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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6364
Docket No. 6193
2-SOU-CM-'72

The Second Division consisted of the regular members and in addition Referee **Irving R. Shapiro** when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Southern Railway Company

Dispute: Claim of Employees:

1. That under the current Agreement, Carman J. C. Jenkins, Coster Shop, Knoxville, Tennessee, was improperly discharged from service October 15, 1970.
2. That accordingly, the Carrier be ordered to restore Carman J. C. Jenkins, Coster Shop, Knoxville, Tennessee, to service and be paid for all time lost beginning October 16, 1970 and be granted all other rights and benefits due under the controlling Agreement.

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.

Rule 34 of the controlling Agreement reads in part as follows:

"An employee will not be dismissed without just and sufficient cause or before a preliminary investigation,..."

The claimant herein admitted committing assault and battery upon his supervisor. In Awards too numerous to cite, this Board has held that such conduct constitutes just and sufficient cause to terminate an employe.

The Petitioner seeks an exception from the above stated sound and well established concept by alleging that the claimant was provoked into committing the punishable acts. Except for the claimant's own subjective responses to the circumstances on the night of October 15, 1970, the record herein fails to support

this allegation. It further charges that the Carrier failed to sustain the full basis upon which it removed the claimant from service, namely; "insubordination, ... and immediately leaving the premises without regard for the welfare of your supervisor etc.", in addition to the admitted attack and physical violence committed. The Carrier is only required to establish that it had just cause to separate claimant from its service. Even if it could be held that it did not present substantial evidence to sustain those charges, it would be immaterial, the record being sufficient to support a meaningful ground for the action taken.

As to the Organization's plea that the penalty was excessive, considering the claimant's seventeen years of service, we reassert the holding of all divisions of the National Railroad Adjustment Board which were best summarized by Referee Whiting in Third Division Award No. 6085 as follows:

"There is a vast difference between the correction of an excessive penalty and reinstatement on a leniency basis. We can correct an excessive penalty because the imposition of such a penalty is a violation of those provisions of the agreement which are adopted to protect employes from arbitrary, capricious or discriminatory discipline by the carrier. Reinstatement on a leniency basis is a discretionary remission of an appropriate penalty. We do not remit penalties on a leniency basis because we have no power or right to exercise managerial discretion."

The Claimant having been afforded a fair hearing, the record indicating substantial evidence to sustain a finding of just cause for dismissal and the penalty imposed was not arbitrary, capricious or an abuse of discretion we will not reverse the determination by the Carrier. (see Awards 1323, 3092, 2087, 2769, 3874, 4000, 4001, 4089, 4132, 4195, 4199, 4693, 6196, 6240.)

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September, 1972.