

Award No. 1239
Docket No. 1173
2-FtW&DC-FO-'48

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 140, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (FIREMEN AND OILERS)**

FORT WORTH AND DENVER CITY RAILWAY COMPANY

THE WICHITA VALLEY RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That the carrier has unjustly withheld Laborer M. L. Hands from service since July 30, 1947.

That accordingly the carrier be ordered to return Laborer Hands to service with all seniority rights intact and compensate him for all time lost.

EMPLOYEES' STATEMENT OF FACTS: Laborer M. L. Hands entered the employ of the Ft. Worth & Denver City Railway at Ft. Worth, Texas, as an engine washer, March 31, 1943. With the exception of a period of time served in the armed forces while on leave of absence, Mr. Hands continued in the active service of the carrier until July 30, 1947.

On July 26, 1947, and on receipt of his pay for the first half of July, Hands inquired of the division clerk the reasons for what appeared to be a shortage in his time for the first half of July.

On July 29, 1947, a Mr. Bradshaw informed Hands of how his time was figured. Dissatisfied with the explanation, he checked out and visited the general office for more information. On being referred back to the round-house office, he endeavored to discuss this shortage of time with Mr. Smerke, division foreman, and Mr. Hands' immediate supervisor. What discussion took place was through the screen door of the office and Hands left with the impression that further consideration would be given to his claimed shortage.

On the following morning of July 30, Mr. Hands presented himself at his regular place of employment some 30 minutes prior to his regular starting time of 8:00 A. M. with the intention of discussing his claim with the foreman without further loss of time. Because of Division Foreman Smerke's attitude prior to his regular starting time, Mr. Hands was unable to get an audience with him until about 8:15 A. M., at which time Mr. Smerke hailed him from a distance and addressed him with the question, "had he quit". On Mr. Hands' reply of "could be", Mr. Smerke instructed Hands to go with him to the office for his time. On arriving in the office, a short distance away, Mr. Smerke, followed by Hands, instructed the clerk to give Hands his time, that he (Hands) had quit and immediately left the office.

was then five days in the future, alleging removal from service without apparent reason, requesting restoration to service, claiming pay for time lost, and requesting that in the event of refusal of the carrier to meet these conditions and in the event of denial of such request and claim, a formal investigation be conducted. Written reply of the foreman to Hands was by notation on that date, July 30, and read:

"You resigned on your own accord. Under these circumstances investigation is not necessary."

Copy of aforesaid communication of Hands with notation by Mr. Smerke is submitted herewith as carrier's Exhibit A, consisting of one page, and made a part hereof. Later, upon request of general chairman representing this class or craft of employees, the carrier, through letter of Superintendent of Motive Power J. L. Roach, dated August 12, 1947, addressed to the general chairman, waived procedure, and arranged for formal investigation. This was done with the reservation that the carrier did not and does not agree with the employees on the applicability of the investigation rule (No. 28), which reads:

"(a) An employee who has been in the service more than sixty days shall, in case of discipline or dismissal, be apprised of the charge against him and shall be accorded an investigation, provided that he makes written request of his employing officer within five days of the date of such discipline or dismissal. The investigation shall be held within ten days of the date of the receipt of the request. He shall have reasonable opportunity to secure presence of necessary witnesses. He shall be present and may be represented by his duly authorized representative. The employee or his duly authorized representative shall, if the employee is disciplined or dismissed, be furnished a copy of the transcript of the investigation. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him resulting from said suspension or dismissal.

(b) The provisions of Rule 27 shall be applicable in connection with appeals and time within which appeals shall be made in cases involving discipline or discharge."

Transcript of evidence produced at the investigation is submitted herewith as carrier's Exhibit B, consisting of eight pages and made a part hereof. Further, carrier submits herewith, as its Exhibit C, copies of correspondence by and between representative of the employees and representatives of the carrier, consisting of nine pages, and made a part hereof.

POSITION OF CARRIER: This is a plain case of an employee feeling dissatisfied and aggrieved, who took matters in his own hands and by his own action terminated his employment relationship by adopting a wilful and arbitrary course by deserting his work and walking off the job instead of following the lines of orderly procedure provided for him in the Railway Labor Act and under the terms and conditions of a working agreement collectively bargained and negotiated for this class and craft of employees by representative selected and designated, likewise under the provisions of the Railway Labor Act. This error on his part was then followed by another one in his return to the carrier and his effort to make it appear that the wrong-doing was on the part of the carrier, that he was mistreated, and that there should be reparation, all of which is unfounded. There are no extenuating circumstances. The claimant is not deserving of any consideration. The request and claim are utterly without merit. Carrier asks that they be denied in full.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The whole record of what occurred in the instant case involves a question of whether Claimant Hands quit the service of his own volition or was dismissed from the service. It is the carrier's position that Claimant Hands left the service of his own accord. It is clear that the claimant's attitude and actions on July 29 and 30, 1947, could lead Foreman Smerke to believe that Hands no longer wished to remain in the service. When asked by Foreman Smerke if he had quit, the answer was: "Could be." The foreman thereupon said: "Let's go to the office and get your time." While the foreman's clerk was preparing the order for pay for time worked, the claimant asked the clerk if he would be entitled to unemployment compensation to which the clerk replied that since he had resigned, that was doubtful, whereupon the claimant for the first time said he had not quit and left the office without taking the order for his time.

On the afternoon of the same day, July 30, 1947, Hands reappeared at the office of the foreman and alleged that he was removed from the service unjustly and requested restoration to service and pay for all time lost. He also demanded an investigation which was subsequently accorded him but failed to develop any more evidence in his favor.

It does not appear that this can rightfully be regarded as a discipline case—the carrier brought no charge against the claimant, nor did the carrier in any way indicate that he had violated any company rule; neither does the record show that the foreman discussed any intention to impose discipline.

However, the fact still remains that Claimant Hands did not at any time definitely say that he was quitting the service and yet his attitude and actions throughout July 29 and 30, 1947, clearly indicates that he cannot be held entirely blameless for the results of his own actions. There remains some doubt, therefore, as to Claimant Hands' real intentions in respect to quitting the service and yet, by his own attitude and actions he must be held responsible for any time lost. All things considered, it would seem not inconsistent to restore to claimant his position and rights but without compensation for time lost.

AWARD

Claim disposed of in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 19th day of February, 1948.