Award No. 6300
Docket No. 6175
2-PATH-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph E. Cole when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (Carmen), RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O.

PORT AUTHORITY TRANS-HUDSON CORPORATION

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the Controlling Agreement on August 21, 1970, when it held Car Cleaner Gerald Bowman out of service pending an investigation.

2. That the Carrier unjustly dismissed G. Bowman from service effective May 5, 1971.

3. Accordingly, he is entitled to be made whole by being compensated for all time lost from August 21, 1970, plus 6% interest on all monies due him, to be restored to service with seniority unimpaired, all vacation privileges, sick leave benefits, Health and Welfare benefits and any losses that may have accrued as a result of his removal from service and later his dismissal.

EMPLOYES' STATEMENT OF FACTS: Car Cleaner Gerald Bowman, hereinafter referred to as claimant, was an employe of the Port Authority Trans-Hudson Corporation, hereinafter referred to as the carrier. He was employed as a car cleaner with a seniority date of May 12, 1970, and works various tours of duty with relief days of Saturday and Sunday.

On Saturday, August 15, 1970, while on his relief day, he accompanied a friend named G. Daniels to meet some girlfriends who were arriving in the Port Authority Bus Terminal. An incident occurred involving G. Daniels and an individual named Flynn, who claimed he had been threatened with a knife, allegedly in the possession of G. Daniels. This was later proven incorrect. During this incident, the claimant tried to intercede and explain the story was untrue, and the officer involved called for additional help. When this help arrived, they started to manhandle the claimant.

Subsequently, on Agust 21, 1970, the claimant was removed from service without a hearing or investigation. In a letter dated August 26, 1970, the

this issue at this late date in its efforts to reinstate an employe with only three months service whose assaults resulted in the hospitalization of at least one Police Officer and the injury of another one. The facts in this case do not militate in favor of such leniency.

Although PATH did not act "unjustly" in dismissing the claimant, it is assumed that the claimant in demanding to be "made whole" would credit PATH with whatever earnings accrued to him since the period he has been held out of service. This assumption may be incorrect in light of the claimant also demanding that he be "compensated for all time lost from August 21, 1970."

PATH must, in any case, be credited with whatever earnings or unemployment compensation the claimant received or should have received during any period it may be held that he was entitled to be employed as a matter of leniency or otherwise. In **Raabe v. Florida East Coast Railway Company,** 259 F. Supp. 351 (1966) the District Judge held that the carrier must be credited with such payments and observed:

> "In cases of this type, courts have almost universally deducted wages actually earned or those that should have been earned by the exercise of reasonable diligence. See, e.g. Brotherhood of R. R. Trainmen v. Southern Ry., Civil No. 10318, N.D. Ala., May 28, 1965; Brady v. Trans World Airlines, Inc., 244 F. Supp. 820 (D. Del. 1965). Not only is this procedure in accord with the common law rule of mitigation of damages but it is also consistent with the procedure followed by the N.L.R.B. in cases under its jurisdiction."

District Judge McRae went on to hold (at page 356):

> "The deduction of the unemployment compensation payments, however, should be allowed. Unlike the situation in the N.L.R.A. cases, federal law authorizes the fund from which Raabe was paid and federal law requires the carrier (here the F.E.C.) to reimburse the Railroad Retirement Board in full for the amount of benefits paid to Raabe by the Board for which the F.E.C. is responsible. The F.E.C. should not have to pay twice; therefore, the amount due to the Railroad Retirement Board shall constitute a lien on the judgment awarded Raabe."

In view of the above, it is submitted that there is no basis for the claim and that it should be dismissed. The claimant, after a few months of employment, admitted that he committed acts that would justify the dismissal of a long term employe. There is no reason for him to be reinstated and awarded back pay in light of his admittedly atrocious conduct.

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 waived right of appearance at hearing thereon.

The merits of this case did not enter into the rationale of this decision.

The agreement, Section 11, page 22, clearly states that a hearing shall be held in fifteen (15) days.

The Board recognizes that upon mutual agreement, a hearing may be continued.

In this case, the record shows that there was no mutual agreement of continuance.

1. Claimant is to be compensated for all time lost since August 21, 1970, less any amount he received from other employment.

2. His seniority shall be unimpaired.

3. He shall have all vacation privilege, sick leave benefits, Health and Welfare benefits.

4. Since no interest is included in the agreement, no interest is allowed.

AWARD

Claim sustained subject to above limitations.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June 1972.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 6300, DOCKET NO. 6175

At he outset, the Referee in **Award No. 6300** erred in his finding that: "In this case, the record shows that there was no mutual agreement of continuance."

The submissions of both the Carirer and the Employes contained three documents attesting to the fact that the investigation was posponed by mutual agreement. These documents were directed to the Referee's attention in Carrier's brief and in panel discussion, but he chose to ignore them. The Referee's attention was also directed to the fact that the first written record from the Employes with respect to their alleged objection to the postponement of the investigation is contained in a letter from the General Chairman dated June 17, 1971, or almost two months after the hearing was held on April 23, 1971.

The fact that claimant admitted during the investigation that he was convicted in court and fined $100.00 or ten days in jail for assaulting a car-

rier patrolman, was brushed off by the Referee as having no relevance and of not being worthy of comment in his findings.

The Dissent of the Carrier Members in **Award No. 6297**, Docket No. 6172, with respect to Health and Welfare, is applicable with equal force and effect in this case and by reference is made a part hereof.

In addition, when the Carrier Member further discussed the Referee's proposed Award, Section 10(b) of the Collective Agreement was again directed to the Referee's attention. That Rule reads, in pertinent part as follows:

> "The Commissioners of the Port Authority as a matter of policy provide benefits for its employes by according them benefits with respect to group life insurance, hospitalization, surgical and major medical benefits, excused absence, education refunds and military leave. **These benefits are accorded** Port Authority employes **without contractual obligation to them** and subject to change from time to time in the discretion of the Port Authority Commissioners."

Carrier Member's argument and the Rule was brushed aside by the Referee as follows:

> "I have carefully read the awards and the Agreement with the Brotherhood of Railway Carmen of the United States & Canada and Port Authority Trans-Hudson Corporation.
>
> Rule 11c states that an employe who has been unjustly dismissed shall be 'Reinstated in full for all time lost.' I interpret this to mean that he will get everything that he would have received if he had been working.
>
> I consider fringe benefits to be part of the emolument he receives for his work. I do not consider that claimant should be paid the amount that it cost the carrier to give him those benefits, but he should have the protection in the event of a loss.
>
> Section 10b certainly is included in the agreement. It does say that the furnishing of benefits as a matter of policy but not of contractual obligation to the employe, and it is subject to change at the discretion of the Port Authority.
>
> The purpose of the Act under which we operate is to prevent, if possible, the flexing of economic muscles by the Carrier or the employe.
>
> To withdraw the fringe benefits granted employes under Section 10b, I believe that the Port Authority would have had to withdraw the benefits from all of their employes.
>
> If the claimant had been working he would have received the protection granted under the agreement. He should be made whole and he should be entitled to this protection.
>
> The award will stand as originally written."

If the Referee had confined his findings to the record and the Agreement Rules, instead of expounding his philosophy as indicated in the above quotation, the claim would have and should have been denied in its entirety.

The authority of this Board is limited to interpreting the Agreement between the parties. The Board is without authority to change the terms of the Agreement. It cannot change the terms of the Agreement by interpretation or otherwise.

What this Board did was simply to ignore the controlling Agreement provisions and find fault with the Carrier's present operation, and then attempt to direct the Carrier's future operation.

The Board should follow the principles of many prior better reasoned awards and refrain from attempting to substitute its judgment for that of the Carrier which, in fact, it has no authority to do.

For these reasons we record our vigorous dissent to the Award.

G. M. Youhn
G. M. Youhn, Carrier Member

W. B. Jones
W. B. Jones, Carrier Member

P. C. Carter
P. C. Carter, Carrier Member

E. T. Horsley
E. T. Horsley, Carrier Member

H. F. M. Braidwood
H. F. M. Braidwood, Carrier Member

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