

**Award No. 1378**  
**Docket No. 1302**  
**2-SP (Tex&La)-CM'50**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**SECOND DIVISION**

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION No. 162, RAILWAY EMPLOYEES'**  
**DEPARTMENT, A. F. of L. (Carmen)**

**SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA**  
**(Texas and New Orleans Railroad Company)**

**DISPUTE: CLAIM OF EMPLOYEES:** That under the current agreement Carman Merlin L. Harvey was unjustly discharged on April 5, 1949, and that accordingly the carrier be ordered to reinstate him to all service rights with compensation for all time lost retroactive to the aforesaid date.

**EMPLOYEES' STATEMENT OF FACTS:** Merlin L. Harvey, hereinafter referred to as the claimant, was regularly employed by the carrier at Avondale, Louisiana. He entered the service of the carrier as a carman in the Algiers general car shops on December 31, 1941, and was laid off in force reduction on January 31, 1949, returned to the service as a car repairer at the Avondale car repair track and was regularly assigned from 7:30 A. M. to 11:30 A. M. and from 12:00 Noon to 4:00 P. M., seven days per week at the time he was removed from the service of the carrier on April 5, 1949.

On the morning of March 14, 1949, the claimant was ill with a cold and due to the inclement weather on that date the claimant knew that he would have to work in the rain on account of there being no shed at Avondale to work under and he knew he would get wet and cause his illness to become worse. At approximately 8:00 A. M. March 14, 1949, the claimant's mother called Car Foreman E. J. Castille's office to report that the claimant would not be able to report for work that day. Car Foreman Castille was not in his office at the time the claimant's mother called, but his clerk answered the 'phone and stated to the claimant's mother that she could not take reports of men laying off from work.

On the same date, March 14, 1949, the following employees: A. Bergeron, I. P. Zatarian, R. Blanchard, F. L. Foucha and Sonnier employed as carmen at the Avondale car repair track, were also off duty account the inclement weather. On March 15, 1949, Chief Terminal Inspector A. J. Garon (who is the general foreman over the Avondale car repair track) called the claimant and the other five above named employees in the car foreman's office and questioned them as to why they were absent from their assignments on March 14, 1949, without permission from their foreman. They all gave their reason and they were accepted by the general foreman with the exception of the claimant and his reason was not accepted by the general foreman and the general foreman started an argument with the claimant by stating to him that he (the claimant) could not have been sick as the rest of the men told him (the foreman) that they were sick on March 14.

**Award 3618—Third Division—Referee Rudolph:**

"This Board has repeatedly held that where the Carrier has not acted arbitrarily, without just cause or in bad faith, the judgment of the Board as to propriety of dismissals will not be substituted for that of the Carrier."

**Award 3827—Third Division—Referee Douglas:**

"A great number of Awards of this Division have consistently held that in a matter of discipline it is not a proper function of the Division to pass upon the credibility of witnesses or to weigh the evidence in order that we may substitute our judgment for that of the carrier."

In the event, and only in the event, this Division should, despite the evidence, which definitely establishes that Carman Harvey violated the rules of the company, as well as the rules of the agreement between the company and its employees, applicable to his class, and regardless of the numerous declarations that the Board will not substitute its judgment for that of the management in discipline matters, disregard all of this and conclude that Carman Harvey should be reinstated and paid for time lost, then, in that event, the carrier, without waiving, but insisting upon its position as to the merits of this claim, submits that the Division should find, and the Award so state, that the claimant be paid only for time actually lost by reason of the discipline imposed; that is, for the days claimant was available, stood for work in his class or craft, and would have worked, less earnings from other employment. In this connection, it should be kept in mind that this case arose by reason of the fact, as stated by Carman Harvey to his foreman, that it was raining on March 14, 1949, and that was the reason he did not work, and further, that he would not work on any day that it rained. In the light of this statement, it would be most unreasonable to expect the carrier to compensate him on days that it rained, in the face of his notice to the foreman that he would not work when it rained, and further, it would be a grave injustice to require the carrier to pay this man for days that he worked in other employment. It is worthy of mention here, on this point, that the Government does not fail to demand reimbursement of any amounts that are paid for unemployment insurance when a man is reinstated and receives any compensation whatever for the period during which he collected unemployment insurance.

In addition to and without waiving any of the foregoing, the carrier submits that in the event, and only in the event the Division should sustain the claim, that compensation, less deductions covered in the preceding paragraph, should be limited from the date of discharge to October 5, 1949, at which time the management, in the belief that discipline had served its purpose, offered to reinstate claimant Harvey.

**CONCLUSIONS**

The carrier has shown that Claimant Harvey violated the rules of the carrier and of the agreement between the carrier and the organization, applicable to employees of his class; that he was insubordinate; wherefore, he was discharged for just and sufficient cause, under circumstances requiring such action in the interest of the maintenance of proper discipline and with due regard for the observance of applicable rules and regulations. There has been no abuse of discretion, capriciousness or bad faith. In the face of the facts and evidence in this case, the Board cannot properly sustain the claim without utterly disregarding its declaration of policy in matters of discipline.

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Wherefore, premises considered, the carrier respectfully urges that the claim be in all things denied.

**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.

#### AWARD

Claim denied as to compensation for all time lost but sustained as to reinstatement with all rights of seniority unimpaired.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

ATTEST: J. L. Mindling  
Secretary

Dated at Chicago, Illinois, this 28th day of February, 1950.