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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6562
SECOND DIVISION Docket No. 6407
2-NOPB-CM-'73

The Second Division consisted of the regular members and in addition Referee Edmund W. Schedler, Jr. when award was rendered.

Parties to Dispute: System Federation No. 99, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)

New Orleans Public Belt Railroad

Dispute: Claim of Employes:

1. That under the agreement Carman-Inspector W. J. Reuther was unjustly dealt with and unjustly suspended from service of the Carrier from August 21, 1971 through September 4, 1971 both dates inclusive.

2. That accordingly, the Carrier be ordered to compensate Mr. Reuther two (2) hours pay at the pro rata rate and three (3) hours pay at the over time rate for being ordered by the Carrier to attend an investigation on August 16, 1971, and eight (8) hours pay at the pro rata rate for August 23, 24, 25, 26, 27, 30 and 31, 1971, September 1, 2, 3 and 6, 1971, because the Carrier suspended him as a result of that investigation.

3. That accordingly, in addition to the money amounts claimed herein, the Carrier be ordered to compensate Mr. Reuther an additional amount of 6% per annum compounded annually on the anniversary date of August 16, 1971.

4. That accordingly, Mr. Reuther's service record be cleared of any mention what so ever of the investigation conducted on August 16, 1971.

5. That accordingly, Mr. Reuther's rights be reinstated unimpaired in regards to but not limited to, Railroad Retirement Benefits being paid up to the amounts he and the Carrier would have paid in his name had he not been suspended.

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.

This discipline grievance arose because of a letter written by Claimant to the New Orleans Times-Picayune on or about August 3, 1971.

The Claimant identified himself in the letter as W. J. Reuther, General Chairman, Standard Lodge No. 1233, Brotherhood of Railway Carmen. In order to understand the nature of this dispute the Board has carefully studied the background leading up to the Claimant's suspension.

By letter dated April 18, 1970 the Claimant communicated a complaint with the Carrier of certain safety hazards within the shop, to wit:

> "There are two spots on track 13 that were dug up by the track gang but never back filled, large pieces of cement, worn and broken parts removed from cars scattered from one end of the shop track to the other.
>
> Several other places on the Belt where the track was dug up but never back filled, where spilled grain and other matter has been removed from along side the track and thrown between the tracks where Carmen have to step to couple air hose.
>
> Two years ago I reported to Mr. H. J. Kofoed by phone, about a water leak along Southern Interchange Track No. 2, when nothing was done within six months I again reported it to Mr. Kofoed, ... Only after two men slipped and fell at this spot did some one spread shells around this leak. As of this date the leak is not fixed, in fact now there is another leak about a block away.
>
> Sometime back two Carmen were injured while trying to pull a burner cart over large pieces of cement on the shop track, both men required medical attention, one was held out of service by the Public Belt Physician for two or three weeks."

In a letter dated May 4, 1970 Carrier's Superintendent J. R. Cootes answered the various complaints and on July 15, 1970 the Claimant wrote a second letter and stated, among other things:

> "I have also made a personal inspection of the unsafe areas I have complained of, and have found them to be in the same condition or worse.
>
> Nothing has been done about the water leaks at the Southern Interchange Tracks.
>
> There is no excuse for having worn and broken car parts, cement and other debris in the working area for days on the repir track, this should be removed daily.
>
> I cannot agree, that the Carrier is making every effort to maintain safe working conditions... ."

By letter dated August 30, 1970 the Claimant communicated the contents of his correspondence with the Carrier to Mr. G. L. O'Brien, General President of the Brotherhood of Railway Carmen. Mr. O'Brien replied on September 2, 1970 and the last 2 paragraphs of his letter read:

> "In order to be helpful to you in this matter I would suggest you again direct a letter to Mr. P. A. Webb, General Manager of the New Orleans Public Belt Railroad, advising him that unless the conditions complained of by you with respect to health and safety of the Members of our Brotherhood are corrected, it is your intention to spread a strike ballot and peacefully withdraw from services of the railroad until the conditions complained of are corrected.
>
> After you take the strike ballot and have the results of the ballot, I would appreciate you advising my office of the result, and if two-thirds of the members involved voted in favor of withdrawing from the service of the New Orleans Public Belt Railroad, I will authorize such withdrawal."

By letter dated September 7, 1970 the Claimant communicated with General Manager Webb that, among other things, the following items needed immediate attention:

> "1. Removal of waste, trash and grass in all working areas.
>
> 2. Eating facilities and dressing rooms should be kept clean on a daily basis.
>
> 3. Proper receptacles for waste and cigarettes should be installed in above areas, and cleaned on a daily basis.

The Claimant closed the letter by setting an inspection date for the facilities for October 12, 1970 and mentioning the strike ballot and peaceful withdrawal from services of the Carrier unless the conditions complained of were corrected.

The evidence disclosed that some of the conditions complained of were corrected; however due to weather problems the Carrier was unable to correct all the conditions. On December 6, 1970 the Claimant again wrote the Carrier and complained about the spilled grain problem and a problem of keeping the dressing room clean.

On March 26, 1971 an article appeared in the newspaper relating to certain matters of public interest about the Carrier. In the article there was a comment attributed to General Manager Webb about a new safety regulation book and the relevant language in the article read:

"We ran into all kinds of protest from the unions, because some of the regulations refer to the demeanor of employees. But we believe that a man's conduct has a direct bearing on safe operating conditions", Webb said.

"The rules the Belt Railroad are trying to adopt are those of the Association of American Railroads.

He explained that the new rules are now suspended until April 1 while the unions review them.

Our main purpose of course is to improve safety conditions on the railroad," Webb said.

"Commissioner Theodore M. Hickey said, 'We should almost insist - and I emphasize the word almost - on getting more safety.

We don't want to antagonize these unions, but I am sure the AFL-CIO is vitally interested in safety.

I hope we can make it clear to the men we are interested in their safety, both from an insurance standpoint and a humane standpoint. I know I hate to see a man in a wheel chair with two legs or an arm missing.'"

Webb said "he believes the main opposition comes from the railroad's attempt to institute a new set of rules."

On March 28, 1971 the Claimant wrote a reply to The Times-Picayune for the March 26 article and among other things, stated:

"On March 2, 1971 the Union Representative met with the Public Belt Management to discuss their General Order No. 215. In our discussions, it was explained to management that we took exception to their General Order No. 215, because,

> It was partly in conflict with some of our Union Working Agreements which can only be changed as set forth in Section Six of the Railway Labor Act as amended.
>
> Partly, because some of it has nothing to do with safety. For example, Rule 6 of General Order No. 215 states, 'Employes must comply with instructions of supervisors and other proper authority. Affairs of the Public Belt must not be divulged, nor access to records permitted, without proper authorization.'
>
> General Order No. 215, places the burden of safety on the employees. Example, in almost all rules the words, 'employees must, employees are prohibited, employees will report, are used.'"

The Claimant's letter gave data showing the date and number of cars pulled from interchange without inspection or with a penalty defect tag on the cars. The letter closed with the following paragraphs:

> "On March 22 and 23, 1971, Mr. J. Noel Ball, Assistant General Manager, ordered, that 54 and 65 cars respectively be pulled from the L&A Interchange without inspection. These are only a few of the unsafe and unlawful conditions that are practiced daily and knowingly to the Public Belt Management.
>
> All of the above is in violation of the Federal Safety Appliance Act and or the Federal Power Brake Law.
>
> There is no way, Mr. Hickey, or anyone else can antagonize the Public Belt employees with bonafide safety rules. We hope Mr. Hickey, as a Commissioner and State Senator, will insist, that the Public Belt Management comply with and enforce the Federal Safety Acts.

The March 28 letter was not published in the newspaper; however evidence disclosed that the Claimant sent carbon copies to Mr. T. M. Hickey and Mr. P. A. Webb, Jr.

On August 3, 1971 the Times-Picayune published a letter written by the Claimant that stated:

> "Since July 14 the Public Belt Railroad has been pulling cars from interchanges without inspection, moving these cars across New Orleans without a brake test and pulling cars with a penalty defect tag on them, all in violation of the Federal Safety Appliance Act and Power Brake Law. Some of these cars, are tank cars, used to transport all kinds of chemicals and gas, and if one was to derail along the river because of some mechanical defect it could be disastrous.
>
> The management of the Public Belt has been cited by the Department of Transportation's director, Bureau of Railroad Safety, on a number of occasions for violations of the Federal Safety Appliance Act and Power Brake Law, yet they insist on violating these laws.
>
> If General Manager Philip A. Webb, Jr. and commissioner Theodore M. Hickey were quoted correctly in the article appearing in The Times-Picayune March 26, Mr. Webb said, 'Our main purpose of course is to improve safety conditions on the railroad.' Mr. Hickey said, 'We should almost insist, and I emphasize the word almost on getting more safety.'

"I suggest they stop the unsafe and unlawful practices of pulling cars from interchanges without inspection, pulling cars with penalty defect tags on them, issue orders that all Safety Laws and Acts MUST be complied with by ALL EMPLOYES, insist on the use of blue flags and lights, for the protection and safety of employes working in the yards AT ALL TIMES. The Public Belt employes want Safe Working conditions all the time, not just when its convenient. Our lives depend on safety."

The Organization has alleged there were irregularities in the charge against the Claimant in that he was charged with being "guilty of an action inimical to the interest of the Carrier". The Carrier did correct the charge and in the opinion of this Board the charge was sufficiently precise that the Claimant clearly knew the full meaning and implications of the charge. Numerous awards have stated that the formation of the charge need not be in the technical language of a criminal complaint. See Awards 3270 (Carter), 11443 (Dolnick), 12898 (Hall), and 17154 (McCandless).

The Carrier contended they had the right to expect loyalty from their employees. In support of this contention the Carrier cited N.L.R.B. vs. Local Union 1229 of the International Brotherhood of Electrical Workers, 74 Supreme Court Reporter, page 172; Wise vs. Southern Pacific Company, Court of Appeals of the State of California, First Appellate District, Division 3, filed April 23, 1969; Third Division Awards 18363 and 10930; and Second Division Awards 1884, 3253, and 4718. We will discuss the relevancy of each of these to the instant dispute.

In the Local 1229 case the employee technicians of a TV station circulated 5000 handbills attacking the quality of the station's programs. The distribution of handbills took place at a time contract negotiations were taking place. The attack impugned the quality of the employer's product; the attack did not relate itself to labor practices, wages, hours or working conditions of the employer; the attack neither asked for public sympathy nor support for the Union; the Union was not identified on the handbills; the employer policies attacked were those of finance and public relations which were strictly management functions.

In the instant dispute the Claimant impugned the Carrier's safety practices and obviously this was of serious interest to the employees. In the article, published on August 3 the Claimant identified himself as an officer of a labor union and it is palpably clear to this Board that Claimant was seeking public support for improvement of health and safety practices on the property.

In Wise vs. Southern Pacific, the opinion of the court showed Wise was "inciting litigation against the Company and running and capping for specific attorneys (in violation of the law), the evidence of his disloyal and hostile activities received at the time of trial was substantial." It is clear to this Board that the instant dispute is distinguishable from the Wise case.

In Award 18363 the Claimant deliberately interfered in a matter that was of no concern to her and in award 10930 the Claimant failed to communicate the violation of the law to Carrier officials before he communicated with the police - he did not give the Carrier an opportunity to make necessary corrections in the weight of the vehicle.

Awards 1884, 3253, 4718 were similar to the Wise case above in that the Claimants were alleged to be involved in some form of barratry or the Claimant acted as the attorney in an action against the Carrier.

The Board will deny the Organization's claim for interest because interest on a contested claim under a collective bargaining agreement does not accrue until the matter has reached a final determination in the proper forum pursuant to the terms of the Agreement. See awards 6261 and 6438.

It appears from the reading of the transcript of the investigation that the Carrier was particularly disturbed that the Claimant had violated a portion of Rule 6 of the General Order stating:

> "Affairs of the Public Belt must not be divulged, nor access to records permitted, without proper authorization."

The Carrier is a tax payer owned institution and in these institutions the public interest is served only by a full disclosure of the affairs of the institution. There are, however, a few exceptions. The usual exception is that personnel matters are conducted in executive sessions and not open to public view. Also matters whose untimely disclosure would increase the Carrier's cost such as the purchase of land by condemnation are not open to public. Because of his position as General Chairman, the Claimant has a right to criticize the Carrier and the Claimant should be in a position to make a significant contribution through public debate concerning safety in the railroad business. The Carrier should nurture and protect, not debilitate and eradicate, the General Chairman's ideas. Only if the exercise of these rights by the General Chairman materially and substantially impedes the proper performance of his daily duties in the shop or disrupts the regular operation of the shop should a restriction on the General Chairman's rights be tolerated.

It is the majority opinion of this Board that the General Chairman's criticisms as published in the Times-Picayune were made in good faith with a sincere concern for safety and health of the employees of the Carrier.

The Agreement was violated in that the Claimant was not suspended for just cause.

A W A R D

1. Item one in Employe's submission sustained.

2. Item two in Employe's submission is modified. Carrier will ofer to compensate Claimant at 8 hours pay at the pro rata rate for August 23, 24, 25, 26, 27, 30, and 31, 1971, September 1, 2, 3, and 6, 1971.

3. Item three in Employe's submission is denied.

4. Item four in Employe's submission sustained.

5. Item five in Employe's submission sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By: Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of July, 1973.