Award No. 1809
Docket No. 1686
2-L&N-CM-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Carman T. W. Cecil was unjustly discharged from the service on June 12, 1953.

2. That accordingly the Carrier be ordered to restore this employe to service with all seniority rights unimpaired and with compensation for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: Carman (lead car inspector) T. W. Cecil, hereinafter referred to as the claimant, was first employed by the carrier as a coach cleaner June 24, 1925; promoted to carman helper February 11, 1926 and subsequently to carman on August 12, 1930. He worked in this latter capacity until the close of his shift June 12, 1953 at 11:00 P. M.

On May 21, 1953 at approximately 10:30 P. M., the claimant was removed from his position (inspecting passenger trains) by two carrier police.

The claimant received notification from master mechanic under date of May 22, 1953 charging him with being under the influence of liquor, etc. on May 21, 1953 and advising that investigation would be held at 12:30 P. M. May 28, 1953. Copy of letter submitted herewith and identified as Exhibit A.

On May 28, the investigation was held as scheduled beginning at 12:30 P. M. and a stenographic report was taken. A transcription of the report is submitted herewith and identified as Exhibit B.

On June 12, 1953 "Discipline Bulletin No. 56" was placed on bulletin boards and on the same date the claimant received a letter issued by the carrier superintendent indicating his dismissal. The bulletin and letter are submitted herewith and identified as Exhibits C and C-1, respectively. The case regarding this claimant's dismissal has been handled repeatedly with the proper officers of the carrier, in line with the current agreement, by both correspondence and conferences without a satisfactory conclusion.

purpose of determining the employe's guilt or innocence of the offense charged, and on which the hearing is being held, but to determine the extent of the discipline to be imposed in case he is found guilty thereof. It is not only proper but essential, in the interests of justice, to take the past record into consideration, for what might be just and fair discipline to an employe whose past record is good, might, and usually would be, inadequate discipline for an employe with a bad record." (Second Division Award No. 1261, Referee Adolph E. Wenke.)

"In the discipline to be imposed after determining his guilt, it was not only proper but essential in the interest of justice for the Carrier to take into consideration the employe's past record. See Award 1367. In view of such past record and the nature of the charge, we do not find the discipline imposed to be either arbitrary, unreasonable or excessive." (Second Division Award No. 1402, Referee E. B. Chappell.)

"The control by the employer over the employe is the responsibility of the Management. This Division should be very cautious in substituting its judgment in matters of discipline for the judgment of a responsible employer." (Second Division Award No. 153, Referee John P. Devaney.)

"The primary question presented for decision is whether or not such action of the Carrier was arbitrary, unreasonable or unjust. Being a discipline case, it is elementary that the Division can not substitute its judgment for that of the Carrier unless it was so tainted with one or more of such three elements of injustice." (Second Division Award No. 1389 Referee E. B. Chappell.)

The carrier submits that the dismissal of Cecil was not arbitrary, unreasonable or unjust. It was not in violation of any provision of the current agreement, and must stand. A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the carrier. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer. (First Division Award No. 14421, Referee Whiting.) Also see First Division Awards Nos. 15316, 15317 and 15318, in which it was held:

"The Board is without power to pass upon the propriety of the penalty imposed or to direct the Carrier to reinstate or rehire. The principle laid down in Awards 13052 and 14421 is in all respects reaffirmed and controlling in this case."

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.

Claimant was a lead car inspector on May 21, 1953, at the Union Station, Louisville, Kentucky. On that date he was removed from service and charged with being under the influence of intoxicating liquor. An investigation was held and claimant was dismissed from the service. The organization contends claimant was unjustly discharged and requests that he be returned to service and paid for time lost.

There is evidence in the record that claimant was under the influence of intoxicants. Assistant Stationmaster Gross stated that claimant was staggering, thick-tongued, and definitely unfit to perform service. Sergeant of Police Haynes states that claimant was drunk, in a staggering condition and could not talk normally. Haynes stated he had been in police service for twenty-three years, had come in contact with many intoxicated persons, and could determine whether or not a man was drunk. He stated definitely that claimant was drunk. Patrolman Mathis stated that he observed claimant staggering and weaving on the platform. He saw him crawl under a train and get on his feet with great difficulty. He could not talk plain and while changing clothes he "stumbled all over me." Mathis has eight years experience in police work, and stated that he could tell when a person was drunk. He stated without equivocation that claimant was drunk. This evidence is sufficient to support carrier's finding that he was intoxicated as charged.

Claimant was first employed by carrier as a coach cleaner on June 24, 1925. He was promoted to carman helper on February 11, 1926, and to carman on August 12, 1930. He was fifty-two years of age. He denies that he was intoxicated or had anything to drink of an intoxicating nature at the time charged. He says he was suffering from indigestion and took some medicine from a fellow employe's locker. The inference is that he took an over-dose and that it brought about the condition in which he was found.

There was direct conflict in the evidence. The board is in no position to resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony is for the trier of the facts to determine. If there is evidence of a substantial character in the record which supports the action of the carrier, and it appears that a fair hearing has been accorded the employe charged, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established. None is here shown. Reasonable grounds exist to sustain the determination of guilt made by the carrier.

Claimant had many years of seniority on this carrier. It is argued that his employment rights ought not to be terminated too readily. The record shows, however, that he was found guilty on July 8, 1952, with having company property, including shovels, jacks, air hose, etc., in his possession off company property without permission. Because of his long service, he was let off with a reprimand. On December 18, 1952, claimant was found guilty of sleeping on duty. He was given a record suspension of sixty days and warned that his record would not stand any more serious trouble.

Under the circumstances, the dismissal of claimant from the service is not unreasonable, arbitrary, or excessive. Claimant failed to profit from leniency extended to him on two previous occasions. The carrier could properly conclude that claimant had forfeited any further consideration on a leniency basis. The dismissal of the claimant is in all respects consistent with the rules of the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of July, 1954.