



**Award No. 5359**

**Docket No. 5179**

**2-SOU-CM-'68**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

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

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO (Carmen)**

**SOUTHERN RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1. That under the current Agreement Carman R. L. Farley, Birmingham, Alabama, was improperly suspended from service on May 5, 1965 and discharged from service May 24, 1965.

2. That accordingly the Carrier be ordered to restore the aforementioned employee to service with pay for all time lost from May 5, 1965 and with job rights, seniority rights, vacation rights, pass rights and the protections and benefits due said employee under the hospitalization and life insurance policy with Travelers Insurance Company.

**EMPLOYEES' STATEMENT OF FACTS:** Carman R. L. Farley, Birmingham, Alabama, hereinafter referred to as the Claimant, was employed by the Southern Railway Company, Birmingham, Alabama, hereinafter referred to as the Carrier, until May 5, 1965 at which time he was removed from service charged with "Failing to properly perform his duties as Carman on the morning of May 5, 1965, more specifically that he stenciled and failed to echometer the following cars PRR 24910, CN 534172 and NWX 816." Formal investigation was held on May 13, 1965, copy attached and marked Exhibit A.

The trial officer designated by the Carrier was Mr. C. A. Jay, Master Mechanic, Birmingham, Alabama.

In a letter dated May 24, 1965, the Claimant was advised by the Master Mechanic that he was guilty as charged and was being dismissed from the service of the Carrier, copy attached and marked Exhibit B.

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

forever terminated and the Board being without authority to substitute its judgment for that of the Carrier, is left with no alternative but to make a denial award.

All evidence here submitted in support of Carrier's position is known to employe representatives.

Carrier not having seen the Brotherhood's submission reserves the right after doing so to make response thereto and submit any other evidence necessary for the protection of its interests.

Oral hearing is requested.

(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 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 was discharged for falsely indicating that he had ultrasonically tested car axle journals. The employes claim that discharge was an unjust penalty for the offense which was proven.

The claimant admits that he stenciled three cars before scoping them in violation of instructions that cars were not to be stenciled until actually tested. However, according to his testimony at the hearing, he later came back and tested these cars. He contended that he performed the work out of sequence to save time because he had been told the cars were wanted "right quick." He testified that he could not get the testing equipment to the three cars in question when he started his shift at midnight because the track was blocked. He went ahead and marked the cars and then later, when the track was clear, he came back and tested them.

The carrier offered no evidence at the hearing which conflicted with the claimant's version of what transpired. The carrier's witness observed these cars only until 2:45 A.M. and he recognized that the Claimant could have returned after that time and tested the cars before they were moved. He testified that, on the other two occasions during the shift he observed claimant, the claimant was performing the work in the proper sequence.

It is not the function of this Board to weigh the evidence, and the carrier's determination of what occurred will be upheld if it is supported by persuasive, creditable evidence. E.g., Award 2-4753 (Whiting); Award 2-3266 (Hornbeck). However, there simply is no evidence which would permit the carrier to determine that the claimant was guilty of anything more than performing his work out of the proper sequence in a misguided attempt to expedite the performance of the work. It is by no means clear that the carrier even attempted to make any determination beyond this.

Performing the work out of sequence was a serious infraction. It created an untold risk that the required testing would not be performed. It was in violation of specific instructions. Substantial punishment was in order. Within the bounds of reason, the choice of punishment was for the carrier not this Board. E.g., Award 2-3092 (Burke); Award 2-1323 (Donaldson). However, dismissal is so incommensurate with the proven misconduct, viewed in the light of the claimant's 12 years of service without a blemish and the circumstances under which the violation occurred, that it appears the carrier went beyond the bounds of reason in dismissing the claimant.

There is nothing in our previous awards suggesting the contrary. In awards where we have upheld dismissal for falsely indicating that cars have been serviced, e.g., Award 2-3828 (Doyle); Award 2-3626 (Carey), there was evidence that the servicing was never performed. In awards such as Award 2-1459 (Carter), where we have upheld dismissal for failing to follow instructions, the circumstances were such that the failure constituted insubordination.

While dismissal was unjust, the claimant is not entitled to any back pay. A lengthy suspension would have been justified. By his intentional misconduct, the claimant put the carrier in a position where it had to attempt to determine a proper penalty. In making this determination there is no showing that the carrier acted with actual malice, as distinguished from constructive malice which is inferred from the unreasonableness of the assessed penalty.

#### **AWARD**

Claim sustained in part and denied in part. The claimant is to be reinstated with seniority and vacation rights unimpaired, and the period between May 5, 1965, and his reinstatement is to be treated as a disciplinary suspension without pay.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of SECOND DIVISION

**ATTEST: Charles C. McCarthy**  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.