

Award No. 4715
Docket No. 4580
2-CRR of NJ-FO-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Dudley E. Whiting when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 72, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Firemen & Oilers)**

CENTRAL RAILROAD COMPANY OF NEW JERSEY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement, Laborer Robert H. Powell was unjustly discharged effective September 21, 1963

2. That, accordingly, the Carrier be ordered to:

a) Reinstate Laborer Powell to his laborer's position at the Communipaw Engine Terminal, Jersey City, New Jersey, with seniority and employe rights unimpaired, and

b) Compensate Laborer Powell for all time lost from September 21, 1963 to date he is restored to service.

EMPLOYEES' STATEMENT OF FACTS: Laborer R. H. Powell, employed as such by the carrier, with a seniority date of June 28, 1926, without any discipline record before being dismissed.

Hearing was held on September 4, 1963 in connection with the claimant's alleged theft of ice from ice car at Communipaw Engine Terminal on August 17, 1963.

Dismissal notice was directed to the claimant, dated September 17, 1963, by Manager W. F. Daley, Engine Terminals, Central Division.

The dispute was handled with carrier officials designated to handle such affairs who all declined to adjust the matter.

The agreement effective June 1, 1937, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that the claimant with 37 years service, with a clear record, was unjustly dealt with when dismissed effective September 21, 1963, and accordingly, the dispute was progressed in accordance with Rule 10, reading, in part, as follows:

"As an original proposition it might strike the Board that the Claimant's breach of duty to the Carrier occurred only once and was small in amount and that in view of his long service and fairly advanced years he should be given another chance.

But, we are not the Carrier. If there is a finding of wrong doing which is not arbitrary, the Carrier has a right to impose the discipline it thinks necessary to maintain the standards of duty and service deemed desirable even though the sanction chosen may be greater than that which the Board might choose."—Denied.

Also see Second Division Awards 1694, 2484, 3590, and Third Division Awards 8808 and 9214.

In conclusion, the Carrier submits that:

1. There was sufficient evidence for all the findings against the Claimant;

2. The Claimant's breach of duty to the Carrier constituted a sufficient ground for dismissal, notwithstanding the material value of the stolen property involved; and

3. The Board cannot inquire into the propriety of the discipline absent a clear showing that the findings were so baseless or the discipline so incommensurate with the offense as to be arbitrary or capricious.

In addition to the foregoing conclusions, the carrier states that the claimant's length of service is not a proper ground for questioning the propriety of dismissal. In this connection, see the opinion of the board in Third Division Award 9422 which reads, in part, as follows: "The Board may inquire into the propriety of the discipline only in the event of extenuating circumstances. Award 4622 (Carmody). The length of service of an employe is put forward as an extenuating circumstance. While this has been considered a factor in some cases, e.g. Award 6104 (Messmore), it is not an extenuating factor 'in and of itself,' Awards 6108 (Messmore) and 5026 (Parker)."

The discipline given Mr. Powell was assessed in good faith by this carrier. The entire record would indicate that there has been no abuse of discretion, and submits the claim is without merit and should be denied in its entirety.

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 waived right of appearance at hearing thereon.

The right of the Carrier to discipline the claimant under the conditions involved is beyond doubt. 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. However, the evidence on the record considered as a whole has convinced us that the claimant's dismissal, considering his long service with this carrier, under those circumstances, is an unreasonable exercise of the carrier's responsibility.

It is not possible to sustain any claim for compensation and the reinstatement awarded should be considered as tantamount to a warning that similar conduct will result in just cause for discharge.

AWARD

Mr. R. H. Powell shall be reinstated to his former status as an employee with seniority unimpaired, without pay or other monetary benefit for the time lost since his dismissal, such time to be treated as a disciplinary suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May, 1965.