

Award No. 6083
Docket No. 5891
2-PTC-CM-'70

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. 17, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

PENN CENTRAL TRANSPORTATION COMPANY (NYNH&H)

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier (Penn Central Co.) unjustly, arbitrarily, and capriciously dismissed L. Arcari from the service on December 8, 1967.
2. That the improper hearing and investigation held on November 30, 1967 does not support the Carrier's arbitrary and capricious action.
3. That accordingly the Carrier be ordered to restore L. Arcari to his position as Car Inspector at Hartford, Conn, and be made whole for all time lost retroactive to December 8, 1967, with all seniority, vacations, Insurance, Hospitalization and all other rights and benefits afforded under the Carmen's Agreement.

EMPLOYEES' STATEMENT OF FACTS: That L. Arcari is employed as a car inspector at Hartford, Conn. and will hereinafter be identified as the claimant.

He is an employe of the Penn Central Co., hereinafter identified as the carrier.

The claimant has been employed by the carrier at Hartford, Conn. for about 30 years.

He has held his present assignment as road man for four and one-half years. His regular assigned hours are 8 A. M. to 4 P. M. and rest days are Saturday and Sunday.

The claimant was notified by a letter dated November 21, 1967 and signed by E. Beaumont, General Foreman, reading as follows:

"This Board is loathe to interfere in cases of discipline if there is any reasonable ground on which it can be justified."

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"It has become axiomatic that it is not the function of The National Railroad Adjustment Board to substitute its judgment for that of the Carrier's in disciplinary matters, unless the Carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed."

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"The question then remains, was the penalty imposed excessive? This and other Divisions of the Board have often said that they would not substitute their judgment for that of the Carrier unless its action in that respect can be said to be arbitrary, unreasonable, or unjust."

In view of all the foregoing, carrier submits that there is no proper basis on which your board can reverse the carrier's action in this case. The claimant was afforded a fair investigation, the evidence sustains the finding of guilt, and the discipline imposed was reasonable. Accordingly, your Honorable Board is respectfully requested to deny the employe's claim.

Should your board find that claimant is not guilty as charged, despite the clear evidence to the contrary, and that he should not have been disciplined he would not, in any event, be entitled to allowance of the fringe benefits required in paragraph 3 of the employe's claim. Rather, claimant would be entitled only to the remuneration provided in Rule 34 of the applicable agreement reading, in pertinent part, as follows:

"RULE 34

"* * * 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 wages loss, if any, resulting from said suspension or dismissal."

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.

This is a disciplinary case, in which Claimant was charged with failure to perform his assigned duties at the Ensign Bickford Company on October

27, 1967. A hearing was conducted culminating in his dismissal from the service of Carrier effective December 8, 1967.

The Organization contends that Carrier violated Rule 34 of the basic contract, which in pertinent part reads:

"No employe shall be disciplined without a fair hearing by a designated officer of the carrier . . . At a reasonable time prior to the hearing, such employe and the duly authorized committee 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 Organization specifically charges Carrier that 1) it failed to notify the duly authorized representative of Claimant, 2) it failed to apprise Claimant of a precise charge, 3) statements were introduced into evidence without their authors being present and subject to cross examination, 4) the hearing officer refused to permit Claimant's representative to introduce evidence, 5) Carrier failed to produce a certain witness, 6) the master mechanic and General Foreman discussed the matter before the charge was preferred, and 7) the hearing officer acted as accuser, prosecutor and jury.

The facts in this case leading to the hearing are substantially as follows: on Friday, October 27, 1967, Claimant's tour of duty was from 8:00 A. M. to 4:00 P. M. At approximately 3:10 P. M., Claimant was instructed by his supervisor to go to the Ensign Bickford Company to inspect Car #IC 29835 located at their siding. This car was to be loaded with Class A explosives (Dynamite), and these inspections were required by ICC regulations. Claimant testified that he went to the designated location and found at approximately 3:50 P. M. that the loading of the car had not been completed. Since his tour of duty was due to expire at 4:00 P. M. and since Management had previously established a policy designed to discourage overtime work, he did not wait until the car was loaded but returned to his home station to check out at 4:00 P. M. As a result, this car was not moved until the following Monday despite evidence in the record that Carrier officials as late as 7:30 P. M. on Friday were aware of the car's status.

Claimant in essence has been charged with exercising bad judgment by not staying at the site until the loading was completed so that he could make the required inspection, fill out the ICC forms, etc. He also indirectly has been charged with failing to take it upon himself to work overtime to complete the task despite Management's policy. We wonder what the reaction would have been if he had remained and did in fact work overtime. We are not condoning the behavior of the Claimant in this case, because from a review of the record there is no question in our minds that he used exceedingly poor judgment. On the other hand, he was not specifically instructed by his supervisor to stay at the site until the inspection was completed.

Without addressing ourselves to all of the charges made by the Organization against the Carrier, suffice it to say that we find the hearing officer's decision to introduce into evidence the statements of individuals not present

at the hearing, to have been highly prejudicial to the rights of the Claimant. Not being afforded the right of confrontation and the right to cross examine hostile witnesses is fundamental in our adversary proceeding of justice. It is true that these hearings are not bound by the stringent rules of evidence required in a Court of Law, and hence great latitude is usually granted both opposing sides, but to deny Claimant that which is basic to a fair and equitable hearing, is to deny him due process.

In accordance with Rule 34 of the Parties' Agreement, we find that Claimant was unjustly dismissed from service and order his reinstatement with his seniority and vacation rights unimpaired and further order that he be compensated for wage loss, if any, resulting from said dismissal. In determining the wage loss, Carrier is entitled to deduct whatever earnings Claimant had over the period of dismissal.

AWARD

Claim sustained in accordance with Findings.

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.

CARRIER MEMBERS' DISSENT TO AWARD 6083, DOCKET NO. 5891

(REFEREE JOHN J. McGOVERN)

We agree with the Majority's conclusion that disciplinary proceedings are not bound by strict rules of evidence as required in a Court of Law and further point out that such proceedings are not conducted as are judicial proceedings. We disagree, however, with the Majority's conclusion that the Claimant was denied a fair hearing. Nothing in the Agreement specifies the types of evidence that may be used. Beyond that, no prejudice to the Claimant was proved.

For these and other reasons, we dissent.

J. R. Mathieu
H. F. M. Braidwood
W. R. Harris
P. R. Humphreys
H. S. Tansley