

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier's action in dismissing Section Laborers Robert Battles and O. V. Washington from service on July 20, 1954 was without just and sufficient cause and in violation of the effective Agreement;

(2) Section Laborers Robert Battles and O. V. Washington be allowed pay for the exact amount lost because of the violation referred to in Part (1) of this claim.

OPINION OF BOARD: Claimants were charged as follows:

"You are dismissed from service of the company for attempted theft of company journal brass, June 20, 1954, and for theft and sale of company journal brass at East St. Louis on previous dates, about November 1, 1953 and January 1, 1954, in violation of Rules 121 and 127 of the Rules and Regulations for Maintenance of Way and Structures."

This was on July 20th, 1954. On Dec. 8, they were restored to service with all rights except for pay loss during the period.

This claim is for that pay, based on their assertion that the charges against them were not proved.

Carrier's version of what happened is:

"At about 2 A. M. June 20, 1954 Carrier's General Clerk Dent and three employes of the Terminal Railroad Association, Clerks Fritz and Stagner and Carman Weems, observed two men under suspicious circumstances in the Carrier's Valley Junction train yard at East St. Louis, Illinois. One of the two men ran away as the four employes approached but the other was apprehended by them standing alongside of a storage box which contained scrap brass journals."

The man who was apprehended was Tommy Milligan. After some questioning he was told he could go home until he was wanted. A few hours later

the Carrier's officers came for him and took him down to the police station and at seven o'clock that morning Special Agent Damron took a purported statement from him implicating Battles, one of the Claimants.

The Carrier, apparently knowing it did not have a case at this point, took another statement from Milligan four days later i.e., on June 24th, implicating O. V. Washington also, the other Claimant here, but whoever signed this second statement is not the same person who signed the first.

Both sides seem agreed that Milligan was physically and mentally competent to sign the June 20th statement.

Some time during June 24th Milligan was taken by the Carrier's Agents and two policemen over into St. Louis, Mo., to identify the place where the brass had allegedly been sold. Some time that same day Special Agent Damron took the second statement from Milligan.

That there was some manhandling in connection with the investigation on the morning of June 20th is indicated by Battles' statement that when the officers came for him they carried him out to the rip track. Following the trip to St. Louis it appears that Milligan was confined in the County Jail at Belleville, Illinois until the afternoon of June 26th, at which time he was taken to the hospital in a critical condition by the deputy sheriff. He died two days later.

While the report of the Coroner's inquest states parenthetically that death was due to natural causes, the fact that parentheses were used might indicate other causes, in addition to those named. While the "copy" of the report appears to be a photostat, there is no affidavit to that effect, and if it is a photostat the purported signatures would certainly not be typewritten as are the ones on the document submitted.

While the "Coroner's Report" shows Milligan died of "natural causes" the Superintendent of the Hospital stated in a letter to an attorney who was interested in the case that when Milligan was admitted he "had * * * abrasion and bruises on the right shin, and a small laceration on the left forehead" and was suffering hallucinations of persecution.

The record does not show that any one else was in the cell with him at the jail while he was incarcerated.

On September 20, 1954 Claimant Battles was indicted for "theft of 60 brass journals on November 1, 1953" and on December 20, 1954, Claimant Washington was indicted on the same charge, but at a hearing on motions to dismiss, both charges were dropped, due no doubt to Milligan's death and refusal of the court to admit his alleged statements.

At the hearing conducted by the Carrier on August 19, 1954 both of Milligan's statements were introduced in evidence over the protest of the Organization's representatives but Special Agent Damron was not there. Of the three witnesses who signed the statement Kildea admits he did not read the statement before signing it. Erhardt and Polk two other signers as witnesses in response to the question:

"Do you know anything about the charges that have been made against Robert Battles and O. V. Washington for which they were dismissed from the service of the Railroad other than statements made by Tommy Milligan?" answered "No Sir."

And finally—Weems, the Carrier's man who "discovered a sack of brass" admitted he did not recognize any of the alleged thieves. Same is true of witnesses Fritz and Dent.

Thus it become apparent that in reviewing this record, all of the evidence is dependent upon Milligan's alleged statements, which as noted above the

Court in the Criminal Case refused to consider, and the Carrier's "prosecuting witness" Special Agent Damron, failed to appear at either hearing. (Was his mother seriously ill on both occasions, 5 months apart? And even if she were could not Damron have gotten away for the little time, even if he were at her bedside, that it would have taken to give his testimony and tell all about these statements?) This coupled with the probability that Milligan was abused and beaten in connection with the obtaining of the statements, any semblance of a fair trial becomes a mockery, and it would seem a reasonable deduction that the Carrier's action was to protect itself against a possible suit for false arrest.

We conclude that the Claimants did not "have a fair and impartial hearing" as required by Rule 62 of the Agreement, that the Carrier violated the rule and the claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April, 1958.

DISSENT TO AWARD NO. 8299, DOCKET NO. MW-8176

Award 8299 is in error because it is based solely upon assumption, speculation and conjecture about issues which were not presented at the hearing held at the request of the Employees, and which issues were not handled on the property; furthermore, it also is in error because it challenges the credibility of the Carrier's witnesses and evidence, and the coroner's report. We have consistently held that it is not this Board's function to determine or pass upon the credibility of witnesses nor to base its decisions on assumption, speculation or conjecture.

The majority states:

"The Carrier, apparently knowing it did not have a case at this point, took another statement from Milligan four days later, i.e., on June 24th, implicating O. V. Washington also, the other Claimant here, but whoever signed this second statement is not the same person who signed the first."

These issues were not raised at any place in the record nor argued by either side. No reason was mentioned as to why the Carrier took the second statement from Milligan. The authenticity of Milligan's signatures was not challenged at any time. Special Agents Damron and Erhardt witnessed Milligan's signatures on both statements. In addition, Clerk Kildea witnessed

Milligan's signature on the June 20th statement and Lieutenant Polk of the City Police witnessed Milligan's signature on the June 24th statement.

The majority states:

"Kildea admits he did not read the statement before signing it."

The record of investigation shows Kildea testified that the June 20th statement was the one which Special Agent Damron had read to Milligan, and that he (Kildea) had actually witnessed Milligan's signing it.

The majority questions the absence of Special Agent Damron from the investigation. The Carrier stated, and it was not denied or refuted, that "Testimony of Special Agent Damron was waived due to serious illness of his mother." The record of investigation shows that the investigation was closed with the understanding that there was no objection thereto by reason of Damron's absence.

Furthermore, the record of investigation discloses that Special Agent Erhardt's testimony shows he was present at the time both statements were taken from and signed by Milligan, and that he (Erhardt) answered all questions asked him concerning his knowledge of these statements. The testimony of Lieutenant Polk of the City Police was to the same effect in this respect as the testimony of Erhardt and Kildea. There is no indication in the record, by inference or otherwise, that Damron, if he had been present, could have told anything more than those witnesses present could have told if they had been asked.

The majority disregarded the conflict between Claimant Battles' denial of and Lieutenant Polk's testimony that he talked to Battles and Milligan together about the statement from Milligan on June 24th. Polk's testimony in this respect was confirmed by Erhardt's testimony. Agreement between the testimony of Polk and Erhardt establishes their credibility on this point and discredits Claimant Battles' testimony.

The majority states further:

"That there was some manhandling in connection with the investigation on the morning of June 20th is indicated by Battles' statement that when the officers came for him they carrier him out to the rip track."

By this statement the majority assumes that there was physical force used. They assume this from Claimant Battles' statement:

"They came back and told me to put my clothes on and carried me out to the rip track and took me down town."

Claimant's statement, supra, had nothing to do with Milligan's condition. Concerning the latter, the majority states that there was:

"the probability that Milligan was abused and beaten in connection with the obtaining of the statements."

In connection with Milligan, the majority states further:

"The record does not show that any one else was in the cell with him at the jail while he was incarcerated."

The Carrier states:

"Carrier's information is that Milligan was in apparently good mental and physical condition until after his second statement was made and he was placed in a cell adjacent to cells occupied by Battles

and Mims, and that those men threatened to shoot Milligan, and kept up this threat until Milligan began losing his mind and became violent, making it necessary that he be taken to the hospital.

"Milligan's second statement made June 24, was made in jail. It was taken in the presence of Lieutenant Polk of the East St. Louis police force, and there is no evidence to indicate that the statement was obtained through any mistreatment by the special agents or anyone else."

Lieutenant Polk of the City Police testified that Milligan appeared to be normal at the time the latter's statements were discussed.

The majority states:

"While the report of the Coroner's inquest states parenthetically that death was due to natural causes, the fact that parentheses were used might indicate other causes in addition to those named."

The Carrier stated:

"The photostat submitted shows a true copy of the report. The signatures are typewritten of course since it shows a copy and not the original. The report is a public record, and no doubt would have been submitted by the Employees if the information thereon had supported instead of tended to refute their allegation that Milligan died as result of injuries."

The majority cites the hospital Superintendent's letter to an attorney. That letter does not indicate mistreatment and does not conflict with the report of the Coroner and his jury that Milligan died of natural causes. Furthermore, the record does not show that it was presented to the Carrier at any step in the handling of the case on the property.

The majority states that:

"* * * at a hearing on motions to dismiss, both charges were dropped, due no doubt to Milligan's death and refusal of the court to admit his alleged statements."

The record of investigation does not disclose the reasons why the charges in court were dropped. Furthermore this development did not occur until some six months after Claimants were disciplined. The charges in court involved Claimants' indictment by the Grand Jury on charges of larceny whereas Claimants were charged, investigated and dismissed by the Carrier for violation of its rules. This Board has many times held that a prosecution under the criminal law has no effect upon the contractual liabilities of the parties, and that acquittal in court is not recognized as a bar to or invalidation of disciplinary action by Carriers.

The majority states further:

"It would seem a reasonable deduction that the Carrier's action was to protect itself against a possible suit for false arrest."

There is no evidence in the record showing by inference or otherwise that this possibility was considered by any of the parties; it is purely speculation and conjecture on the part of the majority herein.

The majority has evaded the facts herein. None of the premises upon which this Award is based was raised at the investigation or at any stage in the handling on the property. This Board has consistently refused to consider issues which were not raised at investigations or handled on the property.

The facts in this case which were not in dispute are as follows:

1. That the Carrier had been troubled for some time by thefts of journal brass.
2. That several pieces of brass were found in a sack outside the box where Milligan was caught.
3. That Milligan confessed to stealing brass and implicated Claimants Battles and Washington.
4. That the sole question raised at the investigation and handled on the property was the propriety of accepting Milligan's statements as evidence inasmuch as he could not be present for questioning at the investigation.

The rules do not prescribe what type of evidence may be used. This Board has consistently recognized the propriety of written statements as evidence and that it is not necessary for witnesses to be present at investigations. The following excerpt from Award 8300, adopted the same date, and in which the same Referee participated, is illustrative of our position on this feature:

"Was the mother's report admissible? We think it was. While objected as hearsay, there are many exceptions to the hearsay rule, * * *. But be that as it may, after all we are not bound by the strict rules of evidence applicable to formal trials, and there is nothing in this record to indicate (except suppositions) that the girl's mother was not telling the truth.

"No criticism can be directed at the Carrier for the girl and her mother not being present at the hearing, subject to cross-examination."

There is nothing in the record in Award 8299 to indicate (except suppositions) that Milligan and the other witnesses were not telling the truth and this Board is not bound by the strict rules of evidence applicable to formal trials. On the basis of the facts and precedents, the claim herein should have been denied.

For the above reasons, we dissent.

/s/ W. H. Castle
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp