

Award No. 5182
Docket No. 4956
2-C&O-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region)

DISPUTE: CLAIM OF EMPLOYEES:

1. Carman Lamer E. Agee, was unjustly dealt with and his service rights violated; account of dismissed from the service of the Chesapeake and Ohio Railway Company on September 17, 1964.

2. Accordingly, the Carrier be order to restore Carman Agee to service with full seniority, unimpaired hospital and insurance coverage for himself and family, vacation rights, all days credited as days to qualify for vacation and compensated eight hours each day, five days each week, plus all overtime he could have worked had he remained on his position at the carman applicable straight time rate.

EMPLOYEES' STATEMENT OF FACTS: Carman Lamer E. Agee, hereinafter referred to as the Claimant, is employed as a Carman by the Chesapeake and Ohio Railway Company, hereinafter referred to as the Carrier, at Newport News, Virginia regular assigned Monday through Friday, rest days Saturday and Sunday first shift, on the Carrier's Shop Track. At the time of the charges, Claimant was filling a vacancy of Carman C. W. Harper with the work week Friday through Tuesday, rest days Wednesday and Thursday.

Under date of September 17, 1964 the following letter was addressed to the Claimant which reads as follows:

"Newsport News, Va., September 17, 1964
File 117-1

Certified Mail

Mr. Lamer E. Agee
820 "E" Street
Hampton, Va.

Attend investigation in Master Mechanic's Office, Pier 9. at Newport News, Va. at 9:00 A. M., September 24, 1964.

Carrier submits that the record shows conclusively that Agee was guilty as charged. The facts were established in an investigation which claimant's representative agreed was fair and impartial and conducted in accordance with the controlling agreement. In view of Agee's unsatisfactory record of service, the Carrier was fully justified in dismissing him from service.

(Exhibits not reproduced.)

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.

It is the claim of Employees in this dispute that Carman Lamar E. Agee was unjustly dealt with and his service rights violated when he was dismissed from the service of the Chesapeake and Ohio Railway Company on September 17, 1964.

Claimant had been charged with "leaving the job without permission on Sunday, September 13, 1964 at approximately 7:30 A.M. and being absent without permission" for two days thereafter. Following an investigation duly held September 24, 1964, Claimant was found at fault as charged and as discipline was dismissed from the service.

From the record it appears that at 7:00 A.M. on Sunday, September 13, 1964, when the Gang Foreman J. H. Hamilton, came to the locker room at the shop track, he there found present, presumably ready for the work of the first shift, the regularly assigned shop track men, to wit, Car Repairers W. K. Lassiter and Claimant Lamar E. Agee and Helper Herbert Mahone. Foreman Hamilton then went to his office which was not connected with the locker room. Later he was joined there by W. K. Lassiter, above mentioned, who was also Local Chairman of the Carmen at Newport News. Subsequently, they saw Agee outside the door of said office. It was raining and Foreman Hamilton opened the door and invited Agee to come in. However, Agee said he would go to the locker room.

Shortly thereafter, Herbert Mahone came to the foreman's office and said that Agee wished to talk to Lassiter who after a short delay left to see Agee, but he could not find him for Agee had departed. Agee was absent without authorization for the balance of that day and the next two days. He was not heard from until Friday, September 18, following the two rest days of his assignment.

From the record it appears that Claimant's defense to the charge against him was that he had told Foreman Hamilton that he, Agee, was not feeling well and "if it kept on raining I was going home;" that later he told a helper "to tell Mr. Hamilton that I was gone." As to being absent the succeeding two work days, Agee testified: "I assumed they knew I was sick since I told them I was sick when I left the morning of September 13th."

Foreman Hamilton denied having any conversation with Claimant Agee in the wash room when they met there at 7:00 A.M. on the morning of September 13th; he also denied that Agee had mentioned being sick or feeling bad when standing afterward outside the foreman's office; and, further, he denied that still later Helper Mahone came to said office and reported that Agee was sick and was going home.

With reference to a conflict of evidence such as the record discloses here, there have been many awards holding as did this Division in Award 3676:

"It is well settled that where the record contains substantial evidence in support of the Carrier's findings and there is no showing of arbitrary action, this Board will not weigh the conflicting evidence and substitute its judgment for that of the trier of facts. Award 1809."

Neither do we find it improper nor unjust to Claimant that Carrier, in assessing the penalty to be imposed, should have taken into consideration the entire service record of Claimant. (See Second Division Award 3430.)

There being ample evidence in the record supporting Carrier's charge against Claimant and in view of the seriousness of the offense and the poor record of Claimant as to previous absences (Award 5049), we find we cannot sustain the claim of the Employee.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May 1967.