Award No. 5836
Docket No. 5695
2-PCT(NYC)-MA- '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO (Machinists)

PENN CENTRAL TRANSPORTATION COMPANY (Formerly New York Central Railroad — Western District)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier at the Collinwood, Ohio Diesel Terminal Shop violated the working agreement, particularly Rule 36 and Section 60 of the Federal Employes' Liability Act, when they arbitrarily and unjustly dismissed Machinist K. L. Lentz.

2. That Machinist K. L. Lentz be restored to service with full seniority and compensated for loss of benefits and wages from June 16, 1967 and thereon until he is returned to service.

EMPLOYES' STATEMENT OF FACTS: Machinist K. L. Lentz, hereinafter referred to as the claimant has been employed as a machinist for more than four (4) years by the Penn-Central Company (former New York Central Railroad — Western District), hereinafter referred to as the carrier, at its Collinwood Diesel Terminal Running Repair Shop, Cleveland, Ohio.

On May 15, 1967 a notice was served on the claimant, as follows:

"NEW YORK CENTRAL SYSTEM

Collinwood, O., May 15, 1967
File: 10.4(L)

Mr. Keith Lentz
Machinist — Collinwood Diesel Terminal
12316 Mortimer Avenue
Cleveland, Ohio 44111

Dear Sir:

You are hereby notified in accordance with the rules of the System Federation #103 Agreement, to report at the Collinwood Diesel Terminal, 9:30 A.M. Friday, May 19, 1967, in the office of the Shop Manager, L. W. Brennan, for investigation covering the following charges:

the finding of guilt; and that the measure of discipline was reasonable under the circumstances. Carrier did not violate Rule 36 nor were its actions arbitrary or unjust as contended in the employees' statement of claim. The claim is without merit and should be 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 jurisdiction over the dispute involved herein.

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

On November 7, 1963, Claimant in this case was working with Mr. Hausrath on Engine Number 1695. Mr. Hausrath, over a period of the working hours became ill. It subsequently developed that he had suffered a heart attack. Under the provisions of the Federal Employees' Liability Act, Hausrath filed a suit against the Carrier alleging that he suffered the heart attack due to Carrier's negligence in making him work within the carbody when the heat was of such intensity that it caused a heart attack.

On May 3, 1967, the Claimant met with Carrier representatives in preparation for its defense in this personal injury suit scheduled for trial May 8, 1967. A simulated test was run on engine #1801 by the Carrier representatives in an attempt to duplicate if possible, the actual conditions prevailing on engine #1695 on November 7, 1963. Claimant, under the simulated conditions, did not say how hot it was in degrees, but described the heat as being like a hot summer's day. At the actual trial a few days later, Claimant was more specific and testified that the temperature in the engine on which he and the other employee worked was 130° or better. A Dr. Paul Kohn, an Internist and Specialist in cardio-vascular diseases, had testified that, in order to Mr. Hausrath to have suffered a heart attack, caused by the influence of heat, a temperature reading of more than 130° was necessary.

There is some testimomy to the effect that under the simulated conditions on May 3, 1967, Claimant was alleged to have said that the heat then was about the same as on the date in question, November 7, 1963. There is also some testimony that the thermometer on May 3, 1967, registered 103°. It is this variance which is the subject of this claim. Claimant was charged with "Conduct unbecoming an employee prior to the commencement of the trial and during the trial".

As we view this record, we are perplexed as to why Carrier did not attach statements made by the Claimant long before the simulated tests of May 3, 1967. Although Carrier maintains that the hottest it became under the simulated conditions of May 3, 1967 was 103°, and Claimant stated that the heat was about the same as on November 7, 1963, suffice it to say that under the actual and simulated conditions, the working area was hot. For a man to testify 3 1/2 years after an event as to the intesntiy fo heat, whether it was 105°, 110°, or 130° is a most difficult proposition. Viewing the facts of record, we are unable to determine just what effect if any, Claimant's testimony had on the outcome of the case. The power of suggestion by either side in a case such as the one confronting us, can be overwhelming to an individual who finds himself testifying at the trial than he was a few days

earlier at the simulated tests. However, to charge him with conduct unbecoming an employee because of this testimony, is, in our judgment, an indirect assault on other employees who may be called upon to testify in fugure Federal Employee Liability actions. It is our judgment that the integrity of these proceedings must be maintained and we are positive that both the Carrier and the Organization are basically in agreement on this point.

Under the peculiar circumstances of this case, that is, the long delay between the actual event and the day of the simulated tests, the absence from the record of prior statements made by Claimant, the nebulous nature of the testimony in question, the possibility of discouraging other employees to testify in future cases, as well as a thorough and analytical review of the record before us, we find that Carrier's action of dismissal was arbitrary. We will accordingly sustain the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December, 1969.

**CARRIER MEMBERS' DISSENT TO AWARD 5836, DOCKET NO. 5695
REFEREE JOHN J. McGOVERN**

We disagree with the Majority's conclusions and otherwise point out that Claimant's recovery is limited to that as specified in Rule 36 of the Agreement.

For these and other reasons, we dissent.

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ H. S. TANSLEY
H. S. Tansley

/s/ H. F. M. B. BRAIDWOOD
H. F. M. B. Braidwood

/s/ W. R. HARRIS
W. R. Harris

/s/ P. R. HUMPHREYS
P. R. Humphreys

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Serial No. 64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee John J. McGovern when the Interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 5836

DOCKET NO. 5695

Name of Organization:

SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

Name of Carrier:

PENN CENTRAL TRANSPORTATION COMPANY (NYC)

QUESTION FOR INTERPRETATION:

Does the language contained in the findings of Award No. 5836, reading in pertinent part:

> "Under the peculiar circumstances of this case, that is, the long delay between the actual event and the day of the simulated tests, the absence from the record of prior statements made by Claimant, the nebulous nature of the testimony in question, the possibility of discouraging other employees to testify in future cases, **as well as a thorough and analytical review of the record before us,** we find that **Carrier's action of dismissal was arbitrary.** We will accordingly sustain the claim." (Emphasis supplied)

and the Award reading:

> "Claim sustained."

allow the Carrier to deduct from Claimant's wage loss, the following:

1. — Outside earnings.
2. — Vacation pay.
3. — Holiday pay, including Birthday Holiday.
4. — Health and Welfare.

This is a discipline case, in which Claimant was dismissed from the service and we held that such action on the part of the Carrier was arbitrary, as a result of which we ordered Claimant's restoration with back pay etc.

The question in issue is whether Carrier in computing the amount of money to be paid Claimant shall be permitted to deduct earnings in other employment during the period involved. We must and do answer in the affirmative.

The Discipline Rule, Rule 36 was invoked by the Organization. The remedy for a violation is found in the rule itself. It reads in pertinent part as follows:

> "If it is found that the employe has been unjustly suspended or dismissed from the service, such employee shall be re-instated with seniority rights unimpaired, and compensation for his net wage loss, if any, resulting from said suspension or dismissal."

This above language is clear and precise. It has been subjected to interpretation in many awards emanating from this Board sustaining our position that earnings in other employment may be deducted by Carrier.

The Organization's arguments relative to the question of deduction of earnings in other employment not having been raised previously, have been carefully considered but are not persuasive. Rule 36 was invoked by the Organization as having been violated. It was always before us and cannot now be considered a new issue.

The Awards presented to us by the Organization in support of their position have been carefully considered. They are however distinguishable from the instant case in that they were not discipline cases. As we stated before, the remedy for a violation of the discipline rule is found in the rule itself.

Referee John J. McGovern, who sat with the Division as a Member when Award No. 5836 was rendered, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1970.

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