

Award No. 603
Docket No. 631
2-OUR&D-CM-'41

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (CARMEN)

OGDEN UNION RAILWAY AND DEPOT COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That A. V. Cortez be reinstated with seniority rights unimpaired and compensated for all time lost subsequent to his removal from service May 2, 1940.

EMPLOYEES' STATEMENT OF FACTS: A. V. Cortez was taken out of service as result of dispute which arose while he was off duty (with permission to be off duty by the local official). On April 27, 1940, 2:00 P. M., A. V. Cortez was off duty and was on Washington Boulevard in the city of Ogden, Utah, and got into an altercation with the sales manager of the Buick auto show room in front of the building where there was a drain pipe broken.

POSITION OF EMPLOYEES: The contention of the employees representatives, is that the management endeavored to regulate the conduct of their employees while off duty. This procedure will develop, and has in the past, an act of discrimination as it could be used in many instances by those who are in charge of the affairs of the management to claim most any action on the part of an employee while off duty to the visit to a saloon or the place liquor is sold, that he would not be retained in the service, which employees most seriously consider the elimination of their constitutional rights as citizens.

Therefore, under the circumstances we ask you, The Honorable Board, to consider this on the basis of the quoted opinion of the Adjustment Board as outlined in Award 262, Docket 243, in addition to the decision of the board in Award 363, Docket 353, which is similar.

This case has been handled in accordance with Rule No. 35 of the agreement and I am herewith submitting reply after conference and correspondence has been executed between Vice President and General Manager Knickerbocker and general chairman representing the employees of the Ogden Union Railway and Depot Company.

The drain pipe was wrenched out of place and the sales manager claimed Mr. Cortez attempted to destroy the property, subsequently being taken into custody by police officers and preferred charges of which he was released upon payment of the cost of the damage to the property.

At that time there was a sportsman's parade passing in review and Mr. Cortez was present at the parade and participating in an hilarious manner, and was off duty at the time and was not subject to employment at that

The most significant defect in the claim that Cortez's absence on April 27th, was properly sanctioned is the fact that no claim has been made as to the propriety of his absence on April 29 (Monday) or 30, although, presumably, on those dates his conscience was still perfectly clear as to the 27.

Finally, the Board's attention is called to Mr. Peery's statement at the close of the investigation of May 2, 1940, as follows:

"I have investigated the records and find that car inspector Ball was called in Mr. Cortez's place on April 27th, which is evident that he properly layed off and it will be necessary that in view of the above fact to protest any disciplinary measures in this case and if they are shown I will claim time for all time lost."

The circumstances under which Carman Ball was called for duty in place of Carman Cortez are herein above related. Had Mr. Peery investigated the situation, he would have learned that Carman Cortez's foreman did not learn of his intention to lay off on April 27, until 7:00 A. M. of that date and consequently was not able to secure Carman Ball until approximately 8:00 A. M.

The foregoing disposes of Mr. Peery's second contention to the effect that:

"Mr. Cortez, being properly laid off, we feel that his time belonged to him, and whatever he might have done that the management has absolutely no supervision over."

Mr. Peery's final point is:

"That later developments have shown that Mr. Cortez on June 11th, 1940 went to trial charged with the willful destruction of property, and the Court adjudged him innocent and dismissed the case."

Mr. Peery is ill informed. The fact is, as pointed out above, that he was convicted by the Odgen City Court on May 15, of having been drunk, and was sentenced in the alternative to serve five days in jail or pay a \$10.00 fine. That part of the charge concerning destruction of private property was dismissed upon request of the property owner, Mr. Cortez having accounted to him for the damage.

Cortez's failure to report for work on April 27 and his arrest and conviction on the charge of intoxication as developed by an inquiry as to his failure to report for work, coupled with the numerous previous instances, only some of which are herein recited, clearly show that he is an undesirable and irresponsible employe. To restore him to service would result in the displacement of a carman in good standing with the brotherhood and the men, a capable and efficient employe and a good citizen, namely— H. L. Fiet. Fiet entered the service as a coach cleaner in May, 1926 and was promoted to car inspector April 7, 1939. He has a family and is highly respected in the community, and has a clear record of service. If the Board has regard for public interest and safety of transportation, it will deny this request for reinstatement of an employe who has demonstrated that he is an irresponsible hoodlum.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Cortez was dismissed from the service charged with being under the influence of liquor, malicious destruction of property while in this condition, and conduct unbecoming to an employee; also absent from duty April 27 without securing permission.

The record shows that Cortez made a telephone call, requesting permission to be off duty, and, therefore, assumed that he had secured proper permission to be absent April 27; thus no willful disregard of the regulations is shown; however, his conduct was such that could not escape censure.

While the carrier may have had reason to administer discipline and justified in so doing, and with full recognition of the right of the employer to be responsible for the discipline and management of their employees, according to agreement entered into between them, and with fair and proper consideration of their rights as employees, we conclude from the circumstances surrounding this case that the discipline administered has now served its purpose.

AWARD

A. V. Cortez shall be returned to service with seniority rights unimpaired, without payment for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 28th day of March, 1941.