

Award No. 1109

Docket No. 1037

2-StLSF-MA-'46

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Sidney St. F. Thaxter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 22, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
(ST. LOUIS-SAN FRANCISCO & TEXAS RAILWAY COMPANY)**

DISPUTE: CLAIM OF EMPLOYEES: 1.—That about twenty months' service rights of Third Class Machinist M. F. Owens at Sherman, Texas, was unjustly revoked within the meaning of the controlling agreement, particularly Rule 26, by the carrier on November 18, 1943.

2.—That the carrier be ordered to reinstate Third Class Machinist M. F. Owens with all service rights restored and compensate him for all time lost retroactive to November 18, 1943.

EMPLOYEES' STATEMENT OF FACTS: The carrier employed M. F. Owens about May 19, 1942, as a third class machinist at Sherman, Texas, and he continuously remained in the service as such until November 18, 1943.

Third Class Machinist Owens was subjected to stand an investigation on November 13, 1943, on charges by the carrier of neglect of duty while the machinist he was assigned to help was working alone in another part of the roundhouse at about 11 A.M. on November 4, 1943, and this employee was discharged from the service on November 18, 1943.

The reinstatement of Third Class Machinist M. F. Owens has been handled with the highest designated carrier officer to whom such matters are subject to be appealed in accordance with the provisions of the controlling agreement dated October 1, 1937, with the result that such officer of the carrier has refused to adjust this claim.

POSITION OF EMPLOYEES: It is submitted that within the meaning of Rule 26, in applicable part reading—

"If found to have been unjustly discharged, the employee shall be reinstated with full pay for time lost."

that Third Class Machinist (hereinafter referred to as machinist helper) M. F. Owens (hereinafter referred to as the claimant) was unjustly discharged, as will be found to be fully substantiated by the transcript of investigation conducted by the carrier on November 13, 1943, copy of which is submitted and identified as Exhibit A.

There was a very determined effort made by the lawyers to prove Owens had no work to perform while he was in this cab. This is not true as shown by Mr. Peavy's statement and in any event he should have been with the machinist he was helping.

Mr. Foley notified Mr. Owens in letter dated November 18, 1943, he was discharged. Copy submitted as Exhibit N. Mr. Owens requested and was given service letter dated November 18, 1943, copy submitted as Exhibit O. He was also given a statement of availability under War Manpower Commission regulations, on November 18, 1943.

Mr. Owens wrote Mr. Foley November 20, 1943, that he was dissatisfied with the decision rendered and desired to appeal to the superintendent motive power. He did appeal his case to Mr. Lister, superintendent motive power, under date November 21, 1943. Messrs. Brame & Brame also appealed the case to Mr. Lister in letter November 27, 1943.

Mr. Lister wrote Mr. Owens November 29, 1943, with a copy of the letter to Messrs. Brame & Brame, declining request for reinstatement. As shown in this submission, if Mr. Owens desired to handle the case further it should have been referred to Frisco Board of Adjustment No. 1, but this was never done; instead Mr. Owens wrote Mr. H. L. Worman, chief operating officer, under date December 1, 1943.

Nothing further was heard from the case until Mr. Owens wrote Mr. Lister November 25, 1944, that he had turned his case over to his general chairman, Mr. W. R. Cline, "to fight on to the Labor Board in Washington, D. C." Mr. Cline did handle the case verbally with Mr. Lister December 19, 1944, and Mr. Lister wrote Mr. Cline December 19, 1944, as per copy of letter submitted as Exhibit P.

In the investigation effort was made to bring the representation dispute into the picture and it may be alleged the fact Mr. Owens belonged to the I. A. of M. had something to do with his discharge. His union affiliations had absolutely nothing to do with it. In writing about his case, he used I. A. of M. letter-heads. In one of his letters he alleged previous discrimination. The only case of previous grievance he handled was a small pay claim. He wrote Mr. Worman about it on August 12, 1943, copy submitted as Exhibit Q. This was referred to Mr. Foley for report and copy of Mr. Foley's letter August 21, 1943 is submitted as Exhibit R. Mr. Worman replied August 26, 1943, per copy of letter submitted as Exhibit S. Instead of Mr. Owens being discriminated against, it seems he was intent on stirring up trouble over the union membership, daring anyone to do anything to him, and threatening after he was discharged. It is interesting to note the National Mediation Board certification shows a total of 4447 eligible to vote in cases covered by their Case Nos. R-977 and R-1200, including 1442 in the machinists, helpers and apprentices classification and this is the only case where there was any reference at all to alleged discrimination.

It is our information after Mr. Owens left our service he immediately secured employment with another railroad at Sherman in the same classification.

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.

There are two questions here: The first, whether this claim is properly before this Board, the second whether the discipline imposed was warranted.

The carrier claims that this matter should have been appealed to the Frisco Board of Adjustment No. 1 as provided in Rule 26 of the applicable agreement. The claimant was not a member of the employees' organization but he was none

the less bound by the terms of the agreement. He was given a hearing on charges of neglect of duty on November 4, 1943. The organization would not defend him as he was a non-member and he employed counsel. On November 18 the official who heard the case found him guilty and ordered him discharged. The attorneys appealed to the superintendent of motive power who affirmed the decision. This appeal was supplemented by a later appeal of the claimant himself to the superintendent of motive power and a further one to H. L. Worman, chief operating officer of the railroad. On April 24, 1944, the employees' organization elected to withdraw from the Frisco Board of Adjustment No. 1. From then on the National Railroad Adjustment Board took over its duties at least so far as this employe was concerned, whose case was from then on handled by the employees' organization of which he had become a member.

The question is not one of jurisdiction between the old Board of Adjustment and this, but rather whether the claimant delayed too long in taking his appeal. Conceding that appeals should be prosecuted promptly, particularly in view of the penalty provisions of the rule in question, we do not think that in the light of the peculiar facts here involved the delay in question was unreasonable. The carrier calls attention to the fact that the old Board met January 18, 1944. Whether that was the last meeting does not appear, but presumably the carrier argues that the appeal should have been presented at that time. In view of the fact that the claimant was taking the matter up with the railroad officials during the month of December, the time was certainly short to expect him to present the matter before January 18 on penalty of losing his rights. We do not think that laches sufficient to bar the claimant can under all the circumstances be attributed to him.

The neglect of duty consisted in the claimant being in the cab of a locomotive during working hours where he had no right to be. At best he seems to have stopped there for but a few minutes during a lull in his work. Had he been a consistent offender in this respect the discipline imposed might have been justified. But no such penalty seems to have been imposed on others who had similarly offended. This Board is loathe to interfere in cases of discipline if there is any reasonable ground on which it can be justified. Where the record as here indicates that the penalty is beyond all reason, this Board has not hesitated to interfere.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: (Sgd.) J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 5th day of March, 1946.