

Award No. 2207
Docket No. 1947
2-SP(PL)-CM-'56

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. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES: That under covenants of current agreement Car Inspector I. O. Chestnut and Carman Helper P. Stanic were unjustly dismissed from the service on March 25, 1955 and that accordingly Carrier be ordered to reinstate them 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 I. O. Chestnut and P. Stanic, hereinafter called the claimants, from 8:00 A. M. to 4:00 P. M. as car inspector and carman helper, respectively, in the San Jose Freight Train Yard and that claimants have been in the service therewith for approximately twenty and nineteen years, respectively, and who have maintained their positions accordingly since their original date of seniority.

The carrier's master mechanic summoned the claimants to appear for a formal hearing at 9:00 A. M., Monday, March 14, 1955, on the alleged charges of absenteeism from site of their assignments and positions; and suspicions of alleged indulgence in intoxicating beverages and which is affirmed by letter dated March 10, 1955 copy submitted herewith and identified as Exhibit A. However, hearing was held as scheduled and copy of the transcript of such formal hearing is submitted herewith and identified as Exhibit B.

The carriers' master mechanic also made the election to summon as his witnesses at this March 14, 1955 hearing General Yardmaster R. E. Fanning, Yardmaster C. C. Henderson, L. J. Arnold, car foreman and A. Wickam, assistant car foreman, which are confirmed by letter dated March 11, 1955, copy submitted herewith and identified as Exhibit A-1.

The carrier nevertheless made election, through its San Francisco Superintendent J. J. Jordan on March 25, 1955, to dismiss the claimants from the service of the carrier and this is affirmed by copies of letters submitted herewith and identified as Exhibits C and C-1.

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

"If it is found that an employe has been unjustly suspended or dismissed from the service, such employe 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 employes not been discharged or suspended, and the amount that the employes actually earned in some other capacity during the period of their discharge or suspension. The sole purpose of this rule was to provide for compensating employes 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 employes to receive double compensation, which would be the case if no deductions were made for the amounts actually earned during 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 15765, 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 claimants 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 claimants 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 were given due notice of hearing thereon.

On March 10, 1955, carrier charged Car Inspector Isaac O. Chestnut and Carman Helper Paul Stanic with being under the influence of intoxicants while on duty and with absenting themselves from their posts of duty without proper authority. An investigation was held on March 14, 1955. On March 25,

1955, the charges were found to have been sustained by the evidence and they were dismissed from the service of the carrier. It is the contention of the organization that these two (2) claimants were unjustly treated and, upon refusal of the carrier to restore them to service with seniority rights unimpaired and compensate them for time lost, the case was brought to this Board. The issue goes only to the sufficiency of the evidence to sustain the dismissal of these claimants from the service.

Claimants were assigned to work from 8:00 A.M. to 4:00 P.M., in the San Jose Freight Train Yard. On March 9, 1955, at about 10:20 A.M., carrier's General Yardmaster R. E. Fanning found the claimants sitting in an automobile in a parking lot on company property. The evidence of Fanning is that each was drinking beer and that both of them were under the influence of intoxicants. He stated also that both had left their posts of duty which appears to be the fact. Yardmaster C. C. Henderson was called to the automobile and he ascertained that the bottles contained beer. Fanning says he observed the odor of liquor on the claimants. Henderson did not observe such odor. Fanning says that Stanic admitted he was drinking and wanted to be given another chance. Claimants were told to return to their posts until they heard from Fanning. Stanic did so but Chestnut did not. The evidence indicates, that each of the claimants attempted to lay off sick after they were found in the car. Car Foreman L. J. Arnold and Assistant Car Foreman A. D. Wickam observed Stanic at the carmen's shanty and both state that he was under the influence of intoxicants. It appears that Fanning, Arnold, Wickam and Henderson saw Chestnut in his car at about 11:10 A.M. Arnold and Wickam state positively that Chestnut was under the influence of intoxicants. The evidence of these men was positive and unequivocal.

The claimants denied at the investigation that they were under the influence of intoxicants or that they had any beer. They say they had root beer only. They say also that they were sick and attempted to lay off work after they had been detected in the automobile by the general yardmaster. They state also that they were eating lunch when they were in the automobile. There were other employees called who said they observed nothing wrong with the claimants.

We shall make no further attempt to detail the evidence. The evidence of Fanning, Arnold and Wickam is positive. It seems very unlikely that these three men, with some aid from Henderson, would make the mistakes that claimants say they made. Their evidence is not impeached although it is disputed. The story told by claimants appears to have been motivated by self interest. Their story that they were eating lunch at 10:20 A.M., after being on duty for only two (2) hours and twenty (20) minutes, does not seem reasonable. The evidence is such that the carrier could properly find that claimants had violated the rules as charged.

It is not the function of this Board to weigh the evidence as in an original hearing. If the evidence is sufficient, if believed, to sustain the carrier's findings, the carrier's action must be sustained. The evidence is sufficient and a denial award is required.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August, 1956.