliance With Rule 30, Supra.

Claimant, a 17½ year employe, could not be discharged for any cause without an investigation in substantial compliance with that part of Rule 30 involving suspension or dismissal. He had been suspended pending a hearing. The hearing was prompt. The precise charge concerned Claimant's alleged failure to comply with Rule 14. At a reasonable time prior to the hearing, Claimant and his duly authorized representative were so apprised, and had reasonable opportunity to secure the presence of necessary witnesses.

Local Chairman Blanton, and two Committeemen, Seeds and Hickman, appeared with Claimant at the appointed time and place for the investigation, in accordance with the notice of December 29, 1965. Chairman Blanton objected as a matter of record, to the November 23, 1964 instance being investigated approximately 13 months later. The Board will entertain and rule on the objection later.

Other ground for the Employes' objection to the investigation are:

(See Exhibits A & B)

"(1) General Foreman Hughes suspended the Claimant from Carrier's service and entered the charge against him;"

(See Exhibit C)

"(2) General Foreman Hughes testified against the Claimant at the hearing held on the charge;"

(See Exhibits D, E & F)

“(3) General Foreman Hughes made the decision that the Claimant was guilty, and discharged him from service.”

It is the position of the Employes that Mr. Hughes “was acting in the incompatible position of complaining officer, witness, jury and judge”, and thereafter “sentenced” claimant, a practice not to be condoned from what they see in Awards by able and prominent Referees, of judicial temperament and discerning judgments, who have been on this and other Divisions of the NRAB, from time to time. The Board, as constituted in this case, takes note of those Awards, but will decide this dispute in accordance with the Agreement which the parties made in collective bargaining.

It is first observed that the words “fair and impartial investigation”, or “fair and impartial trial” that appear in some rules, on other properties, do not appear in Rule 30 on this property, an omission not to be lightly regarded.

The investigation was in charge of Trainmaster D. L. Bouchard. Trainmaster is a high ranking officer on the railroad, but he is not a judicial officer in any sense of the words.

The fact that Foreman Hughes suspended Claimant to lay a foundation for the investigation is not deemed to be a violation of Rule 30 per se. Suspension in proper cases, pending a prompt hearing, is permissible under the rule. What is a proper case usually depends upon the final outcome of the hearing.

Foreman Hughes did what he was obligated to do as Foreman when he reported on the instances which should be investigated to develop the facts, discover the cause, and determine Claimant’s responsibility for a reported Rule 14 violation. He was not a “complaining officer”, much less “judge” or “jury”.

Foreman Hughes gave his version of the instances under investigation within the hearing of Claimant and three of his representatives. Claimant gave his version of both instances. Neither testified as witnesses according to rules of evidence, or in the context of a formal trial.

At the conclusion of the investigation, Foreman Hughes, first in the line of authority, notified Claimant of the results of the investigation, as was his duty. It is not fair to say that the Foreman “sentenced” Claimant after judicially determining his guilt. The purpose of the investigation is not to convict, but rather to administratively determine and terminate the seniority and thus the tenure of an employe who, after a preliminary examination, is found to have breached his contract of employment. The administrative action, based upon a preliminary examination, is not final; but, to the contrary, is subject to appeals to the highest officer on the property for handling time claims and grievances and beyond to this Board after all other appeals have been exhausted. The transcript of the record made at the preliminary examination is conclusive and binding on the Reviewing Officer, or the Board agency, a matter of great importance to the one whose continuing employment rights are in jeopardy.

The transcript of the record is complete in this case. A careful review of that record discloses no reason for saying that Claimant’s right to an investigation was prejudiced in any way. The Trainmaster did a commendable job. All facts were carefully investigated. Claimant was heard to explain his

failure to report off duty and to disclaim any responsibility for the unexcused absences.

Before the hearing ended, Trainmaster Bouchard inquired of the Claimant, Chairman, Blanton, and Committeemen Seeds and Hickman: ^{1/}

“Mr. Bouchard—Are there any further questions?
No questions.

Q. Mr. Blanton, Mr. Seeds, Mr. Hickman, Mr. Dennis, have you presented all the evidence you desire?

Mr. Blanton—Yes.

Mr. Seeds—Yes.

Mr. Hickman—Yes.

Mr. Dennis—Yes.

The record was thereupon closed by Trainmaster Bouchard: ^{2/}

Q. Has this investigation been conducted in a fair and impartial manner?

A. Mr. Dennis—Yes, I would say so.

Mr. Blanton—Yes sir.

Mr. Seeds—Yes.

Mr. Hickman—Yes.

Q. Are there any further questions?

No question.

For the record, this investigation will close at 11:30 A.M. and those desiring a copy of the transcript please advise Mrs. Lohmiller. Those entitled to same will be given one.

Mr. Dennis you will continue to be held out of service pending disposition of this investigation.”

The Employes further complain of prejudice on the part of Foreman Hughes who told Claimant, before the investigation, that “he missed a call and would miss several from now on.”

Foreman Hughes had been advised about 4:30 P.M. on December 23, that Car Inspector Dennis had not reported for work at 3:00 P.M. to cover his

^{1/}Transcript, page 12

^{2/} Transcript, page 13.

assignment, a matter of some concern to the Yardmaster who had reported that he was having to work shorthanded. Foreman Hughes went to look for Claimant and found him in a tavern known as the "Teacup". From observation, Foreman Hughes reasoned that Claimant had been imbibing in something besides tea. In these vexatious circumstances as they appeared to Foreman Hughes, he made the remark that offends the sense of justice of the Empolyes.

Foreman Hughes is only human. He is also a compassionate man who has a high regard for fair play, as evidenced by the following dialogue: */

"Mr. Blanton—Mr. Hughes has Mr. Dennis' work been satisfactory other than laying off without permission?

A. I will say yes, with reservations.

Q. Would you be willing to take him back when he is able to work after reporting off account illness?

Mr. Bouchard—Mr. Blanton, I believe you are asking the man to form an opinion before the facts of the investigation can be digested. However, if Mr. Hughes can give you an answer, I would request that he do so.

A. (Mr. Hughes). Consideration will be given."

Consideration was given. An April 15, 1966 Carrier offered to reinstate Claimant on a leniency basis without pay for time lost. The offer was declined. After further consideration, Carrier came up with an offer to reinstate Claimant with seniority and vacation rights unimpaired, with the understanding that he will be restricted from occupying a car inspector position in the yard, but leaving the question of back pay to be decided by the Board. This offer resulted in the settlement agreement dated September 25, 1967.

NEXT QUESTION: Did Carrier Unjustly And Without Due Cause Discharge Claimant From Its Service On January 12, 1966?

The Board cannot decide the dispute over wage loss, if any, within the meaning of Rule 30, without inquiring into the justice and the cause for discharge. Claimant has no standing before the Board for any wage loss suffered for which Carrier was not at fault.

On the other hand, if the Carrier erred in suspending and thereafter dismissing Claimant, the wage loss, if any, is due; for, this is what was agreed between Carrier and the Employees when they negotiated Rule 30.

Rule 14, under which Carrier acted in this case, seems to discourage stern or arbitrary action on the part of either the Carrier or the Employees. Carrier has "just causes for complaint" over "repeated instances of absence without permission". The Employees have "just causes for complaint" over the "failure to grant leave, when possible".

*/ Transcript, page 12.

The Foreman will "endeavor" to grant a leave of absence from work for "less than thirty (30) days" when requested, provided the employe "must obtain permission from the foreman whenever practicable to do so."

In the instant case, Claimant did not report for his regular shift on December 23, 1965. It would have been practicable for him to have asked his foreman's permission to be absent, but he didn't. Claimant, as was shown at the investigation, has a spotted record of repeated instances of absence without permission, but these are all closely associated with illness. One on July 15, 1963, not so associated, was the subject of a written complaint and warning from Carrier.

For purposes of making out a case of "repeated instances of absence without permission" in violation of Rule 14, Carrier coupled the December 23, 1965 absence with another on November 23, 1964. The July 15, 1963, and other absences were ignored. Claimant was held for investigation of the November 23, 1964 instance over his Local Chairman's protest.

The record will speak for itself at this point:⁴

(Trainmaster Bouchard)

"Q. Mr. Blanton you brought out the fact that Mr. Dennis had been absent account illness with Mr. Dennis answering yes. No definite dates were given so for the record Mr. Dennis was absent account personal sickness April 6, 1961 to May 16, 1963. Is that correct sir?

A. That's correct. A year and nine months.

Q. Mr. Dennis' personal record shows absent from duty July 15, 1963, third shift, and I believe while not charged with this date, I will read this letter into the transcript as Mr. Dennis' entire record has been brought forth by Mr. Blanton, reading as follows:

'Oaklawn Freight Car Shop, July 19, 1963. Mr. Walter Dennis, Brewer, Illinois. You were absent from duty Monday night 3rd shift July 15, 1963, without permission and neither did you notify anyone. This is in direct violation of Rule 14 of the current agreement, and is the second offense for you. A recurrence of such and a formal investigation will be held. Signed H. M. Hughes, copy Roy Ruggles.'

Mr. Ruggles I believe at that time was Local Chairman.

You were then granted leave of absence account personal sickness October 8, 1963 to May 21, 1964. Again absent account personal sickness November 27, 1964 to May 20, 1965. I believe that brings your work record up to date. Are those dates correct Mr. Dennis?

A. Substantially, yes.

⁴Transcript, pages 10, 11.

Q. Since the date of November 23, 1964, you were off on sick leave from November 1964 to May 20, 1965, or very nearly six months, is that correct?

A. Yes.

Q. Mr. Blanton do you have a question?

A. I wanted to ask Mr. Dennis another question. Mr. Dennis in cold weather don't that seem to affect you — being out in the cold?

A. Why absolutely. Yes.

Q. In what way does it affect you?

A. Well more ways than one but actually the worst part is the right arm and hand gets completely numb from the operation possibly and poor circulation. Not only that, in severe cold weather my lungs — I just cough continuously.

Q. You only have one lung, is that correct?

A. Well one and a half.

Q. One and a half?

A. Yes, one and a half.

Q. I think the record shows that Mr. Dennis has had lots of illness. A lot of this he was entitled to be off.

Mr. Bouchard — Mr. Dennis you stated a while ago, and I again ask you -- you have not been refused permission to be off account of your illness, have you?

A. No not until — up to this date — it has not been refused as far as I know."

It does not reasonably appear to the Board that Rule 14 was negotiated to separate a 17½ year man from his job permanently over absences when he did not report for work on account of sickness, and after disability leave was later granted.

On the basis of the record which the Board has considered, it readily appears that Carrier unjustly and without due cause wrongfully discharged Claimant from its services on January 12, 1966 as claimed.

FINAL QUESTION: What Wage Loss, If Any, Resulted From The Suspension And Dismissal Of Claimant?

For obvious reasons, the complete answer to this question will not be found in the transcript of the investigation. Nevertheless, the parties of their free will and accord, have submitted that question for the Board to decide. Since the question is here, the parties will be held to that part of their bargain in connection with the September 25, 1967 Agreement on the property, and

the Board will look to the facts of record and the submissions of the parties for the answer to the claim for wage loss, if any.

Claimant has a "history of pulmonary tuberculosis, rt. pneumonectomy, poor muscular development," etc., as shown by a report from Carrier's Chief Surgeon⁵ and verified in some measure by Claimant's own words.⁶

Claimant admitted on the day of the investigation that he was not physically able to return to work at that time. He worked in the parts department of an automobile agency in Danville, Illinois, May 24, 1966 to May 1, 1967.

Claimant was not physically able to return to work pursuant to the settlement agreement made with Carrier, so far as the Board can find in this record.

He applied for and received a disability annuity in accordance with the Railroad Retirement Act while this dispute was pending.

AWARD

Claim (1) sustained.

Claim (2) sustained for wage loss May 24, 1966 through the month of May, 1967, less outside earnings received by Claimant during that period, in full satisfaction of the claim for wage loss, if any, to date.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1969.

⁵Carrier's Submission, Page 5.

⁶Transcript, Pages 10, 11.