

Joseph Lazar, Referee

AWARD NO. 1

CASE NO. 1

PARTIES)
TO)
DISPUTE)
)
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)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
VS.
JOINT TEXAS DIVISION OF CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY AND FORT WORTH AND DENVER
RAILWAY COMPANY

STATEMENT
OF CLAIM:

1. That the Carrier violated the Agreement when as a result of an investigation conducted September 10, 1979, they dismissed Section Laborer R. C. Cotton, said dismissal being arbitrary, capricious and without according Claimant due process.
2. That the Carrier shall reinstate Claimant R. C. Cotton to his former position of Section Laborer with seniority, vacation and other rights unimpaired and in addition shall compensate him for all wage loss suffered account the Carrier's improper action.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Section Laborer R. C. Cotton was dismissed from service of the Carrier on September 14, 1979 "for violation of Rule 661 and 667 of Burlington Northern Safety Rules in connection with failure to comply with instructions from proper authority and insubordinate conduct at Bardwell, Texas on August 28, 1979 as disclosed in investigation afforded him" on September 10, 1979.

The letter of the Carrier advising Claimant of the investigation of September 10, 1979, stated in part:

"Arrange for representative and/or witnesses if desired, in accordance with governing provisions of prevailing Schedule Rules."

Schedule Rule 26, Hearing (a), provides, in part: "...and may be represented by his duly authorized representative of the Organization party to this Agreement."

At the investigation of September 10, 1979, the Carrier's Investigating Officer asked Claimant: "Do you have a representative?" Claimant answered: "I have one but he couldn't be here today."

The Carrier's Investigating Officer proceeded to hold the investigation without protest or objection by Claimant.

At the conclusion of the investigation, the transcript records (p.8):

- "Q. Mr. Cotton, has this investigation been conducted in a fair and impartial manner under the rules of your agreement?
A. No.
Q. Have you had full opportunity to question the witnesses at this investigation?
A. Yes.
Q. In what way do you consider the investigation as not being fair and impartial under the rules of your agreement?
A. Well, I thought you had to have a representative.
Q. Did the notice of investigation state that you should arrange for a representative and/or witnesses as desired in accordance with the governing provisions of prevailing schedule rules?
A. Yes, but one quit and the other one is sick."

The evidence of record is clear, showing that the Carrier afforded Claimant notice and opportunity to arrange for a representative as desired in accordance with the governing provisions of prevailing schedule rules. Further, it is clear that Claimant failed to object, protest, or ask for continuance when he had no representative. In such circumstances, it would be consistent with orderly procedure in the conduct of an investigation to deem the Claimant's conduct as a waiver of his right of representation and to hold that subsequent

objection on grounds of denial of due process comes too late.

The right of representation, of course, is a fundamental right of due process. Waiver of such a basic right, especially in the light of the limited background of the Section Laborer's education, should be completely voluntary, explicit, and plain beyond doubt. The Referee is fully persuaded by the quoted language at the end of the hearing (p. 8 of transcript) that Claimant did not give consent to having the investigation being held without representation.

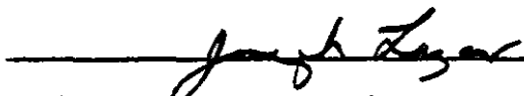
Investigations are under the control of the Carrier and are conducted by it. The Carrier's rights can be expected to be safeguarded at the investigation. The employee's rights must be protected likewise. The holding of the investigation is not for the purpose of proving the correctness of the charges but for the purpose of developing all the facts material to the charges, both against and favorable to the employee. This does not call for a knowledge of court procedure. It does call for the exercise of fair play.

In the peculiar circumstances of this particular case, when it was made evident to the Carrier's Investigating Officer that Claimant was not giving his voluntary consent to the investigation without having representation, the Investigating Officer should have further clarified any objection by Claimant and should have suggested, if so desired by Claimant, a continuance of the investigation.

In the circumstances of this particular case, neither Claimant nor Carrier's Investigating Officer acted blamelessly.

A W A R D

1. The Carrier is in violation of the Agreement.
2. The Carrier shall reinstate Claimant R. C. Cotton to his former position of Section Laborer with seniority, vacation and other rights unimpaired. Claim for all wage loss is denied.


JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER


S. E. FLEMING, EMPLOYEE MEMBER


B. J. MASON, CARRIER MEMBER

DATED: Dec. 16, 1981