

Award No. 1843
Docket No. 1746
2-SP(PL)-CM-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES: That under the current agreement Car Inspector Virgil Shreckengaust was unjustly dismissed from the service on December 3, 1953 and that accordingly the Carrier be ordered to reinstate him to all service rights with compensation for all time lost retroactive to the aforementioned date.

EMPLOYEES' STATEMENT OF FACTS: The Southern Pacific Company (Pacific Lines), hereinafter referred to as the carrier employed Virgil Shreckengaust, hereinafter called the claimant, from 7:00 A. M. to 3:00 P. M., as a car inspector in the New Yard at Fresno, California, and the claimant has been in the service therewith for approximately seven years, who since December, 1949 has been retained in the position of local chairman of the carmen's craft.

The carrier's master car repairer summoned the claimant, together with three other car inspectors, E. A. Carlson, C. E. Hendrickson and William Broderson, to appear for a formal hearing at 8:00 A. M., Wednesday, November 18, 1953, on the alleged charges of entering into an altercation at 6:50 A. M. on November 8, 1953 at the car inspector's shanty and which is affirmed by copy of letter dated November 13, 1953 identified as Exhibit A. However, the hearing was held as scheduled and a copy of the transcript of such hearing is submitted herewith and identified as Exhibit B.

The carrier's master car repairer also made the election to summon as his witnesses at this November 18, 1953 hearing Car Foremen N. J. Hodel, O. E. Denman, C. N. Tribble and L. F. Kain, including one freight carman, J. V. Brown, and three car inspectors, J. E. Kemp, D. F. Martin and V. E. Jansen, which are confirmed by copies of letters dated November 13th and 17th, 1953 respectively, submitted herewith and identified as Exhibits C and C-1.

The carrier nevertheless made the election, through its Bakersfield Superintendent Eastman on December 3, 1953, to dismiss this claimant from the service of the carrier, and this is affirmed by copy of letter submitted herewith and identified as Exhibit D.

This dispute has been handled with the carrier up to and including the "highest officer so designated by the Company", with the result that he has declined to adjust it, which is affirmed by copy of letter dated January 26, 1954, submitted herewith and identified as Exhibit E.

The cause of the altercation is not necessarily here involved and does not excuse the claimant in any manner for having violated carrier's rules.

"f) No fistic affray was indulged in by the claimant and the mere use of words is insufficient to justify the drastic action of dismissal."

General Rules 801 and 802 specifically state that employees who are quarrelsome, or otherwise vicious, will not be retained in the service; that civil, gentlemanly deportment is required of all employees in their dealings with each other, and that boisterous, profane and vulgar language is forbidden; that employees will not enter into an altercation but will report the facts to their immediate superior. These rules do not distinguish between oral and physical altercation. The fact that an employee did not use his fists, does not necessarily mean that he did not enter into an altercation. The petitioner's attempt to excuse the claimant in this case for the reason that he did not use his fists, is further evidence of the desperate attempts being made to excuse the actions of the claimant, who is unworthy of such defense.

The carrier here asserts that it has shown that all of the alleged bases for the claim in this docket are without merit.

Analysis of claim for "compensation for all time lost retroactive to the aforementioned date (December 3, 1953)."

The carrier, having already conclusively proved that the claim as submitted is, in its entirety, without merit, is confident the Board will deny it. Notwithstanding this position and in no way admitting that the carrier's dismissal of the claimant was not justified and proper, the carrier submits that in the event the Board does sustain the claim insofar as the request for reinstatement is concerned, and gives consideration to the matter of compensation for time lost, the Board should take into consideration the fact that claimant's loss of time subsequent to January 22, 1954, the date carrier offered to reinstate him on a leniency basis, is due entirely to his own actions and neglect, and that therefore he is not entitled to any compensation subsequent to that date. Moreover, the Board should take into consideration the matter of deducting the amount earned in other employment during the period involved.

Rule 39 of the current agreement reads in part as follows:

"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 compensated for wage loss, if any resulting from said suspension or dismissal."

The Board will note that this rule provides for compensation for "wage loss, if any." This can only be interpreted as meaning the difference between the amount that would have been earned had the employee not been discharged or suspended, and the amount that the employee actually earned in some other capacity during the period of his discharge or suspension. The sole purpose of this rule was to provide for compensating the employee for any wage loss suffered by virtue of an improper discharge or suspension. It was not intended that this rule should operate so as to permit the employee to receive double compensation, which would be the case if no deduction were made for the amount that the employee actually earned during his period of discharge or suspension from the carrier's service. The carrier's position in this respect is sustained by numerous awards of the National Railroad Adjustment Board, some of which are as follows:

In Second Division Award 1638, with Referee Edward F. Carter, statement is made under "Findings" as follows:

"Whatever the method of calculating the compensation may be, a deduction of outside earnings is required * * *"

In First Division Award 15756, with Referee Edward F. Carter, statement is made under "Findings" in part as follows:

"Claimant is therefore entitled to recover the amount he would have received as wages had the contract been performed from July 12, 1950 to December 19, 1950, less what he earned in other employment during that period, or what he might by reasonable diligence have earned in other employment during such period."

This position is also sustained by First Division Award 15258, with Referee Curtis W. Roll, rendered on January 26, 1954, wherein it was ruled that outside earnings would be deducted when payment is made for wage loss. In this connection also see First Division Award 16558.

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the Board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

CONCLUSION

Having conclusively established that the claim in this docket is without merit, carrier respectfully submits that it be denied.

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 waived right of appearance at hearing thereon.

Discipline in this case was justified. However, we believe the Carrier's subsequent offer to reinstate the claimant without pay was and is a just disposition of this case and should have been accepted.

AWARD

Claimant shall be reinstated with seniority rights unimpaired. Claim for time lost denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1954.