

Award No. 1718

Docket No. MC-1381-77

2-PRR-I-'53

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

PARTIES TO DISPUTE:

NICHOLAS W. PICO, PETITIONER

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF PETITIONER: (1) Reinstatement to the position of car inspector from which he was dismissed by the carrier on July 15, 1948.

(2) Restoration of seniority as of October 30, 1925.

(3) Payment for loss of earnings from July 15, 1948 to the date of hearing.

PETITIONER'S STATEMENT OF FACTS: Petitioner commenced employment with the carrier on October 30, 1925, as a laborer. Since 1941, he was employed as a car inspector and so classified, and he was employed as such on May 25, 1948. Due to a temporary layoff, he took a car oiler's job about June 4, 1948 and was employed as such until July 15, 1948.

Petitioner, who is married and has two children, became sick and unable to work because of a heavy cold and diarrhea. Because of this condition, he telephoned his superior, Mr. L. R. Smink, on May 25, 1948, and requested him to notify Mr. Philip DeRose to report him "off" because of his sickness and inability to work. His sickness continued, as well as his inability to work, from May 25, 1948 to June 2, 1948. On May 26, 1948, despite his sickness, he came to the carrier's office to pick up his pay check, which was a matter of necessity in order to provide for himself and his family. His sickness and inability to work is supported by a medical report which was supplied to the carrier. (See Exhibit G.)

Despite his sickness and his inability to work, and his reporting said fact to the carrier, petitioner received a notice, in the form of a letter, dated June 4, 1948, requesting him to be present at the foreman's office, Greenville car shop, on June 8, 1948, at 1:30 P. M., EST, to answer the charge "Failure to comply with Regulation 8-I-1 of the current Agreement for the government of employees of the M of E Department, Greenville CT Yard, May 27, 1948 to June 2, 1948," a copy of which notice is submitted herewith and identified as Exhibit A. A hearing was held, at which petitioner was not represented.

Because of his sickness and inability to work from May 24, 1948 to June 2, 1948, petitioner was charged with failure to notify his foreman of his inability to work. As a result, petitioner was dismissed from service on July 15, 1948. It is from this dismissal that petitioner presents his grievance, which he contends was illegal, improper and arbitrary.

the judgment of the Board as to the propriety of dismissals will not be substituted for that of the Carrier. In this case there may be differences of opinion as to the importance and significance of particular items of the service record of the petitioner, but there can be no doubt that there is ample evidence of record of convincing character to support the charge of 'unsatisfactory service' upon which the dismissal was based. It is questionable whether the Board could with any show of reason reach a conclusion different from that of the management even if it were itself to exercise the discretion in this sphere which is vested in the management; but there certainly is no ground for concluding that the management was without reasonable basis for its disciplinary action."

The carrier submits there is no evidence that its action in disciplining the claimant in this case was in any way arbitrary, malicious, or in bad faith; and contends that, on the other hand, the discipline was only imposed upon the claimant after full investigation and trial, and on the basis of undisputed evidence of the claimant's guilt of the offense with which charged.

Therefore, your Honorable Board is respectfully requested to deny the claim in this matter.

The carrier demands strict proof by competent evidence of all facts relied upon by the claimant with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

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.

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

A hearing was afforded the parties on September 29, 1953. The claimant, Nicholas W. Pico, presented his grievance to this Division without first progressing said grievance up to and including the highest operating officer of the carrier designated to handle such disputes, as required by Section 3(i) of the Railway Labor Act.

The rules of procedure of the National Railroad Adjustment Board require that "No petition shall be considered by any Division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

This Division has previously held in Awards Nos. 514, 1275 and 1680:

"In order that this Board might assume jurisdiction of a dispute on petition, it must appear that the dispute has been handled in the usual manner in negotiations with the carrier as provided by the statute; and that it is only in case there has been a failure to reach an adjustment in the manner so provided that this Board will review such proceedings. In the instant case there was no compliance with the statute on the part of petitioner. The usual manner of negotiating with the carrier was not complied with. There was no failure to reach an adjustment in the usual manner."

Due to the claimant's failure to pursue the required method of presenting his grievance this Division of the National Railroad Adjustment Board is without power to pass upon his claim.

AWARD

The Second Division of the National Railroad Adjustment Board, having no jurisdiction over the petition in this case, the petition is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 19th day of October, 1953.