Award 16955
Docket 27656

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois
With Referee Emmett Ferguson

PARTIES TO DISPUTE

SWITCHMEN'S UNION OF NORTH AMERICA

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY—East

STATEMENT OF CLAIM: "Claim in favor of Yard Foreman L. E. Heaton for minimum yard day's pay each day at Yard Foreman's rate, from January 24, 1950 to May 2, 1950, account being withheld from service during this period for alleged violation of the 5th paragraph of Rule 702, Carrier's Operating Rules."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

On January 20, 1950 claimant refused, on the ground of safety, to make a shove without air as ordered by the carrier. Another crew did the task and claimant was assigned other work. On January 24, 1950 he was dismissed from service. The Employes' Statement of Facts alleges "his further insistence resulted in his dismissal from service January 24, 1950 and the matter of pay for time held out of service was left in dispute". The Carrier's Statement of Facts alleges "Heaton was dismissed . . . January 24, 1950 for violation of Paragraph 5, Rule 702" (Insubordination clause).

From the record, we are unable to determine whether the insubordination, if any, occurred January 20th or later. There must have been some action in addition to the discharge, which occurred January 24, 1950. Whether it was an investigation, or merely a delayed decision cannot be determined in the absence of a transcript. We note further that the docket makes no reference to written charges being placed against the claimant as required by Rule 20(a).

In the light of these facts, we are of the opinion that the discharge of the claimant was not properly performed in line with the schedule requirements and was arbitrarily decided by the carrier.

AWARD: The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: (Signed) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 1st day of March, 1955.

DISSENT OF CARRIER MEMBERS TO AWARD 16955, DOCKET 27656

The fault of this award lies in the complete evasion of the dispute, submitted by the parties, to this Division, and the invention, or contrivance, of an issue not in dispute between the parties upon which the author could, whimsically and capriciously, base a sustaining award. The evasion and invention is not even skillfully done.

The submission of the ex parte submission of the petitioner in this case consisted of one, single-spaced, typewritten page plus seven lines. The carrier's answer consisted of about four and one-third pages. The petitioner did not avail himself of the privilege, which was his, of replying to the carrier's answer, hence the carrier's statements stood unchallenged and unrefuted.

The first three sentences of the first paragraph of the findings in this award are accurate. The next sentence, (considering what follows it) and the quotation (aside from an omission in the quotation not indicated—which was doubtless inadvertent) seems purposely contrived to leave the inference that some act of the claimant, Heaton, after January 20, 1950, led to his dismissal on January 24, 1950. The part of the employes' Statement of Facts, which the author purports to quote, reads, in full:

> "His request was denied and his further insistence resulted in his dismissal from service January 24, 1950. He was reinstated May 2, 1950 and the matter of pay for time held out of service was left in dispute."

The facts of the case are that the claimant, a yard foreman, was directed, about 2:00 P. M., to couple up some cars on a hump track, in carrier's Milwaukee yard, and shove the cut through on to the eastbound main track. Instructions were given him by the phone director. He replied that he would not shove the cut unless the air hose was coupled. He was told that the movement was regularly made without air hose being coupled. He still refused. The Assistant Superintendent was then called in, and undertook to persuade claimant to make the movement as directed, and again claimant refused, stating that he would make a stand on it, notwithstanding he was told that throughout all the years the same movement had been made without air brakes operating. The carrier says:

> "As a result, Yard Foreman Heaton was dismissed from the service of the Carrier January 24, 1950 for violation of Paragraph 5, Rule 702, * * *."

The dismissal of claimant on January 24 was thereby tied directly to his insubordination on January 20. There was nothing in the petitioner's submission from which any reasonable implication could be drawn that there was any act on the part of the claimant, during the intervening four days, that had any bearing on his discharge.

But, in the second paragraph of the formal findings, the author says:

> "From the record, we are unable to determine whether the insubordination, if any, occurred January 20th or later."

The petitioner, with slight coloring, told the same story with respect to the incident leading to the claimant's discharge that the carrier told. The entire argument of the petitioner is contained in the following paragraph:

> "In the position of Yard Foreman, Mr. Heaton was responsible for Safety of the Movement he was instructed to make. It was, therefore, his prerogative and his duty to insist upon complete safety precaution in such movement of cars. We respectfully submit, even though his supervisors did not agree with his judgment in the matter, he should have been given favorable consideration for using his honest judgment when complying with Rules of Safety that would afford his crew members and the Carrier's equipment maximum protection. He was not, however, extended such consideration, but was made to suffer loss of wages during period January 24, 1950 to May 2, 1950."

If, from the record in this case, the author was unable to determine whether the insubordination, for which claimant was dismissed, occurred January 20, or later, he was the only person familiar with the record in this case who found himself in such a predicament. Even a cursory reading of the record would have left no doubt on that question. The whole incident was set out fully. There was not even a denial by the petitioner that the claimant had been insubordinate. His only contention was that "he should have been given favorable consideration for using his honest judgment * * *."

Next, the author says:

> "There must have been some action in addition to the discharge, which occurred January 24, 1950. Whether it was an investigation, or merely a delayed decision cannot be determined in the absence of a transcript. We note further that the docket makes no reference to written charges being placed against the claimant as required by Rule 20 (a)."

What action must there have been "in addition to the discharge"? Upon what grounds does he concoct such a supposition? And why should he be concerned whether there was an investigation or merely a delayed decision, which he was unable to determine in the absence of a transcript? There was no issue, whatsoever, between the parties, concerning the formalities leading up to claimant's discharge.

There was no reference in the record by either the petitioner or the carrier to any investigation having been held. The rule on this carrier does not require one unless demanded. That portion of the rule reads:

> "20(d) Yardmen * * * taken out of service or censured * * * shall be notified by the company of the reason therefor, and shall be given a hearing within five days after being taken out of service if demanded * * *."

Paragraph (a) of Rule 20 provides:

> "20(a) When objections or charges are placed against any yardman or switchtender they shall be put in writing conveying clearly to the accused the nature thereof."

The petitioner made no reference, whatsoever, to these provisions of Rule 20. He invoked and quoted only the last sentence of paragraph (d) of this rule, reading:

> "In case the suspension, dismissal or censure is found to be unjust, Yardmen or Switchtenders shall be reinstated and paid for all time lost."

By Section 3, first, (i) of the Railway Labor Act:

> "* * * disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * (failing of adjustment on the property after handling in the manner prescribed) may be referred * * * by the parties or by either party to the appropriate division of the Adjustment Board."

In this language the Act clearly defines and limits the functions of the National Railroad Adjustment Board. They are to decide disputes between employes and carriers. It is no part of its functions to contrive or invent disputes not submitted by the parties, and not existing on the property, for the purpose, or with the result, of a conclusion gratifying to either one.

The author, here, confesses that the docket makes no reference to the placement of written charges as provided in Rule 20 (a). If the petitioner does not allege a violation of the rule, by what right does the author suspect there might have been, and conclude "that the discharge of the claimant was not properly performed in line with schedule requirements and was arbitrarily decided by the carrier"?

It is indeed regrettable that, with the author's great erudition, he is not cognizant of the principle:

> "In an action such as this, wherein the question of the propriety of the right of the carrier to assess or impose discipline is involved, it is incumbent upon the claimant to demonstrate to the satisfaction of the division that the action of the carrier was erroneous in order to obtain relief." (Award 13051, Referee Yeager.)

In the instant case the petitioner or claimant did not allege that the carrier's action was erroneous, in any particular, with respect to the formalities, resulting in the discharge of claimant. It remained for the author of this award to discover some grounds upon which he might conclude "arbitrarily and capriciously" that the discharge of claimant was not properly performed.

Geo. H. Dugan

The undersigned concur:

H. V. Bordwell
H. J. Reeser
H. W. Burtness
L. B. Fee