NATIONAL RAILROAD ADJUSTMENT BOARD

SPECIAL BOARD OF ADJUSTMENT

PUBLIC LAW BOARD 1325

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes	:	Award No. 38 Docket No. 314
vs.	:	Claim of: T. J. Hasibar
REA Express, Inc.	:	Discharge

STATEMENT

This, and three other cases: R. L. Dean, Case No. 315; F. L. Lelli, Case No. 316; and L. T. Quam, Case No. 317, came before this Public Law Board 1325, upon an agreement of the partisan members of this Board, dated November 6, 1974, to eliminate the intermediary steps in the line of appeal, and instead, to file the appeal directly with Mr. R. C. Beans, as the final officer of the Carrier, which would satisfy the procedural requirements of the Agreement between the parties and the provisions of the Railway Labor Act (Exhibit A, attached hereto); a letter addressed to Mr. Roy J. Carvatta, Staff-Director of Grievances of the National Mediation Board, dated December 13, 1974 (Exhibit B, attached hereto); and Petition dated December 18, 1974 addressed to this Board, by the

partisan members thereof, to waive the procedural aspects of processing the disputes involved, setting forth the issues to be determined and requesting immediate hearings of the above cases, (Exhibit C, attached hereto).

The petition and request was unanimously approved by the Board, and hearings were held on December 20, 1974.

Both parties appeared by their representatives and were given full opportunity to be heard and present their respective positions and submit cases in support of their positions.

ISSUE SUBMITTED

The following issue was jointly submitted by the parties for determination:

> "Was the discharge of the employee justified, and if not, shall he be returned to service with seniority rights unimpaired, and with pay for all time lost beginning October 17, 1974 and continuing until he is returned to service, and shall he be fully reimbursed for all out-of-pocket expenses incurred by him because of loss of welfare and fringe benefits, and shall he be paid interest on such losses as of the date beginning October 17, 1974 until the date he is returned to service."

BACKGROUND AND FACTS

On October 16, 1974, the pickup and delivery drivers in Chicago, totaling between 90 and 100 employees, having been

dissatisfied with and resenting the behavior of Mr. Jordan, a Vehicle Supervisor, refused to work.

A meeting between management, represented by Mr. Johnson and the employees involved, was held and after listening to the complaints of the employees, the Carrier suggested that the employees choose a committee of five to discuss with him their grievances, and that they should go to work and return to work the next day. The employees elected such a committee consisting of the four above-mentioned employees and Mr. Orchard.

The committee of five, as suggested by Mr. Johnson, met with management on October 16 to convey the grievances of the group against Mr. Jordan and, apparently, the matter was settled.

The employes were, apparently, under the impression that they would be paid for the entire day of October 16. Later they learned that they would not be paid for the lost time of October 16, whereupon they refused to resume work on October 17 unless they were paid for the loss of time on October 16.

As a result of their refusal to return to work on October 17, Notices pursuant to Rule 11 of the Agreement were sent to 11 out of the 90 employees involved charging them with violation of Rule 29, "Code of Conduct for Employees," of the Handbook for Employees of REA Express and advising them of hearings to be held on the charges.

Rule 29 reads:

> "Employees must not engage in illegal or unauthorized work stoppages, slow-downs or other interruptions of work."

Thereafter two additional employees were sent such notices, making a total of 13. The notices scheduled hearings for the individual employees at different hours of October 21, 22 and 23, 1974. Thereafter and before commencement of hearings, eight of the notices were withdrawn, leaving only five, under charges.

The hearing of Mr. Hasibar was held on October 21, 1974 at 10:00 a.m. The Union on behalf of the employee objected to the hearing on the ground that the notice did not comply with the provisions of Rule 11 of the Agreement and that it was not specific, and further objected that the Hearing Officer erred in simply noting objections without ruling on them.

After the hearing employee Hasibar was discharged. Dean, Lelli and Quam were also found guilty and discharged. The charges against Orchard were dismissed because of insufficiency of evidence.*

POSITIONS OF THE PARTIES

The Organization contends:

1. That Rule 11(i) was violated by the Carrier;

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*The fact about the reversal of the charges against Orchard was disclosed by the parties during the arguments.

2. That the Hearing Officer erred in not ruling on procedural objections;

3. The employes did not receive a fair and impartial investigation;

4. The evidence did not sustain the charges;

5. The discipline imposed is harsh and unreasonable.

The Carrier denies the arguments of the Union and contends that it acted properly and that Hasibar admitted that he didn't work on the 17th, and that Mr. Coon testified that Hasibar "said he would not work under Jordan and that he would not return to work unless something was done about Jordan." That this proved his guilt and the Board may not upset the disciplinary action taken.

OPINION OF THE BOARD

1. We find the procedural objections of no merit: (a) the notice was specific enough to comply with Rule 11 of the Agreement; (b) the mere fact that the Hearing Officer simply "noted" the objections without immediately ruling on them is not sufficient violation of the role and duties of an Hearing Officer. Often Hearing Officers use the term "noted" instead of "denied."

2. The Awards of the Railroad Adjustment Boards are replete with decisions holding that the Board's jurisdiction is limited to interpretation of contract provisions and may not review findings of a

Hearing Officer or disciplinary actions taken by a Carrier against an employee, unless the findings are totally contrary to the evidence and the action taken is arbitrary and capricious under the circumstances involved.

In order to determine whether the proceedings herein and the discipline herein was arbitrary and/or capricious subject to reversal we must review several factors in the case.

Before proceeding, however, several maxims should be clearly enunciated by this Board.

1. The Railway Labor Act seeks to eliminate unauthorized work stoppages and cessation of work. The Railroad Adjustment Boards were established for the purpose of adjusting grievances arising out of claimed contract violations. They are the forum for employees aggrieved by violations of the Carrier to seek redress of their grievances. An unauthorized cessation of work, as a means of redressing grievances, by one or a group of employees is improper and subjects participants of such stoppages to disciplinary proceedings.

2. Boards may not reverse finding of Hearing Officers or disturb disciplinary action imposed by management upon finding of guilt of employees, except in case where such findings and/or disciplinary action imposed is arbitrary and/or capricious.

On October 16, 1974, the entire Vehicle Department refused to

work in protest against the alleged harsh behavior of the supervisor of the department. In the opinion of this Board, such action was unauthorized and in violation of the provisions of the contract. Management, however, chose not to take any disciplinary action, but, instead met with the entire group, and suggested that they choose a committee to discuss the matter with supervision. The employees were persuaded to return to work upon the alleged promise by Management that they would be paid for the hours lost on that day and to investigate the charges against Mr. Jordan.

The only ones that did not go to work that day was the committee, which was chosen upon the suggestion of the Carrier, and which remained to meet with Mr. Johnson and other representatives of the Carrier to discuss the problem of Mr. Jordan. During the meeting Management advised the committee that the stoppage that morning was in violation of the Agreement, and that the employees would not be paid for their time lost.

The following morning the employees reported to work at their scheduled hours, but upon learning that they would not be paid for time lost the previous day, they refused to work.

Mr. Hasibar reported to work at 8:00 a.m., his scheduled starting time, and learned that the other employees refused to work. He, too, refused to take his assignment.

The following is an excerpt from the testimony at the hearing on the charge against Mr. Hasibar.

"Mr. Johnson: About 8:00 a.m. on Wednesday, October 16th I was asked if we had a drivers' meeting. I said I knew nothing about it. I was told the drivers were in the locker room. I went to the locker room and found all, if not all most of all of the drivers there and Mr. Pappas. I asked Mr. Pappas to come to my office, which he did to and I asked him in my office what was the matter, what was causing the problem. He stated the problem was Lee Jordan. Without further ado I went back to the locker room and told the employees, the drivers that nothing would be accomplished by walking off the job. Nothing could be accomplished with a large crowd of people in the locker room. The only way to get to the problem was to meet and discuss it and I suggested that the drivers select a committee of drivers and appointed B. R. A. C. representatives and they could meet in my office at any time, immediately or whatever time they would like to meet, but only after all the drivers returned to work. No matters could be discussed with drivers refusing to work. Mr. Hasibar was present at that meeting.

"Mr. Sumner: Did they select a group of drivers?

"Mr. Johnson: I left there. Mr. Pappas came and said the drivers were willing to go back to work on that basis and they would meet shortly and within a short time about 9:30 the group entered my office to begin the meeting, and Mr. Hasibar was a member of the group.

"Mr. Johnson: The drivers agreed to go back to work and were working at the time of the meeting. At the end of the meeting the people in attendance were asked to work, were told they would be paid from 9:30. They were to go to work.

"Mr. Pappas: Mr. Johnson, when you were up at the meeting you recommended that the drivers pick a committee and come down, is that correct?

"Mr. Johnson: Yes.

"Mr. Pappas: And when we started to select the committee, weren't you up there when they chose Mr. Hasibar as a member of the committee?

"Mr. Johnson: I was not in the locker room when the committee was selecting. I suggested the driver select a committee and I suggested Mr. Hasibar be a part of it because he was most vocal."

On October 17, 1974 eleven men were cited for violation of Rule 29 of the Code of Conduct for Employees in refusing to work on October 17, 1974. Thereafter two more names (Quam and Orchard) were added, making a total of 13 employees out of about 90 who refused to work on October 17. Thereafter eight of the citations were recalled and the employees were directed to report to work.

When asked by a representative of the Union why only five of all the employees involved in the stoppage were cited, the Hearing Officer rejected the question remarking: "I can't see what bearing this has on the case." (P. 9 of transcript)

This query was finally answered by Mr. Coon, Area Vice President of the Carrier:

"Mr. Coon: I will tell you why they were cited and why they were eliminated.

Thursday morning when I told a group we wanted them to go to work there was work and I was told they would not go to work unless we agreed to pay them for Wednesday. I said no way. They were told to go to work or leave the premises and they left the premises. In an effort to try to get them to come back to work we attempted to serve letters of citation on a number of groups. We picked out the group that we could identify as being the most vocal and being the most visible and that we felt was the most active participants in the strike. Friday afternoon we were reviewing our choices and we talked to local management and I made the decision to drop certain citations. I also made the decision to hold out certain other citations.

I made the decision to hold on the five that was at the committee meeting because not only were they active in the strike, they were told by me Wednesday that any stoppages or that kind of thing was highly illegal and might well break the company.

So in reviewing in an effort to make sure that we were all right, I made the arbitrary decision to drop the charges against eight of those men. I called Peter Pappas to tell him of our decision and I at the same time told him we were adding two that was left off due to a clerical error. So basically it was an effort hoping to smooth down bad feelings but by the same token to hold accountable those who we felt should be held accountable. That was the reason for the decision."

The above extracts of the testimony show that the company was caught in a quandary. It felt that the employees of the Vehicle Group committed a violation of the Agreement and some punishment should be meted out to somebody. It tried to pacify the employees and yet punish them. The stoppage of October 16, was not only excused, but Mr. Johnson, the Service Center Manager, attended the meeting of the entire group and suggested that they elect a committee. He further suggested that the claimant herein be elected as one of the members of the committee.

The employees accepted the suggestion of Mr. Johnson and elected a committee. They then went back to work.

The committee and a Union representative (Mr. Pappas) met with Management and apparently had an amiable conference. The employees were to come back next day to fill their regular assignments. They were, apparently, under the impression that they would be paid the entire day's work for October 16. When the first group of employees scheduled to start at 7:30 a.m. arrived at work they discovered that their time cards of the previous day were marked as of 9:30 instead of 7:30. They felt that the Company breached its promise to pay them their full wages for the day, and refused to go to work.*

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*The company representative denied ever making such a promise, yet this was the only reason for the employees refusal to work on October 17.

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This, apparently, was a spontaneous action on the part of those employees. When the subsequent groups arrived, including Mr. Hasibar, (8, 8:30, etc.) they already found the first group refusing to work, and were advised to join in the stoppage or face the danger of bodily harm.

The Carrier failed to pinpoint anyone who directly instigated or led the stoppage of October 17.

The only specific charge against Hasibar was that he failed to go to work on his assignment on Thursday, October 17, 1974, at 8:00 a.m., a time when the stoppage was already in progress.

The evidence against Hasibar was that he was vocal on the 16th of October and expressed certain thoughts at the meeting of the committee with Management on October 16th. He testified that he reported to work at 8:00 a.m. on October 17, and was surprised to find the men refusing to work and charging the Company with reneging on its promise to pay them. Whether for fear of bodily harm or agreement with the others, he, too, refused to work. The Board does not justify his action in refusing to work but his violation on October 17 was not greater than that of the other 90 odd employes.

As Mr. Coon testified (see above):

> "In an effort to try to get them back to work we attempted to serve letters of citation on a number of groups. We picked out the group that we could identify as being the most vocal and being the most visible and that we felt was the most active participants in the strike. Friday afternoon we

> were reviewing our choices and we talked to local management and I made the decision to drop certain citations. I also made the decision to hold out certain other citations.
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> "...I made the arbitrary decision to drop the charges against eight of those men... at the same token we were adding two that was left off due to a clerical error."

He explained his "arbitrary decision" as an "act of compassion to put oil over troubled water" and to avoid hurting the company by citing all employees that refused to work.

This Board fully sympathizes with the attempts of the witness to show compassion and to save the company from loss as a result of a layoff of the entire department, but for Mr. Coon, a Vice President of the Company, to "arbitrarily" pick on some, merely as an example for others is contrary to all concepts of proper labor relations and grossly unfair. Instead of helping to establish good relationship between management and labor it could only deepen the gap between them, create bitterness and in the long run harm management as much, if not more, then labor.

The charge against Hasibar shows nothing more than his failure, together with ninety other employees, to work October 17. He violated the Agreement. But so did all the other employees. The only reason that he together with four others were cited and tried was

the fact that they were members of the committee chosen by the employees and met with management presenting the grievances of the employees. But this committee was chosen on the suggestion of management, and the name of Mr. Hasibar was recommended by management. But their offenses, if they were offenses, occurred on October 16. On the 17th, Hasibar committed no offense that was not committed by the others.

Had Mr. Hasibar been cited with the offense of being vocal on October 16, and making certain statements on that day, as leading and inciting the stoppage of the 16th, the evidence against him might have been proper. But none of it was alleged in the citation besides his failure to work on the 17th of October.

At the hearing before this Board the Carrier submitted a series of awards in support of its position. We shall here try to analyze the awards and compare them with the instant case.

In Award No. 16287, claimant admitted at the hearing that he was inciting an unauthorized work stoppage. The Referee found that the weight of the evidence clearly shows that the claimant was one of the primary instigators of the work stoppage.

No such evidence was submitted in the instant case. On the contrary, it shows that claimant did report to work, but the stoppage was already in progress on the 17th of October. If he did commit

any such violations on the 16th he was not cited for it.

In Award No. 16949, claimant was charged "with inciting" an unauthorized work stoppage. In the instant case claimant was merely charged with "failure" to go to work. The two cases are totally differentiated.

In Award No. 13, Special Board of Adjustment No. 752, the claimant was charged with picketing in violation of the Agreement, an actual active offense. No such charge is involved in the instant case. But even in that case the Board unanimously reduced the penalty from discharge to one year suspension.

In Award No. 25, Special Board No. 752, the evidence showed that claimant not only participated in picketing, but was seen adjusting the placards on other pickets - acts of direct leadership and responsibility, all of which was lacking in the instant case. Yet the Board reduced the discharge to one year's suspension.

In Award No. 28, arising out of the same incident as Award No. 25 above, the claimant admitted at the hearing that he picketed the company's premises on his own volition. The charges against him alleged "actively inciting and promoting a work stoppage." His admission at the hearing certainly justified his discharge.

No such allegations or charges were made against the claimant herein. Nor has he made any admissions.

In Award No. 30, arising out of the same dispute as the two previous awards, the claimant was charged with "aiding, abetting or actively participating in an unauthorized work stoppage." Evidence was submitted that not only did he lead and direct the work stoppage, but advised other employees not to work and threatened them with bodily harm.

In sustaining the dismissal of claimant the Board said in part:

> "The claimant was a responsible union officer who had the duty of administering or assisting in the administration of the cognizant collective bargaining agreement...He had the duty and obligation to direct the employees to cease this picketing and return to work.--He was not privileged to stand by idly..."

No such duties were imposed upon the claimant in the instant case. He was not a union official, but merely chosen by the rank and file upon the suggestion of management.

In Award No. 30, claimant was charged with being absent for several days without permission, and being grossly negligent with regard to company monies by leaving them in an unoccupied office.

The case is entirely different from the one at bar here. Yet the Board reduced the discharge to a suspension.

In Award No. 1-D (Special Board No. 752) claimant was charged with "inciting a work stoppage." The Board found that the charges were sustained and unanimously sustained the dismissal.

No such charges are involved herein.

Award No. 7-D is similar to 1-D.

In Award No. 19986 (Third Division) the charges alleged "aiding and abetting and actively participating in an unauthorized work stoppage." No such charges were preferred herein.

Similarly in Award No. 20113, claimant was specifically charged "with aiding, abetting and actively participating in an unauthorized work stoppage."

This Board disagrees with that part of Award No. 1 (Special Board of Adjustment No. 752) which denies claimant Health and Welfare Insurance and other fringe benefits. If claimant sustained such losses as a result of the dismissal he should be made whole for such losses.

The effort of the Carrier in the instant case to use compassion in dealing with the problem is commendable, because compassion in labor relations helps cement good relations and is of benefit to both management and labor. But compassion must not be applied arbitrarily to some and not to others in the same category. Arbitrary application of compassion to some members of a group, while punishing others for the same offense should not be practices in labor relations. It is sometimes used in wars between nations or in revolutions when certain members of a group or community are picked arbitrarily for

meting out punishment. It cannot and may not be used in democratic institutions and governments.

The testimony in support of the allegations against Mr. Hasibar and the others was to the effect that they were vocal at the meeting with management on October 16 where they expressed their opinions against Mr. Jordan and allegedly stated that they would not work under Mr. Jordan. They acted as a committee of the entire department.

The evidence fully shows that the matter was settled at the meeting of October 16 and all employees worked the rest of the day on the 16th and were to return to work on the 17th. The stoppage on the 17th was not a continuation of the dispute of the 16th against Mr. Jordan but was an entirely new dispute, caused by the alleged failure of management to pay the employees for the full day of October 16. The employes' committee did not discuss this matter on Wednesday - in fact they could not do so, because it was not in existence. Their "vocality" was solely in connection with the Jordan issue. Their vocality was limited to that, and a finding of guilt on statements made in other matters on different dates and occasions than set forth in the citation is arbitrary and capricious.

The conclusion is inevitable, that the citation and dismissal of Hasibar was arbitrary and capricious, and in violation of the provisions of the Labor Agreement and of the Railway Labor Act.

FINDINGS

Special Board of Adjustment No. 1325, upon the whole record and all the evidence, finds and holds:

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

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

That the parties presented oral argument at the hearing herein; and

That the Carrier has violated the Agreement.

AWARD

1. The discharge of employee T. J. Hasibar was unjustified, arbitrary, capricious, and in violation of the Agreement.

2. He shall be returned to service with seniority rights unimpaired and be paid for all time lost beginning October 17, 1974 and continuing until he is returned to service and he shall be fully reimbursed for all out-of-pocket expenses incurred by him because of loss of welfare and fringe benefits.

3. His request for interest is denied.

ORDER

It is ordered that Carrier comply with the Award, supra, within thirty (30) days of issuance shown below.

Special Board of Adjustment No. 1325

Benjamin Rubenstein
Chairman and Neutral Member

DISSENTING
Roger J. Corgel
Carrier Member

Robert J. Devlin
Employe Member

Dated Miami Beach, Fla.
January 17, 1975