

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

ERIE RAILROAD COMPANY

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

(a) The Agreement governing hours of service and working conditions between the parties effective December 1, 1943, amended July 1, 1945, and Supplemental Agreement effective September 1, 1949, were violated by the Carrier on May 1, 1950, at Jersey City, N. J., in the treatment accorded employe Nathan Potash in suspending him from service for a period of sixty (60) days and disqualifying him as Dock Foreman as a result of an alleged investigation conducted on May 5, 1950, and

(b) Employe Nathan Potash shall have his record cleared of all charges and disqualification be removed and restored to his former position of Dock Foreman and all employes adversely affected by this violation shall be compensated for all wage loss, and

(c) Nathan Potash shall be compensated for all wage loss sustained May 1, 1950, and subsequent thereto until restored to his former position and rate of pay. (F-948)

OPINION OF BOARD: This is a disciplinary proceedings involving Dock Foreman Nathan Potash. The System Committee of the Brotherhood contends Carrier violated its effective Agreement with them when, effective May 1, 1950, it suspended Potash from service for a period of sixty days "actual" and disqualified him as a Dock Foreman. It asks that Potash's record be cleared and that he be restored to his former position of Dock Foreman and that he, and all other employes adversely affected by Carrier's action, be compensated for all wage loss resulting therefrom.

Potash was charged with the violation of Operating Rules O-1, and O-2 of the book of "Rules of the Operating Department" effective July 1, 1930.

The records of the Carrier show that Potash signed for a book of these rules on February 14, 1945, being book No. 31639. He admits being familiar with Rules O-1 and O-2 thereof. As an employe of the Carrier he was bound to observe the principles these rules set forth.

Rule O-1 provides:

"Employes must not absent themselves from duty nor provide a substitute without proper authority.

"Time must not be shown on time slip, time book or payroll, except for work actually performed by the person named."

Rule O-2 provides:

"Employees who are dishonest, immoral, vicious, quarrelsome, uncivil in deportment, or who are careless of the safety of themselves or of others will not be retained in the service."

Hearing was had on May 5, 1950 but no decision was rendered as a result thereof. In fact, on June 1, 1950 Carrier ordered a reinvestigation of the same charges to be held on June 8, 1950, and notified Potash of its action. Although the charges set out in the notice of May 1, 1950 were sufficiently specific to meet the requirements of Rule 41 (a) of the parties' effective Agreement, however, these were more specifically set out in the notice of June 1, 1950 in the following language: "* * * with misappropriating Erie Railroad Company property, absence from duty without permission and time shown on time reports when not in Erie service."

The System Committee contends this resulted in three investigations or hearings, namely: April 28, 1950, May 5, 1950 and June 8, 1950, whereas Rule 41 of the parties' Agreement contemplates only one.

On April 27-28, 1950, Carrier's police officers, on information received, were checking the night operations, 6 P. M. to 3 A. M., on Dock 8, Jersey City, N. J., to see if any employees under Potash were obtaining Carrier's gasoline and oil for use in their private owned automobile and to see if Potash was absenting himself from duty without permission and permitting other employees under him to do the same. As a result of this check or inquiry statements were taken from several employees, including Potash. This check was not an investigation but an effort to see if anything was wrong on Dock 8, and if so, to obtain evidence upon which to base charges for disciplinary proceedings under Rule 41 if Carrier deemed it proper and necessary to do so. Whether the statements taken were voluntarily given is another question, but not important here for the reasons hereinafter set forth. It was not an investigation within the meaning and intent of Rule 41.

Pursuant to notice dated May 1, 1950 a hearing was had on May 5, 1950. At this hearing it became apparent that Potash had not received the notice dated May 1, 1950 until May 4, 1950. Consequently, Potash's representative at this hearing protested against it and asked for a continuance, giving as his reasons therefor that: "less than 24 hours' time is not sufficient to handle a matter as serious as this," "that I might avail myself of the assistance of duly accredited representatives" and "to acquaint ourselves with the facts of the dispute." At the hearing Carrier denied this request but subsequent thereto, and without making any decision, it authorized a reinvestigation to be held on June 8, 1950, as evidenced by its notice of June 1, 1950.

We think this resulted in but one hearing as contemplated by Rule 41 and that it was fairly and impartially conducted. The hearing of June 8, 1950 resulted in Potash being found guilty of misappropriating Company supplies and also being absent without permission. As of June 20, 1950 Carrier imposed upon Potash a 60-day suspension, "actual," effective May 1, 1950 the date he was suspended, and disqualification as Foreman.

The System Committee raises a question as to the sufficiency of the evidence to sustain this finding. In this respect the rule is that statements of witnesses which are not presented at the hearing and put or read into the record do not become a part thereof and cannot be considered in determining the guilt or innocence of the party as to the charges against him. The accused is entitled to know what the proof is against him so he can have a fair opportunity to refute it. Such is contemplated by Rule 41. If evidence is to be used and relied upon by the Carrier it should and must be produced at the hearing. This would apply to the statement of Carrier's Chief of Police

John Charles Stearns dated September 26, 1951, to the statement of Carrier's Lieutenant of Police Thomas R. Barrett dated October 10, 1951, to the statement of Carrier's Policeman George Roy Kell dated September 25, 1951, and to numerous statements of other employees which are found in the record.

At the hearing on June 8, 1950 Carrier read into the record the statement of Potash given to its police force on April 28, 1950. It is true that Potash gave a resume of the circumstances under which it was given and also that it was not his voluntary statement. Nevertheless it was admissible, its weight being a question for the trier of the facts. But whether or not it was considered by Carrier in arriving at its decision is not here material. At the hearing Potash, while denying the statement correctly reflected the facts as he had given them to Carrier's policemen, admitted the truth thereof only in a lesser degree. He admitted absenting himself from work without authority, admitted he permitted other employees under his supervision to be absent from or leave work when he had no authority to do so, admitted that he caused the time records of himself and other employees to show that full time had been worked when so absent from work and to be paid accordingly, and admitted he let employees have Carrier's gasoline and oil for use in their privately owned cars. It is true he gave his version of why he did it, but that was a question for Management to decide and as Dock Foreman Potash had no authority to make the decision.

Potash's services with the Carrier began on January 24th, 1924. He had been Dock Foreman of Dock 8 since September 22, 1943. His past record is clear and his services seem to have been good. He has returned to service, doing so on July 3, 1950 as a Dock Clerk on Dock 8. The System Committee contends the penalty imposed is too severe. The charges of which Potash has been found guilty are of a serious nature and ordinarily would end in a dismissal. Apparently Carrier considered this man's past record when it imposed the penalty it did. We do not find the penalty imposed unreasonable.

In view of the foregoing we find the System Committee's claim in behalf of Potash to be without merit.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1952.