

Award No. 1303
Docket No. 1222
2-SP (PL)-MA-'49

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES: That the carrier's refusal under the current agreement to reinstate Machinist George Gellert on or before April 14, 1948 is unjust, and that accordingly the carrier be ordered to reinstate him to all service rights with pay for all time lost, retroactive to said date.

EMPLOYEES' STATEMENT OF FACTS: The Carrier employed George Gellert, hereinafter referred to as the claimant, on May 8, 1941, as a machinist at Oakland, California, and his regularly assigned hours on December 14, 1946, were from 3:30 P. M. to 11:30 P. M.

The carrier preferred charges against this claimant on December 17, 1946, for alleged infraction of company rules while on duty at West Oakland roundhouse on Saturday, December 14, 1946, and therein set his hearing at 3:30 P. M. on December 23, 1946. A copy of this transaction from Assistant Master Mechanic Williams to the claimant, is identified as **Exhibit A** submitted herewith.

The claimant's hearing was held as above scheduled, but it was recessed that day at 5 P. M., due to the absence of witnesses for the carrier and the claimant. This hearing, however, reconvened at 3 P. M., December 26, 1946, and was concluded that day at 4:30 P. M. A copy of the hearing transcript is submitted, identified as **Exhibit B**.

On January 9, 1947, the carrier elected to discharge this claimant from the service, and a copy of this transaction from Superintendent Moody to the claimant is submitted, identified as **Exhibit C**.

The dismissal of this claimant has been handled in accordance with the current collective agreement, effective April 16, 1942, up to and with the highest designated Carrier officer to whom such matters are subject to appeal, with the result that this officer has declined on more than one occasion to settle this dispute on any basis, for the reasons stated in the copies of letters submitted, identified as **Exhibits D, D-1, E-1 and E-3**, respectively, dated June 28, 1947, January 26, April 14 and June 7, 1948.

POSITION OF EMPLOYEES: It is submitted that this claimant did not commit any offense and was not convicted of having committed any offense,

adopted by these awards, claimant is entitled to recover in the amount of her net loss of **wages**. In other words she is entitled to recover the amount she would have received from the Carrier during the period she was laid off less such sum as she **actually earned in other employment** during that period. It appears from the record that Miss Allen earned \$10.00 during the time she was laid off." (Emphasis ours.)

The Division's attention is also directed to the following portion of the court's Oral Opinion and Findings of Fact and Conclusion of Law in the case of **Brotherhood of Maintenance of Way Employees, by Luther E. Rhyne, a member of the said Brotherhood and an officer thereof, being its General Chairman of Employees of the Quanah, Acme and Pacific Railway v. Quanah, Acme and Pacific Railway Company**, (District Court of the United States, Northern District of Texas, Dallas Division No. 772 Civil) :

"It would not be right to allow him to recover what he would have made from the defendant Railway and also keep in his pocket what he did make with other employers during the time."

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the Board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

CONCLUSION

Having conclusively established that the claim in this docket was not presented or progressed in accordance with controlling provisions of the current agreement, the carrier respectfully submits that it should be dismissed.

If, however, the Board elects not to dismiss same, the carrier then respectfully requests that the claim be denied on the showing it has made that the claim in its entirety is without merit.

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 waived right of appearance at hearing thereon.

Foremen Wagner, Actis and Jenkins gave positive and convincing testimony on the subject of Gellert's being under the influence of intoxicating liquors during his working hours on December 14, 1946. It cannot be said, on the record submitted, that the carrier acted either arbitrarily or without just cause in directing Gellert's dismissal.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 24th day of February, 1949.