Award No. 5987
Docket No. 5757
2-AT&SF-MA-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (Eastern Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current controlling agreement Machinist Marland M. Edgar of Argentine, Kansas, was unjustly dismissed from the service of the AT&SF Railway Company by Certified Mail dated October 27, 1967.

2. That accordingly the carrier be ordered to reinstate this employe to service with all service rights, seniority, all net wage loss, and payment in lieu of all other accrued contractual benefits to which otherwise entitled had he continued to remain in carrier service dating from his improper discharge on October 27, 1967.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the AT&SF Railway Co., hereinafter referred to as carrier, and System Federation No. 97, Railway Employes' Department, AFL–CIO, representing among others the International Association of Machinists and Aerospace Workers, parties to this dispute, identified as "Shop Crafts Agreement," effective August 1, 1945, as amended (reprinted January 1, 1957, to include revisions), a copy of which is on file with the Second Division, National Railroad Adjustment Board, and is hereby referred to and made part of this dispute.

Mr. Marland M. Edgar, hereinafter referred to as claimant, was charged in formal investigation held at Argentine, Kansas on October 23, 1967, with being absent from duty from September 28, 1967, without permission in alleged violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966, (a carrier authored, implemented and administered set of rules), and was dismissed from service on October 27, 1967.

(2) It has a right to discipline an employe for just cause as it did in this case when evidence adduced at a formal investigation clearly showed that claimant was absent without the proper authority.

(3) It did not act in an unreasonable, arbitrary, capricious or discriminating manner and did not abuse its discretion in handling this discipline case.

(4) It fully met the requirements of Rule 33½. Claimant was properly notified to appear, but he elected to ignore the notice and absent himself from the investigation.

(5) The degree of discipline was reasonably related to the seriousness of the proven offense and to claimant's past record, particularly in view of the fact that claimant had only been in the employment of this Carrier some 15 months, demonstrating in that time an attitude not deserving of leniency and he should not be returned to service under any circumstances.

The carrier, therefore, requests the Board to deny this claim in keeping with its long line of unequivocal decisions on similar cases.

The carrier is uninformed as to the arguments the Petitioner will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are required in replying to the Petitioner's ex parte submission.

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.

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant entered Carrier's service at Argentine, Kansas, as a Machinist on June 6, 1966, and was so employed at all time material herein.

Claimant last worked September 25, 1967, and was absent without permission beginning September 28, 1967. Prior thereto he had been "off without permission" on two occasions for which discipline was assessed in the total of 40 "Demerits."

Under date of October 16, 1967, Carrier mailed to Claimant, registered mail return receipt requested, the following Notice of Hearing and Charge:

"Please arrange to appear for formal investigation in the Superintendent of Shops office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your alleg-

edly being absent from duty without securing proper permission from your foreman to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966.

You are entitled to representation in accordance with your Agreement if you so desire."

Hearing was held on the appointed day. Claimant did not appear. The hearing proceeded in his absence. Notwithstanding that Carrier's Notice of Hearing and Charge was returned to it on October 23, 1967, because of incorrect address, Carrier proceeded, on the basis of the record made to issue findings of guilt and assessed discipline under date of October 27, 1967:

"As a result of the facts brought out in the formal investigation held in the Superintendent of Shops office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your allegedly being absent from duty without securing proper permission from your foreman to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966, you are hereby removed from the service of this company effective this date."

This document was correctly addressed, mailed to Claimant registered mail return receipt requested and was received by Claimant. The Local Chairman made claim that the findings and discipline assessed were wrongful in that the discipline procedure failed to comply with Rule 33½ which in pertinent part, with emphasis supplied, reads:

"(a) No employe will be disciplined without first being given an investigation which will be promptly held, unless such employe shall accept dismissal or other discipline in writing and waive formal investigation. Suspension in proper cases pending a hearing, which shall be promptly held, will not constitute a violation of this rule. An employe involved in a formal investigation may be represented thereat, if he so desires, by the Local Chairman and one member of the Shop Committee.

(b) **Prior to the investigation, the employe alleged to be at fault shall be apprised of the charge sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses.**

(c) A copy of the transcript of the evidence taken at formal investigation will be furnished the employe, or his representative, **provided request therefor is made at the time the investigation is held.**" (Emphasis ours.)

Claimant not having been served with proper notice as required by Rule 33½(b) the proceedings were voidable **ad initio** and were voided by the Organization's complaint.

Under date of November 1, 1967, Carrier again issued a charge identical to that of October 16, 1967; except, the hearing date was set for November

8, 1967. This charge was received by Claimant on November 2, 1967. Claimant failed to appear at the hearing; nor did he in any way communicate with Carrier relative to the hearing. The hearing proceeded in his absence. Carrier, on November 14, 1967, issued findings and assessment of discipline identical to that of October 27, 1967, which was duly served on Claimant.

On November 28, 1967, Organization filed claim that: (1) Claimant was denied due process and therefore the hearing on November 8, 1967, was improperly conducted in violation of Rule 33½; (2) "since you (Carrier) have already discharged Mr. Edgar (Claimant) from carrier service, he is under no obligation contractually or otherwise, to respond to carrier instructions or directives"; (3) Carrier is contractually obligated to reinstate Claimant with back pay. Elsewhere in the record Organization alleges that Carrier violated the Agreement in that: (1) it failed to supply Organization with copy of the transcripts in both hearings; and (2) the admission into evidence, during the hearing, of Claimant's past discipline record was prejudicial error. The claim was denied at each step of the proceedings on the property.

General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966 — concerning which Claimant had signed a statement that he had studied and fully understood — reads in material part, with emphasis supplied:

> "16. Employes must obey instructions from the proper authority in matters pertaining to their respective branches of service.
>
> They must not withhold information, **or fail to give all the facts, regarding** irregularities, accidents, personal injuries or **rule violations.**
>
> **Employes must report for duty as required** * * *. They must not absent themselves from duty * * * **without proper authority.**" (Emphasis ours.)

General Rules promulgated by a carrier, unless they contravene the terms of a collective bargaining agreement, are mandatory standards with which an employe agrees to comply, expressly or impliedly, in his employment contract. Failure to comply subjects him to disciplinary action.

The voiding of the first proceedings was not prejudicial as to Claimant. It merely restored the parties to the **status quo** of their relationship which existed prior to the October 27, 1967, baseless dismissal; and, continued thereafter to Claimant's dismissal from service by the findings and assessment of discipline in the November 14, 1967 notice. In the interim period the employer-employe relationship continued and Claimant remained subject to the Rules of the collective bargaining agreement. His Organization's allegation that Claimant was already discharged prior to the second proceedings and was "under no obligation contractually or otherwise, to respond to carrier instructions or directives" is without substance in law or in fact. When Claimant failed to appear at the hearing of November 8, 1967, after having been properly served with notice, he acted at his peril; and, Carrier's proceeding with the hearing in his absence was not a denial of due process.

There being no evidence that Organization **requested** copies of the transcripts — a condition precedent to contractual requirement — Carrier did not violate Rule 33½(*c*), **supra.**

The introduction of Claimant's past record involving disciplinary action against him for absenteeism is not reversible error. While it was not material and relevant evidence in the resolution of the issue as to Claimant's guilt as charged, it was properly introduced for the limited purpose of measurement of reasonable discipline.

We find: (1) Claimant was afforded due process; (2) the finding of guilt as charged is supported by substantial evidence; and (3) the discipline imposed was reasonable. See and compare Third Division Award No. 13127.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of September, 1970.

LABOR MEMBERS' DISSENT TO AWARD 5987, DOCKET 5757

The majority is in gross error when they concur with the referee findings in Award 5987.

The record reflects from the very beginning of this instant case that the carrier has committed serious defects in due process under the contract agreement, Rule 33½.

"DISCIPLINE

"(a) No employe will be disciplined without first being given an investigation which will be promptly held, unless such employe shall accept dismissal or other discipline in writing and waive formal investigation. Suspension in proper cases pending a hearing, which shall be promptly held, will not constitute a violation of this rule. An employe involved in a formal investigation may be represented thereat, if he so desires, by the Local Chairman and one member of the Shop Committee.

(b) Prior to the investigation, the employe alleged to be at fault shall be apprised of the charge sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses.

(c) A copy of the transcript of the evidence taken at formal investigation will be furnished the employe, or his representative, provided request therefor is made at the time the investigation is held.

(d) If the final decision shall be that an employe has been unjustly suspended or dismissed from the service, such employe shall

be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal.

(e) When employes are required to report outside of their regular bulletined hours to act as witness for the Company in investigations, they shall receive straight time rates from time reporting at designated location until released.

(f) All conferences between local officials and Local Committees to be held during regular working hours without loss of time to Committeemen.

(g) Prior to the assertion of grievances 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 employes.

MEMO No. 1: Paragraph (a) — If an employe involved in a formal investigation desires a representative, such will be the Local Chairman, or his representative, of his craft and one member of the Shop Committee; in the latter event it is desirable, in the interest of avoiding confusion that only the Chairman shall question witnesses. The cooperation of the Committee to that end should be solicited in case issue is taken on this point."

The referee recognized the fact that Machinist Marland M. Edgar, the claimant in this instant dispute, did not receive the registered mail notice of investigation and therefore was not aware that such investigation was to be held on October 23, 1967. When he included in his findings on page 2 of Form 1:

"Under date of October 16, 1967, Carrier mailed to Claimant, registered mail return receipt requested, the following Notice of Hearing and Charge:

'Please arrange to appear for formal investigation in in the Superintendent of Shops' office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your allegedly being absent from duty with securing proper permission from your foreman [sic] to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966.

You are entitled to representation in accordance with your Agreement if you so desire.'

Hearing was held on the appointed day. Claimant did not appear. The hearing proceeded in his absence. Notwithstanding that Carrier's Notice of Hearing and Charge was returned to it on October 23, 1967, because of incorrect address, Carrier proceeded, on the basis of the record made to issue findings of guilt and assessed discipline under date of October 27, 1967:

'As a result of the facts brought out in the formal investigation held in the Superintendent of Shops office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your allegedly being absent from duty without securing proper permission from your foreman to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966, you are hereby removed from the service of this company effective this date.'

This document was correctly addressed, mailed to Claimant registered mail return receipt requested and was received by Claimant. The Local Chairman made claim that the findings and discipline assessed were wrongful in that the discipline procedure failed to comply with Rule 33½ which in pertinent part, reads:"

He then proceeded to fabricate a conclusion of his own, not substantiated by the record, when he stated:

"Claimant not having been served with proper notice as required by Rule 33½(b) the proceedings were voidable **ab initio** and were voided by the Organization's complaint."

We believe that such statement could be only for the purpose of laying a facetious foundation for this defective award.

The record is constructively clear in the fact that the carrier **did not** write to the claimant, or his Union representative, rescinding their original decision of assessed discipline in its highest form (complete dismissal) on October 27, 1967 when the claimant was tried in absentia. The referee does take cognizance of the record when he states:

"Under date of November 1, 1967, Carrier again issued a charge identical to that of October 16, 1967; except, the hearing date was set for November 8, 1967. This charge was received by Claimant on November 2, 1967. Claimant failed to appear at the hearing; nor did he in any way communicate with Carrier relative to the hearing. The hearing proceeded in his absence. Carrier, on November 14, 1967, **issued findings and assessment of discipline identical to that of October 27, 1967,** which was duly served on Claimant."
(Emphasis ours.)

This is a clear-cut case of additional error, of being denied the very basic principle of a fair and impartial investigation or hearing. These basic principles, even if not spelled out in the Agreement, certainly are implied and flow from the Constitution of the United States as well as the Agreement. Certainly this man was required to be twice jeopardized and as a result paid the supreme penalty that any employer can render upon an employe, that is, complete dismissal, and deprived of future earning power (res adjudicata).

The referee then states in pertinent part (p. 4, Form 1):

"The voiding of the first proceedings was not prejudicial as to Claimant. It merely restored the parties to the **status quo** of their

relationship which existed prior to the October 27, 1967, baseless dismissal; and, continued thereafter to Claimant's dismissal from service by the findings and assessment of discipline in the November 14, 1967, notice."

For the majority to subscribe to such naivete is to say, at the very least, a most unprofessional act in the field of arbitration. The record is clear that the investigation, discipline assessed, as well as these improper findings should be declared a nullity.

We dissent.

R. E. Stenzinger
E. H. Wolfe
E. J. McDermott
D. S. Anderson
O. L. Wertz

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.