

Award No. 1847

Docket No. 1732

2-SOU-FO-'54

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Lloyd H. Bailer when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 21, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Firemen and Oilers)**

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

- 1) That under the current agreement Laborer Henry Ayers was unjustly dealt with when he was suspended from service on October 23, 1953 and discharged from the service on October 24, 1953.
- 2) That accordingly the Carrier be ordered to restore the aforesaid Laborer to service with seniority rights unimpaired and paid for all time lost retroactive to October 23, 1953.

EMPLOYEES' STATEMENT OF FACTS: Laborer Henry Ayers (hereinafter referred to as the claimant) was assigned as laborer at Memphis, Tennessee, on the 8:00 P. M. to 4:00 A. M. shift. Claimant was suspended from service on October 23, 1953, and investigation held on October 24, 1953 on the charge set forth in the hearing transcript. A copy of the hearing transcript is submitted herewith and identified as Exhibit A. The claimant was discharged from the service on October 24, 1953.

The carrier officials have declined to adjust this dispute.

The agreement effective December 1, 1940, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that the carrier's action in the instant case constitutes an abuse of discretion because

- "(1) The hearing record does not substantiate the testimony of the Foreman that the Claimant was asleep during his tour of duty on the night of October 23, 1953.
- (2) The hearing record does in fact reflect that the Claimant was sick from oil according to his testimony."

The carrier failed to consider the testimony of the claimant that he was sick from oil and with lightning-like speed railroaded him out of service,

"Extending leniency and reinstating a former employe who has been justly disciplined for a violation of the company rules is a function lodged in management and not in this Division."

In First Division Award 14421, Referee Whiting, it was held that:

"A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the employer. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer. In the absence of any enforceable right to reinstatement there is no basis for this time claim."

Thus the matter of extending leniency and rehiring a former employe is a function lodged solely in the management and not in the Adjustment Board. The fact is also established that dismissal for cause terminates an employe's employment relationship, and a dismissed employe has no contractual right to be reinstated or rehired.

The claimant was dismissed for cause, although the agreement does not specifically state that there has to be cause for dismissal. His employment relationship has been severed and there is no basis for his being rehired, except as a matter of leniency. The matter being solely in the hands of management, the Board has no authority to extend leniency to the claimant.

CONCLUSION

It has been shown that:

(a) Decision by the highest officer designated to handle disputes given the Brotherhood's general chairman, in letter dated January 19, 1954, is final and binding under Rule 26, as the Brotherhood's general chairman did not notify carrier that this decision was not accepted. Furthermore, claim has not been handled as required by the Railway Labor Act or Rules of Procedure of the Adjustment Board. It is not only barred by the agreement but by the Railway Labor Act and Rule of Procedure of the Board. In these circumstances, the Adjustment Board has not jurisdiction over the claim and therefore is without authority to decide it on the merits.

(b) The claimant has been negligent and unfaithful to the carrier's interests and is therefore unfit for further service.

(c) Charges against the claimant were proven and he was dismissed for cause.

(d) The principles of prior awards of all four Divisions of the Adjustment Board support carrier's position.

(e) There is no basis for carrier to extend leniency.

Under the circumstances, the demand which is here made should be dismissed for want of jurisdiction as decision given by carrier's personnel officer, in letter to the Brotherhood's general chairman on January 19, 1954, is final and binding on all parties. Carrier, therefore, requests that the Board dismiss the claim.

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.

The petition alleges Claimant Henry Ayers, formerly in carrier's service as a laborer at Memphis, Tennessee, was unjustly suspended on October 23, 1953 and was discharged without cause on October 24, 1953. Carrier's action resulted from its findings pursuant to investigation on the property, that Ayers was guilty of sleeping while on duty.

Carrier contends the Division is without jurisdiction to rule upon the merits of this claim. It asserts the dispute was finally decided on the property by virtue of failure of claimant's representative to give timely written notice of rejection of denial by Carrier's highest officer designated to handle such disputes. Organization responds a timely oral notice was given and that failure to tender a timely written notice is merely a technical violation that should not be permitted to deprive Claimant Ayers of relief from the injustice allegedly suffered. Carrier denies timely oral notice was given, although it contends that under the collective agreement notice by oral means at final step on the property is without force and effect.

Rule 26 of the agreement sets forth the procedure to be followed in handling "claims and grievances" arising thereunder. Said rule provides in part: "Decision by the highest officer designated to handle disputes shall be final and binding unless within sixty (60) days after written notice of such decision the said officer is notified in writing that his decision is not accepted." By letter dated January 19, 1954, said "highest officer" advised organization's general chairman of denial of claim. Neither the organization nor the claimant notified in writing said officer within the following sixty days that his denial was not accepted. Under the agreement carrier's denial thus became final and binding.

The claim may therefore be revived, and reviewed on its merits, only in violation of a clear and unambiguous provision of the agreement. But the Division has no power to set aside a contractual Provision, quite apart from the fact that under the Railway Labor Act and Board Circular No. 1 we are entitled to consider only such claims as have been handled in the "usual manner" on the property, and have failed to reach an adjustment in such manner. Under the "usual manner" as set forth under the agreement the dispute was adjusted by denial of the claim.

Being without jurisdiction to rule on the merits of the instant claim, we have no alternative but to direct its dismissal.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December, 1954.