

Award No. 1041

Docket No. 967

2-LV-CM-'44

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Herbert B. Rudolph when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (CARMEN)**

LEHIGH VALLEY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That within the meaning of the controlling agreement and particularly Rule 35, Carman Tony J. Lattari has been unjustly dealt with by the carrier on and since September 8, 1943.

2. That Carman Tony J. Lattari is entitled to be restored to service with his seniority rights unimpaired and compensated for all time lost retroactive to and including September 8, 1943, by the carrier.

EMPLOYEES' STATEMENT OF FACTS: At Sayre, Pennsylvania, car shop, the carrier maintains a force of approximately 150 carmen and helpers on the 8:00 A. M. to 4:30 P. M. shift, six days a week.

Tony J. Lattari entered the service of the carrier at Sayre car shop as a carman helper on October 18, 1928, and who was promoted to the classification and pay of a carman on April 4, 1941. Since this date several additional carmen helpers have been promoted to carmen.

For several months prior to September 2, 1943, Carman Tony J. Lattari was assigned to and worked in the train yard as a car inspector seven days per week. However, Carman Lattari was transferred back to the car shop, six days per week, on September 2, 1943, and thereupon was assigned to repair cars in the steel yard with a carman helper where he worked (except Sunday, September 5 and Labor Day, September 6), on September 2, 3, 4, 7, and resumed work as usual on the morning of September 8 on track No. 11 on a fitting up job.

On the previous day, Tuesday, September 7, as junior carmen to Carman Lattari were assigned in the train yard to work Sunday and Labor Day, September 5 and 6, Carman Lattari turned in a time claim for the time worked by these junior carmen on September 5 and 6. This was approved by his committee and turned in to General Car Foreman Kresge that same day, September 7.

On the morning of September 8, Carman Lattari, with his helper, was at the west end of steel yard track No. 11, which accommodates approximately 20 cars. Car Foreman Ault came to Carman Lattari from the other end of track No. 11, on which there were several carmen working, and instructed Carman Lattari to buck rivets for another carman. Carman Lattari's helper

"Q—And that you also directly referred to Mr. Kresge and said—
'You can fire me any time you want to, God Damn you. What
do you think of that?'"

"A—Yes."

We respectfully submit that Mr. Lattari was given a fair hearing and was found guilty of the charges against him, as indicated by his statement at the investigation, and his conduct justified his dismissal and our conclusion that we could not restore Mr. Lattari to the service without seriously affecting the discipline of the shop. Therefore, we ask that our action be sustained.

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.

The parties to said dispute were given due notice of hearing thereon.

The record clearly shows that Mr. Lattari used abusive language addressed to the foreman on September 10. The carrier was, therefore, justified in finding Lattari guilty of the offense, and subjecting him to disciplinary action. It is well established that the action of the carrier in discipline cases will not be disturbed unless the carrier has acted arbitrarily, without just cause or in bad faith. It is clear, so far as this record is concerned, that the carrier has acted neither arbitrarily, without just cause or in bad faith so far as the finding of guilt is concerned. The question presented is whether it has so acted in the infliction of punishment. Generally the Board will not substitute its judgment for that of the carrier on the question of the amount of discipline imposed by management; but where the amount of such discipline is so out of proportion to the gravity of the offense as to appear arbitrary, the Board does interfere.

In this case we believe there are mitigating circumstances, which while not a defense, nevertheless bear heavily upon the severity of the discipline imposed. The facts disclose that Lattari was suffering from a heart ailment, which was known to the carrier. The argument arose over the type of work to which Lattari was assigned, and whether he should be asked to perform such work in view of his physical condition. Obviously, Lattari was concerned about the ailment, and while such concern is no justification for his actions and language, it does afford substantial basis upon which to predicate a belief that his statements and acts were not intended to be as serious as they might appear. Lattari had a service of approximately twelve years with the carrier and his record was clear of any prior charges or difficulty. We have reviewed a large number of awards of this and other Divisions of the Board, and while each case must of necessity depend upon its own facts and circumstances, nevertheless, from such review of the awards we are convinced that dismissal of Lattari for this offense when viewed in the light of the facts of record, does not accord with the discipline others have considered reasonable under somewhat similar circumstances.

We appreciate the problems with which the carrier must contend in maintaining discipline, and hesitate to interfere, but after giving the whole record careful consideration we are convinced that dismissal in this case does not constitute a reasonable exercise of the carrier's power to impose discipline. We therefore direct that Lattari be reinstated to service, with seniority rights

restored. We are of the opinion that being held out of the service, and the loss of compensation during that time, is ample discipline for the offense.

AWARD

Tony J. Lattari will be reinstated on or before November 23, 1944, with seniority rights restored.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 13th day of November, 1944.