Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10693
SECOND DIVISION Docket No. 10602
2-SSR-MA-'85

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

(International Association of Machinists and
(Aerospace Workers
Parties to Dispute: (
(Seaboard System Railroad

Dispute: Claim of Employes:

1. That the Seaboard System Railroad violated the controlling agreement when it unjustly suspended Machinist William Conley for an indefinite period beginning March 18, 1983 and continuing thereafter without a prompt investigation and timely decision pertaining thereto, in violation of Rule 32, but not limited thereto, of the January 1, 1968 Agreement.

2. That accordingly, the Seaboard System Railroad be ordered to:

(a) Restore Machinist William Conley to service with eight hours pay at the pro-rata rate for every day held out of service, including all lost holiday and vacation pay, beginning March 18, 1983 and continuing thereafter.

(b) Pay premiums for employees group insurance policies, i.e. Travelers, Provident, Aetna, etc. provided by applicable agreements.

(c) Clear personal work record of all references to the charges and make him whole for all contractual losses incurred as a result thereof.

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 employes 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.

On March 15, 1983, Claimant was arrested and placed under custody pursuant to a warrant issued against him upon a charge of rape. The alleged rape occurred off the Carrier's property. Following his release on bail, the Claimant reported for work on March 18, 1983, at which time he was immediately suspended from service pending the outcome of a formal investigation scheduled for March 25, 1983. The charged violation was based upon that portion of Rule 12 of the Seaboard Coast Line Rules and Regulations of the Mechanical Department which states: "intemperance, immorality, vicious and uncivil conduct will subject the offender to summary dismissal."

After postponement the formal hearing was conducted on April 4, 1983. At the end of the formal investigation the Conducting Officer announced that the investigation would be held in abeyance, and that the Carrier would continue to hold Claimant out of service until his "status changed," or the criminal charges were dropped.

In December, 1983, the Claimant was tried, convicted of rape and sentenced to five years in the State penitentiary. The Carrier "reconvened" the initial investigation on January 19, 1984, noted the rape conviction, and dismissed Claimant from Carrier's service on January 19, 1984.

The Organization argues that the procedure followed by the Carrier in its suspension of Claimant was a violation of Rule 32. Rule 32 provides in pertinent part:

> "No employee shall be disciplined without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employee and the local chairman will be apprised in writing of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and be represented by the duly authorized representative of System Federation No. 42.
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> "If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage lost, if any, resulting from said suspension or dismissal."

The Organization contends that Rule 32 calls for a prompt hearing, and that the Carrier cannot simply recess an investigatory hearing without a timely decision. The Board finds merit in the Organization's position. When the Carrier elected on March 18, 1983, to charge the Claimant with a Rule 12 violation and suspended him pending a hearing, it was necessary to promptly conduct a formal investigation.

An important distinction must be drawn between rules promulgated by the Courts and State or Federal statute which govern the trial of criminal charges, and the rules reached by agreement of the parties which control disciplinary proceedings on Carrier's property. Rule 32 of the controlling Agreement mandates that a fair hearing be conducted promptly. The American Heritage Dictionary (1971) defines the word prompt as "on time, punctual, done without delay." To recess or postpone an investigation other than by agreement between the parties until a State or Federal criminal investigation has concluded can amount to a delay of months or even years, and is not provided within the clear intent of the rule.

The Transcript of the hearing conducted on April 4, 1983 is fifteen pages in length as compared to three and one-half on January 19, 1984. Five witnesses testified in the Claimant's first investigation, whereas only one witness testified on January 19, 1984, and then only as to the fact of Claimant's conviction. This Board finds that the Carrier did in fact conclude the formal investigation on April 4, 1983, and administered discipline when it ordered Claimant suspended pending the outcome of his criminal trial. The real issue before this Board is whether the suspension administered in this case was proper.

A charge of rape is a serious charge which requires the utmost skill, time, financial resources and energy to defend. An employee's defense to serious criminal charges is weakened when his financial ability to prepare and conduct that defense has been damaged by a lengthy, pretrial suspension from employment. Delay of any magnitude in an employee's eventual reinstatement or discharge by "holding the investigation in abeyance" fails to best serve the concerns expressed in Award No. 18536, Third Division, and Award No. 2787, Second Division, namely that an employee's position in the ensuing criminal trial not be jeopardized.

In addition to the questionable rationale that an employer-conducted investigation is necessarily prejudicial to an employee's pending criminal trial, such awards are factually distinguishable from the instant appeal. In Award No. 18536, Third Division, the Claimant was indicted by a Federal Grand Jury for dynamiting a Southern Railway train. The Carrier's interest in precluding further damage to its property by Claimant is self-evident. In Award No. 2787, Second Division, the Claimant was charged with grand larceny and receiving stolen property after his arrest was published in a public newspaper. The Carrier was publicly placed in a bad light, and the offense was clearly related to the Carrier's need to protect the shipping public from theft.

In the instant case there was no evidence of record that Claimant's arrest and the charge of rape was published in a newspaper, or broadcast on radio or television. There was no evidence that the general public had any knowledge of Claimant's charged offense, or that his fellow employees would have had difficulty working on the property with him.

Arbitration Awards in other industrial settings have approved employer administered suspensions pending a Court trial, and are useful in the analysis of this case. In Pfeiffer Brewing Co.., 26 L.A. 571 (Ryder, 1956), the employer was held to be justified in suspending a truck driver pending the Court trial on the charge of driving while intoxicated. In Plough, Inc., 54 L.A. 541 (Autrey, 1970), the Grievants were indicted for off-plant conduct involving threats to non-striking employees. The Arbitrator in Plough upheld a temporary suspension limited to sixty days even though the guilt of the charged employees had not been established. In Pearl Brewing Co., 48 L.A. 379 (Howard, 1967), the Claimant was charged with off-duty conduct including first degree burglary and assault. In upholding an indefinite suspension pending the outcome of criminal proceedings, the Arbitrator in Pearl, id., noted the general rule that off-duty conduct is not a proper basis for discipline except where the misconduct has the effect of disqualifying the employee from properly and effectively rendering service, impairs his usefulness to his employer, or has, or is likely to have an adverse or detrimental effect upon the employer's business. See, also, Award No. 10409, Second Division.

A careful review of the evidence at the investigation supports suspension of Claimant pending the Court determination of his guilt. As was the case in Pearl Brewing Co., supra, a judicial finding of probable cause to charge Claimant was made at a preliminary hearing, and he was bound over to the Grand Jury. Admittedly there was no evidence in the record of the publication of Claimant's arrest and charge to the general public, or that Claimant's fellow employees would have had difficulty working with him on the property.

However, the testimony of Claimant's Attorney was extremely damaging. The testimony established Claimant engaged in sexual intercourse with the complaining party under circumstances which a jury could reasonably find to constitute forcible rape beyond a reasonable doubt after a complete presentation of all the evidence at trial.

The evidence goes far beyond a charge of alleged, off-the-property misconduct, and includes substantial evidence tending to prove the crime itself. The degree of proof required to uphold the discipline of indefinite suspension pending the outcome of the criminal trial was met in this unusual case in large part by the incriminating testimony of Claimant and his own Agent. A remedy for the conduct of Claimant's Counsel is not to be found, however, within the confines of this appellate forum.

The Board finds upon all the evidence that the Carrier met its burden of proof, and that the suspension while lengthy, was neither arbitrary, capricious nor excessive. The claim is hereby ordered denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1986.