

Award No. 4133
Docket No. 4043
2-NONE-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Carman H. L. Curtis was improperly suspended September 17, 1960, unjustly discharged from the carrier's service September 21, 1960, reinstated to service October 11, 1960.

2. That accordingly the carrier be ordered to compensate the aforementioned employe for all time lost September 17, 1960-October 11, 1960.

EMPLOYEES STATEMENT OF FACTS: Carman H. L. Curtis, hereinafter referred to as the claimant, employed by the carrier at Meridian and Hattisburg, Mississippi, was taken out of service, charged with failing to report for duty at 11:00 P. M., September 16, 1960, at Hattisburg, Mississippi.

Formal investigation was held September 19, 1960, and on September 21, 1960, the claimant was notified he was dismissed from the service of the carrier. October 11, 1960, Claimant Curtis was restored to service without pay for time lost.

This dispute has been handled with the carrier's officers designated to handle such matters, in compliance with current agreement, all of whom have refused or declined to make satisfactory settlement.

The agreement effective March 1, 1926, as subsequently amended is controlling.

POSITION OF EMPLOYEES: It is submitted the claimant was subject to the protection of the provisions of the aforesaid controlling agreement made in pursuance of the amended Railway Labor Act, particularly the terms of Rule 34, which reads in pertinent part:

"An employe will not be dismissed without just and sufficient cause or before a preliminary investigation which shall be held imme-

The Board should be guided by the principles of its prior awards, holding that it will not interfere with disciplinary action taken where, as here, it was imposed in good faith without bias or prejudice.

CONCLUSION

Carrier has conclusively shown that:

(a) Carman Curtis was not improperly suspended or unjustly discharged from carrier's service. To the contrary, he was derelict and remiss in assuming his obligations as car inspector and repairer under the effective agreement. He was negligent and unfaithful. He was dismissed for just and sufficient cause for failing to protect his assignment on the night of September 16, 1960.

(b) The discipline administered was not imposed as a result of arbitrary or capricious judgment or in bad faith. The action taken is supported by evidence of record and was in good faith without bias or prejudice. Carrier's action is fully supported by the principles of awards of all four Divisions of the Board.

Carman Curtis, having been dismissed for just and sufficient cause and having been reemployed on a leniency basis at carrier's discretion, does **not** have a contract right to be paid the compensation here demanded on his behalf. The Board, in these circumstances, cannot do other than follow its prior decisions and make a denial award.

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, H. L. Curtis, was employed as a carman by the Carrier at Meridian, Mississippi, but was furloughed in the course of a reduction in the working force prior to the time here relevant. In the late afternoon of September 15, 1960, he received a call from Master Mechanic Turner who requested him to go to Hattiesburg, Mississippi, a distance of about 85 miles, to substitute for a carman during the latter's absence. The Claimant accepted the assignment. He left Meridian at about 8:30 P. M. and drove to Hattiesburg where he worked from 11:00 P. M., September 15, to 7:00 A. M., September 16, 1960. He was scheduled to work again from 11:00 P. M., September 16th, to 7:00 A. M., September 17th. However, he overslept because his alarm clock did not ring or he did not hear it. When he awoke, he realized that he was late for work, dressed hurriedly, and ran to his work location. He met Foreman Tucker in the Yard at approximately 1:20 A. M., or about 2:20 hours after the start of his shift. Since Tucker had already called another carman to fill the Claimant's assignment, he did not permit him to work.

The Claimant was immediately suspended and, after a formal investigation hearing, dismissed from the Carrier's service as of September 21, 1960. On October 11, 1960, he was re-employed on a leniency basis.

He filed a grievance in which he requested compensation for all time lost during the period from 11:00 P. M., September 17, 1960, to October 11, 1960. The Carrier denied the grievance.

In this case we are asked to decide whether the Claimant's dismissal was just and sufficient cause as contemplated in Rule 34 of the applicable labor agreement. For the reasons hereinafter stated, we are of the opinion that the answer is in the negative.

1. In support of his claim, the Claimant argues that he is entitled to the protection of Rule 21 of the agreement which reads, as far as pertinent, as follows:

"In case an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work . . . for any . . . good cause shall notify his foreman as early as possible."

The flaw in the Claimant's argument is that his failure to report for work at 11:00 P. M., September 16, 1960, was neither "unavoidable" nor for "good cause" within the purview of Rule 21. It was his obligation to make every reasonable effort to report for work at 11:00 P. M. The fact that he merely relied on an alarm clock which admittedly may not even have rung does not excuse his tardiness. Thus, the Carrier's right to take reasonable disciplinary action against him cannot be denied.

2. We have consistently held that a disciplinary penalty imposed by a Carrier upon a employe can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Awards 3874, 4000, and 4098 of the Second Division. The evidence on the record considered as a whole has convinced us that the Claimant's dismissal was an excessive penalty. The Claimant was merely guilty of a minor infraction of the working rules and not of a serious breach of his contractual obligations or a major offense. Moreover, it speaks well for him that he immediately attempted to mitigate his tardiness when he awoke. Finally, the record is devoid of any indication that he had ever given cause for discipline prior to the incident under consideration.

Under these circumstances, we hereby set aside his dismissal. As a result, he is entitled to compensation for all time lost during the period from 11:00 P. M., September 17, 1960, to October 11, 1960. From such compensation there shall be deducted any compensation which he may have earned in other gainful employment during said period as well as an amount equal to the premium payment which the Carrier paid to the employe who substituted for the Claimant on the night from September 16 to 17, 1960.

The record is inconclusive as to the days on which the Claimant would have worked had he not been suspended and subsequently dismissed. We are confident that the Carrier's records will reveal those days. Yet in the event the parties cannot reach an agreement on this point, each party shall be entitled to re-submit this case to us for a final determination of the exact amount due to the Claimant under this Award.

AWARD

Claim partly denied and partly sustained in accordance with the above Findings, without prejudice, however, to re-submit it to this Division as indicated hereinbefore.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1963.