

Award No. 3309

Docket No. 3106

2-L&N-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1—That the Carrier's dismissal of Carman O. G. Gabbard from service on November 19, 1957 was not authorized by the current agreement.

2—That accordingly the Carrier be ordered to restore him (Gabbard) to service with all seniority rights unimpaired and with pay for all time lost retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: Carman O. G. Gabbard, hereinafter referred to as the claimant, held a first shift shop track assignment as carman, 7 A. M. to 3:30 P. M., Monday through Friday, at the carrier's facilities at Hazard, Kentucky when this incident occurred.

Under date of September 24, 1957 the carrier's departmental foreman addressed a letter to the claimant charging him, in pertinent part, with laying off under false pretenses at 7 A. M., September 3, 1957. A copy of those charges are submitted herewith and identified as Exhibit A.

Investigation regarding the charges was postponed and finally held at Hazard, Kentucky on October 16, 1957. A copy of the transcript of investigation is submitted herewith and identified as Exhibit B.

On November 19, 1957 the claimant was notified that he had been dismissed from the service of the carrier

“ . . . for laying off under false pretenses September 3, 1957.”

A copy of that letter is submitted herewith and identified as Exhibit C.

days for failure to properly service journal boxes on October 7, 1952. It is obvious, therefore, that this is not the type of employe the carrier should be asked to continue in its service.

In conclusion carrier submits that there is substantial and convincing evidence in the record to substantiate the charges against Carman Gabbard. Further, that in view of the seriousness of his offense, and his prior record, his dismissal was entirely justified and should stand. In this connection attention is invited to the following excerpts from awards of this and other divisions of the Adjustment Board:

“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.” (Second Division Award 1809, Referee Carter.)

“This Board is loathe to interfere in cases of discipline if there is any reasonable grounds upon which it can be justified.” (Second Division Award 1109.)

“. . . it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed.” (Second Division Award 1323.)

“In proceedings such as these we do not examine the record of testimony to determine weight of credibility. We look for substantial and satisfactory support, and when that is found our inquiry ends. Awards upon this point are so numerous as to make citation of any of them unnecessary.” (First Division Award 14552.)

“. . . Our function in cases of the kind here involved, as we understand it, under Awards of this Division of the Board so well known and established that they require no citation or further consideration, is not to pass upon the credibility of the witnesses or weigh the evidence but to determine whether the evidence is substantial and supports the charges as made. If it is we cannot substitute our judgment for that of the carrier and it is our duty to leave its findings undisturbed unless it is apparent its action is so clearly wrong as to amount to an abuse of discretion.” (Third Division Award 5401.)

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.

Parties to said dispute were given due notice of hearing thereon.

By notice dated November 19, 1957 Claimant Gabbard was dismissed from service "for laying off under false pretenses September 3, 1957." This action was taken following a hearing held in compliance with Rule 34 of the agreement.

While there is conflict in the testimony adduced at the disciplinary hearing, there are reasonable grounds for carrier's finding that on September 3, 1957 claimant reported off as sick, when in fact he was unable to work because he was in jail. Later the same day he was convicted and fined \$100.00 for reckless driving. In view of the above, no basis is afforded for setting aside carrier's conclusion that claimant laid off under false pretenses as charged. Even considering his past record as stated by the carrier, however, the penalty of dismissal is altogether excessive. The time already lost is sufficient discipline for claimant's infraction. He should be reinstated with seniority unimpaired but without compensation for time lost.

AWARD

Claim sustained to the extent indicated in the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1959.