Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9314
SECOND DIVISION Docket No. 8722
2-CRI&P-FO-'82

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Chicago, Rock Island and Pacific Railroad Company

Dispute: Claim of Employes:

1. Under current agreement, Firemen & Oilers, Mr. M. A. Kifayatullah, in Car Department for the Chicago Rock Island and Pacific Railroad Company in Kansas City, Kansas was unjustly terminated from Carrier's service on date of May 11, 1979.

2. That accordingly, Firemen & Oiler Mr. M. A. Kifayatullah be made whole, restored to Carrier service with all seniority rights, vacation rights, Holidays, sick benefits that are a condition of employment unimpaired and compensated for all wages lost from date terminated, May 11, 1979 plus 6% interest on all such lost wages sustained also reimbursement for all losses sustained account loss of coverage under health, welfare and life insurance agreement during time held out of service.

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.

On April 6, 1979, pursuant to a formal investigation which was held on March 28, 1979, Claimant, a Laborer (F & O) at Carrier's Kansas City, Kansas facility, with a seniority date of November 11, 1978, was terminated "... for absenting (himself) from duty without authority between 4:30 PM and 6:20 PM, March 15, 1979 and claiming this time on (his) time card, a violation of Rule N and Q of Form G-147 Revised..." This matter was resolved by Second Division Award 9278.

A second hearing involving Claimant was conducted on April 25, 1979, in order "... to develop the facts, discover the cause, and determine (his) responsibility, if any, in connection with a report received that (he) refused to answer questions asked of (him) by interrogating officer, Mr. J. T. Baier, Master Mechanic, during a formal investigation conducted ... March 28, 1979 ..." As a result of this second investigation, Claimant was notified that he was found guilty as charged and that he was terminated effective May 11, 1979. Claimant's second termination is the basis of the instant claim which is now before the Board.

As its initial contention, Carrier asserts that the Board is without jurisdiction in this matter because, pursuant to a strike, bankruptcy and seizure of the Railroad by the United States Government, the Carrier is no longer in existence and is no longer the "Carrier" per se as contemplated in Sections First and Fifth of the Railway Labor Act. Carrier additionally argues that it (Carrier) has been directed by the Federal Reorganization Court to submit all disputes to the Court for resolution; and further that it would be improper to progress this matter under the aegis of the National Railroad Adjustment Board.

Organization argues that the dispute is properly before this Board since the two (2) precipitating incidents which have given rise to the instant claim occurred at the time when Carrier was, in fact, the "Carrier" and therefore, covered by the Railway Labor Act. Additionally, Organization also argues that it is a well established tenet of labor law on the railroads that the National Railroad Adjustment Board operating through its respective Divisions does have jurisdiction over estates of bankrupt and/or liquidated companies in cases involving minor disputes.

Upon a complete and careful analysis of all testimony, documents and evidence which has been presented in this dispute, the Board concludes that though the matter is properly before the Board, the claim, nonetheless, must be rejected because: (1) there is absolutely no doubt that Claimant wilfully refused to answer questions which were put to him at the initial hearing and that Claimant's responses for engaging in said refusal are unacceptable (Clark v. S.C.L., 332 F. Supp. 380, 381 (N.D. Ga. 1970); Edwards v. St. L. & S.F., 361 F. 2nd 946, 953 (7th Cir. 1966); Third Division Awards 22427, 22128, 15676 and 5104); and (2) it is clearly established in the railroad industry that a claimant is expected to testify in an investigation hearing and that refusal to do so is at his own peril (Second Division Awards 5987, 8028, 8342 and 8439).

The basic rationale for the resolution of the aforestated jurisdictional question was perhaps articulated most cogently and succinctly in Pennsylvania Railroad Company v. Day (360 U.S. 548, 1959), wherein, while addressing the issue of the jurisdiction of a particular Board, the Court noted that, "There is nothing in the Act (Railway Labor Act) which requires that the employment relationship subsist throughout the entire process of administrative settlement ... (and) ... (T)he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." (In this same context see also Second Division Award 8970, Referee LaRocco, and Second Division Award 9204, Referee Briggs.)

Regarding the merits portion of the dispute, Carrier argues that Claimant's refusal to answer questions which were posed to him by the Hearing Officer at the March 28, 1979 hearing was proper justification for Carrier's preferring of the second set of charges against Claimant; for the conducting of the second investigatory hearing; and, subsequently, for the issuing of a second termination to Claimant for his improper conduct. According to Carrier, it was obligated to obtain a true and accurate account of the facts surrounding Claimant's initial set of charges; and that Carrier further had the right to have Claimant answer all questions which were posed to him and to otherwise cooperate fully in the conduct of the investigation. Thus, Carrier summarizes that Claimant's hearing

was conducted in a fair and impartial manner; that there is sufficient evidence in the record to support Claimant's guilt in the matter; and that Claimant's termination was proper and, therefore, should remain undisturbed.

Organization's position, in the main, is that Claimant was not insubordinate while testifying at the March 28, 1979 hearing since Claimant did not refuse to respond to questions which were addressed to him, but instead he simply did not respond in precisely the manner as Carrier's representative had wished. Additionally, Organization contends that Claimant was disciplined twice for the same charge; that Carrier failed to prove that Claimant was guilty of the charges which were brought against him because the second investigation was predicated upon the first investigation which was not completed; Claimant was not an employee of Carrier at the time of the second hearing because he had already been terminated by the Carrier as a result of the preceeding hearing; and that throughout the holding of the second hearing, Claimant was not a "hostile employee" in any way because "... he conducted himself in a courteous manner, was not loud, was not belligerent, was not disrespectful..."

Once Carrier has proven that Claimant refused to answer questions which were properly put to him at an investigatory hearing the Board can only defer to the several Awards and Court Decisions cited hereinabove in which it has been concluded that such action on the part of a railroad employee is improper and can be used to justify the disciplining of said employee up to and including discharge.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 20th day of October, 1982.