Award No. 4014
Docket No. 3847
2-CB&Q-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. The Chicago, Burlington & Quincy Railroad Company violated the controlling agreement by closing out of service Carman Elias Addleman for allegedly absenting himself from duty without proper authority, May 6 to May 9, 1960.

2. That accordingly, Elias Addleman be reinstated to service with seniority unimpaired and compensated for all wages lost from May 10, 1960 until so restored.

EMPLOYES' STATEMENT OF FACTS: On the date of May 10, 1960, the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the carrier, notified Carman Elias Addleman, hereinafter referred to as the claimant, that he was 'closed out of service' effective May 10, 1960 on account of being absent from duty without proper authority from May 6 through May 10, 1960.

In accordance with the requirements of the agreement, the claimant requested an investigation. On May 13, 1960, the carrier wrote the claimant again, advising him of the precise charge as is required by the agreement and, also, informed him of the time and place the investigation would be held. The investigation was held on the charge on May 17, 1960.

At the close of the investigation Mr. B. H. Barrett, General Shop Superintendent, reaffirmed the decision he had made on May 10, 1960, and when appeal was made, Superintendent Barrett again reaffirmed his previous position in writing on June 7, 1960.

This dispute was handled in accordance with the agreement with all carrier officers authorized to handle grievances, including a conference with

Surely here the record is also more than adequate to support the dismissal of Carman Addleman. On the basis of these facts, no other form of disciplinary action could be expected.

The petitioning organization in this docket will no doubt make a technical argument to the effect that Addleman, having notified the Shops through his son Robert that he would not be at work, was not subject to disciplinary action by reason of such absence. But the brotherhood cannot produce any evidence whatever, much less any substantial evidence, that claimant Addleman had permission to be absent from duty. Neither can the organization logically contend that his absence because of being jailed on these charges, should have been excused or condoned by the carrier. The evidence supports the dismissal action in every respect, and the Board should not interfere in such a case.

The claim must 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.

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

The Claimant entered the service of the Carrier in January, 1944. He was a carman at its Havelock (Nebraska) Shops at the time here relevant. In the early morning hours of Friday, May 6, 1960, he was arrested in his home by police officers on a charge of having fondled a female minor. Before he was led away by the officers, he asked his son to notify General Foreman Nemeth that he could not report for work at his regular shift which started at 7:30 A. M. The son called Nemeth at about 6:45 A. M. and told him that his father would not be at work. He did not state the reason for his father's absence.

On the same day, the Claimant pleaded guilty in the County Court to the charge of having fondled a minor. Bond was set at $2,000 and he was bound over to the District Court for trial. He was unable to furnish bond and was committed to jail.

Under date of May 8, 1960, W. F. Schubert, a special agent of the Carrier, filed a written report with the latter in which he detailed the Claimant's arrest, the charge placed against him, and his confinement to jail. On the following day (May 9, 1960), the Claimant appeared in the District Court and was permitted to change his plea of guilty to not guilty. He furnished the required bond and was released from jail at 4:07 P. M. In the evening, he called General Foreman Nemeth and asked whether he could return to work. Nemeth advised the Claimant to talk to him on the next day. When the Claimant did so call on Nemeth, the latter refused to let him go back to work.

On the same day (May 10, 1960), the Carrier mailed the following notice to the Claimant:

> "This is to advise that you are being closed out of service as of today account absenting yourself from duty without proper authority from May 6, 1960 to May 9, 1960 inclusive and not reporting for work."

On February 2, 1961, the Claimant pleaded guilty in the District Court to a reduced charge of contributing to the delinquency of a minor and was sentenced to six months in jail. He served this sentence from February to August, 1961.

In the instant claim, the Claimant requests re-instatement and back pay, except for the periods which he spent in jail. For the reasons hereinafter stated, we are of the opinion that his request is only partly justified.

1. During the investigation hearing held on May 17, 1960, there was considerable discussion as to whether or not the Claimant violated Rule 19 (e) of the applicable labor agreement which provides that "an employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible." At one time, the Claimant even admitted that he violated the Rule (Organization's Exhibit "D", p.3) but it is doubtful whether he understood the question asked of him in this connection. It is unnecessary, however, to determine whether he violated Rule 19 (e) because the Carrier has explicitly stated that the "Claimant was not disciplined for violation of this rule of the schedule" (Carrier's Ex Parte Submission Brief, p.4) The Claimant was actually discharged for the sole and exclusive reason of "absenting (himself) from duty without proper authority from May 6, 1960, to May 9, 1960 inclusive and not reporting for work." Hence, the only question before us is whether or not said absence from work without the Carrier's permission constituted just cause for his dismissal within the purview of Rule 31 (a) of the labor agreement.

2. In adjudicating the merits of the instant claim, we start with the premise that, as a rule, a discharge must stand or fall upon the reason stated at the time of the discharge, except where essential facts are discovered thereafter or where the validity or invalidity of the discharge can properly be evaluated only in the light of the discharged employee's totality of conduct in the past. See: Arbitration Award in re West Virginia Pulp and Paper Company, 10 LA 117, 118 (1947); Frank Elkouri and Edna A. Elkouri: "**How Arbitration Works**, Rev. Edition, Washington, D. C., BNA Incorporated, 1960, pp. 425 - 426 and cases cited therein; Lawrence Stessin: **Employee Discipline**, Washington, D. C., BNA Incorporated, 1960, pp. 44 - 45 and cases cited therein. This general principle is also reflected in Rule 31 (a) of the labor agreement which provides, as far as pertinent, that "an employee . . . who has been disciplined or dismissed will be apprised of the charge against him in writing . . ."

In applying the above principle to the facts underlying the case at hand, we have reached the following conclusions:

It is beyond dispute that the Carrier issued the written dismissal notice after it had an opportunity to investigate the circumstances surrounding the Claimant's unauthorized absence from work (statement of General Shop Superintendent Barrett, Carrier's Exhibit No. 1, p. 11) and after it had re-

ceived the detailed report of special agent Schubert. It was, therefore, fully aware of all essential facts which caused the Claimant's arrest. If it wanted to discharge him on the ground that his arrest and confinement to jail made his future employment undesirable or intolerable because of the possible adverse effect upon its business reputation in the community or upon the morale of the working force, it should have so stated in the dismissal notice. Instead, it preferred to discharge the Claimant for the sole and exclusive reason that he absented himself from work without proper authority. It is not within our authority to uphold the Claimant's dismissal on grounds other than the one clearly specified by the Carrier itself in said notice, except in the event of the above noted exceptions. The record does not indicate that any of those exceptions is applicable in the instant case.

3. The basic issue requiring decision is then whether the Claimant's confinement to jail from May 6 through May 9, 1960, constituted justifiable cause for his dismissal. The question of management's right to take disciplinary action, including dismissal, against an employe for this reason has frequently been considered by the Divisions of this Board as well as by industrial arbitrators. See: Awards 18839 of the First Division; 1328, 1578, and 2925 of the Second Division; Arbitration Awards in re Trane Co., 23 LA 574 (1954); Hertner Electric Co., 25 LA 281 (1955); Glasgow-Adrian Co., 25 LA 614 (1955); Stessin, **supra**, pp. 81-86 and cases cited therein. No general declaration of principles to govern all cases of law-enforced absences from work has emerged. But certain guideposts can be deduced from the various rulings on the issue which are helpful in defining management's disciplinary rights in instances, such as this one, where no penalty for such absences is specifically provided in the labor agreement. The guideposts applicable to the facts presented by the instant case are the length of the absence, the difficulty or ease of assigning a substitute employe for the duration of the absence, and past practice in similar instances.

As stated before, the question as to whether the Carrier could have discharged the Claimant because of the possible undesirable effect of his conduct is not before us. Nor are we called upon to decide whether it was entitled to suspend the Claimant pending a final determination of his guilt by the courts or to discharge him after he had been convicted by the District Court to serve six months in jail. He was never charged with being absent from work without proper permission after May 9, 1960, pursuant to Rule 31 (a) of the labor agreement.

We have consistently held that a Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive, or an abuse of managerial discretion. See Award 3874 of the Second Division and other Awards cited therein. The evidence on the record considered as a whole has convinced us that the Claimant's dismissal was an excessive penalty. To be sure, we do not condone the Claimant's offense for which he was arrested and convicted but abhor it. Yet we are restricted to a consideration only of the cause cited in the Carrier's dismissal notice. A review of the Claimant's dismissal within this limited scope discloses the following mitigating circumstances:

First, his unauthorized absence actually amounted only to two days since May 7 and 8, 1960, were his regular rest days. Second, the record does not reveal that the Carrier experienced any difficulties in replacing the Claimant on May 6 and 9, 1960. Third, our attention has not been called to any established practice which would justify the Carrier's action. Fourth,

the Carrier was adequately informed by the Claimant's son that he would not report for work. We place no importance upon the son's failure to disclose the whereabouts of the Claimant because the Carrier was promptly informed thereof by special agent Schubert. Fifth, the Claimant had been in the Carrier's employ for more than 16 years at the time of his dismissal. There is no evidence that he had ever given cause for prior disciplinary action. Under all these circumstances, we believe that a lesser penalty than dismissal, namely, a substantial suspension, is appropriate.

Without establishing a precedent we, therefore, hold that the Claimant shall be re-instated to his former position with accumulated seniority rights but without back pay.

AWARD

Claim partly sustained and partly denied in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1962.