

Award No. 3626

Docket No. 3195

2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

**MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated Article V, Paragraph 1(a) of the August 21, 1954 Agreement, and accordingly the claim or grievance shall be allowed as presented.

2. That under the current agreement Carman R. J. Clemens was unjustly removed from service on August 2, 1957 pending investigation, and further, that Carman R. J. Clemens was unjustly dismissed from service on August 22, 1957.

3. That accordingly, the Carrier be ordered to restore Carman R. J. Clemens to the service of the Carrier with seniority rights and all other rights fully restored, and that Carman Clemens be compensated for all time lost beginning with August 2, 1957 and until such time as he is restored to the service of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: Prior to August 2, 1957, Carman R. J. Clemens, hereinafter referred to as claimant, was employed as a car inspector at Crystal City, Texas. On August 2, 1957 claimant was notified by letter which was signed by Mr. S. P. Byrnes, master mechanic, that he was being held out of service pending formal investigation. Mr. Byrnes' letter also stated that investigation would be held in Mr. Fleming's office at Crystal City, Texas at 9:00 A. M., August 7, 1957.

Investigation was held as scheduled and we herewith submit and make a part of employees' statement of facts, the investigation transcript which is identified as employees' Exhibit B.

The foregoing is in conformity with the common law rule. It is in accord with the rulings of the state courts of the country. And, lastly, the Supreme Court of the United States recognizes the rule. See *Republic Steel Corp. v. Labor Board*, 311 U.S. 7; *National Labor Relations Board v. Seven-Up Bottling Co.*; 73 S. ct. 287. Making the employee whole simply means he shall suffer no loss. Consequently, the measure of damages for the breach of a collective employment contract is the amount an employee would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach. This conforms to the rule that the employee should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purposes of the Board are remedial and not punitive; that its purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

In this connection we are quoting below the following paragraph from Rule 17 (a) of the working agreement, captioned "Discipline and Committee":

"If it is found that an employee has been unjustly suspended or dismissed from the service such employee shall be reinstated with his seniority right unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Attention is specifically directed to that part of the rule reading: "* * * and compensated for the wage loss, if any, * * *". Your Board has, as evidenced by the foregoing citations, distinguished between rules such as this one and those reading: "pay for all time lost" and has recognized that any "wage loss" can only be the difference between what could have been earned and that which was earned during the period of dismissal.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Employees maintain that Carman Clemens was unjustly dismissed from service on August 22, 1957 and that this claim for his reinstatement should be allowed because of the carrier's alleged violation of Article V, Paragraph 1(a) of the August 21, 1954 Agreement.

Claimant was employed as a car inspector at Crystal City, Texas, on and before August 1, 1957. On August 2, 1957, he was notified by the carrier that he was held out of service pending formal investigation on August 7 to determine his responsibility for leaving his post without permission on the

night of August 1, turning in a false time card for the night of August 1, and for placing his symbol on 11 cars which he had not serviced. Following the investigation, which was held as scheduled, claimant and the Vice General Chairman of the Carmen's organization were notified by the carrier that he was dismissed from the service for his responsibility in connection with each of the irregularities stated in the notice of suspension and repeated and understood by him at the opening of the investigation.

Article V, Paragraph 1(a) of the August 21, 1954 Agreement provides that claims or grievances of an employe must be presented in writing within 60 days from the date of the occurrence and if disallowed, the carrier shall within 60 days from the date the claim is filed, notify the one filing the claim in writing of the reasons for such disallowance. The organization maintains that neither claimant nor his representative was given the reason for his dismissal. We think the record indicates that the claimant and his representative were adequately notified of the reasons for dismissal and find that the claim of violation of Article V, Paragraph 1(a) of the August 21, 1954 Agreement lacks merit.

The transcript of the investigation has been carefully reviewed. In a proceeding such as in this case it is necessary that there be substantial evidence to support the charge and that the carrier's action was not arbitrary or capricious. We think the evidence adduced at the investigation was adequate to support all of the charges made against claimant in this case and we find no reasonable grounds for disturbing the decision reached on the property.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of January 1961.