

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: (System Federation No. 4 Railway Employees'
(Department, AFL-CIO Firemen and Oilers
(
(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Fuel Station Attendant Joseph J. Barben was unjustly dismissed from the Carrier effective February 15, 1973.
2. That accordingly the Carrier be ordered to reinstate this employee with seniority unimpaired, vacation rights unimpaired, made whole for all health and welfare and insurance benefits including Railroad Retirement and unemployment insurance, as well as being made whole for any benefits he would have received during the time he was held out of service retro-active to February 15, 1973.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant, an employee with seventeen years of service, was discharged, after an investigation, for "unauthorized possession of merchandise" being transported by Carrier.

Petitioner raises two procedural issues: that the charge was vague and that Claimant and his representative were deprived of their right to timely cross examine Carrier's witnesses at the investigation. Carrier in addition to denying the specific allegations contends that they were presented too late to warrant consideration by this Board. Carrier points to the specific

waiver at the close of the hearing at which time neither Claimant nor his representative took any exception to the conduct of the hearing and the fact that the two issues were not raised until almost a year later. With respect to the alleged waiver, we must take issue with Carrier since there is no restriction on the right of either party to raise issues with respect to a disciplinary matter as long as it precedes the submission of the dispute to the Board - that is, in handled on the property during the normal processing of the dispute (see Award 6795).

We do not agree with the Organization that the charge was too vague and hence a fatal flaw existed. It is abundantly clear from the record that Claimant and his representative were aware of the issue under investigation and were not impaired in the preparation of the defense by the language of the charge (see Award 6638).

The transcript of the investigation herein is confusing, incomplete in certain respects (relating to time), and unconventionally organized. It is clear from that transcript, however, that Claimant and his representative were not permitted to cross examine witnesses in the order of their testimony. Although Claimant's representative did ultimately have the opportunity to cross examine, it did not occur until after each of the Carrier's witnesses testified partially and then completed their testimony after other Carrier witnesses had partially testified on direct examination. In a closely parallel factual circumstance, we held in Award 5892:

"It is our judgment that said piece-meal method of testifying unequivocally violated Claimant's mandatory right to a fair trial or hearing in regard to the charge made against him. Carrier was required by the dictates of fair play to present Carrier's witnesses and have them testify in toto in regard to direct examination and then permit Claimant to cross-examine each such witness at the conclusion of the entire direct examination. Carrier, if it desired to examine its witnesses further had the right to ask questions on re-direct examination of its witnesses after the direct examination and cross-examination were completed. But to break up a witness's direct examination into fragments by permitting other Carrier witnesses to testify partially on direct examination before having each witness conclude his direct examination would, in our opinion, sanction an unnecessary burden being placed on Claimant and or his representatives in attempting to achieve effective cross-examination. Fair play requires and dictates that procedures be not adopted or followed that would be partial or burdensome to either side."

Further in Award 5336, we said, inter alia:

"To deny cross-examination until after all the proponent's witnesses have testified, as was the case here, is to deny the opponent of his fundamental right effectively to test the veracity of the witnesses and to elicit facts bearing upon the weight to be given his testimony by the tribunal hearing the case."

We are not unmindful of the fact that Claimant was given full opportunity to cross-examine witnesses ultimately and was not estopped in presenting any evidence in his own behalf. We also note that Carrier in its argument attempted to equate "unauthorized possession" with theft, although this was not the charge and is unsupported.. It is also evident that Carrier's police failed to halt the break-in and theft they described in their testimony and did not apprehend the culprits who they allege to have watched "in the act". It is clear additionally that Claimant was in possession of goods which had been removed from a box car; his explanation of how he came into possession of the box in question was not credited by Carrier. We have not in the past excluded circumstantial evidence and cumulatively it could well be substantial.

The seriously flawed investigation herein could serve, independently, as grounds for sustaining this Claim. However, we are aware of Carrier's serious theft and disciplinary problems and also the significant testimony adduced at this investigation substantiating Claimant's guilt. Under all the circumstances, we find the penalty of dismissal to be excessive. We order that the Claimant be returned to service without back pay or other benefits, but with seniority and vacation rights unimpaired.

A W A R D

Claim sustained in accordance with the Findings.

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 15th day of October, 1975.