

Award No. 4694

Docket No. 4483

2-GN-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement the Carrier improperly and unjustly dismissed Carman Thomas Gage from its service on November 1, 1961, and

2. That the Carrier violated Article V of the August 21, 1954 Agreement when neither the master mechanic or the division superintendent answered correspondence when claim was appealed to their office in accordance with appeal procedure set up by the carrier, and accordingly claim should be allowed;

3. That accordingly the Carrier be ordered to:

a) Restore the Claimant to service with seniority rights unimpaired;

b) Compensate Claimant for all time lost since December 1, 1961, until the case is resolved;

c) Make Claimant whole for all vacation rights;

d) Pay the premiums for Hospital, Surgical and Medical benefits for all time held out of service;

e) Pay the premiums for Group Life Insurance for all time held out of service.

EMPLOYEES' STATEMENT OF FACTS: The Great Northern Railway Company, hereinafter referred to as the carrier, maintains car repair facilities at Allouez, Superior, Wisconsin.

Prior to November 1, 1961, Carman Thomas W. Gage, hereinafter referred to as the claimant, worked at the Allouez Car Department.

On October 16, 1961 the claimant was served with a notice to appear for

sentence of Schedule Rule 26(e) which limits the damages to "wage loss, if any." Essentially identical language has been interpreted by this board in Awards 1638, 2068, 3449, 3703, 3747 and 3752, to require the deduction of all outside earnings in computing the amount of the wages lost. None of the other items of damages demanded constitute a "wage loss" within the meaning of that term in Rule 26(e).

**THE CLAIM OF THE ORGANIZATION, THEREFORE,
IS WITHOUT MERIT FOR THE FOLLOWING REASONS:**

1. The claim must be dismissed because the organization failed to handle it as required by Article V of the August 21, 1954 National Agreement.

2. The organization has failed to produce any competent evidence that the carrier's decision that the claimant should be dismissed because of his admitted insubordination, was arbitrary, capricious and an abuse of the discretion vested in management.

For the foregoing reasons, the carrier respectfully requests that the claim of the organization 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 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 waived right or appearance at hearing thereon.

When two bad order cars were reported to the Assistant Car Foreman he requested that the Claimant re-test the cars. Claimant informed him that he had tested them once and that once was enough. After the Assistant Foreman requested a second time that the Claimant re-test the cars, the Claimant replied that the Assistant Foreman could re-test the cars himself if he wished to have them re-tested.

There is no dispute about the facts or concerning the fact that the Car Foreman was Claimant's supervisor and that he was required to take orders from his supervisor. After a hearing Claimant was discharged for insubordination.

It is well settled that a Carrier's disciplinary action can be successfully challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See Awards 4000, 4098, 4132, 4195 and 4199. The record is devoid of any evidence or extenuating circumstances. On facts stated above there is no basis for sustaining the claim.

Neither the Carrier nor the Organization urged the procedural matter of time limits in the panel argument and both took the position that the case should be decided on the merits.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4694

Carman Gage believed he was acting in conformity with Section 132.11 of the Power Brake Law of 1958, reading in pertinent part:

"Supervisors are jointly responsible with inspectors . . ."

A reading of the hearing transcript of the investigation concerning Carman Gage's alleged insubordination reveals that he stated the reason he did not comply with the request made by his supervisor was due to the fact that "I considered the type of re-test that he was asking for improper air test because of the previous air test I watched him make no other trains" and I thought it was an improper way to test the car the way he wanted me to do." That Carman Gage was correct is borne out by the fact that government inspectors had taken exception to the condition of air brakes.

The foregoing refutes the holding of the majority that "The record is devoid of any evidence or extenuating circumstances." On the facts stated above the claim should have been sustained.

E. J. McDermott

T. E. Losey

C. E. Bagwell

R. E. Stenzinger

J. B. Zink