

Award No. 1477

Docket No. 1368

2-L&N-BM-'51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Boilermakers)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That Boilermaker D. R. Crowe was unjustly discharged from service on August 23, 1949, after thirty-four (34) years of service, without a fair hearing under the current agreement and that accordingly the carrier be ordered to reinstate him with service rights unimpaired and pay for all time lost retroactive to September 1, 1949, the date he was subject to be recalled to service.

EMPLOYEES' STATEMENT OF FACTS: Boilermaker D. R. Crowe, hereinafter referred to as the claimant, with service rights of approximately thirty-four (34) years with the Louisville & Nashville Railroad was furloughed by the carrier on May 26, 1949, at Montgomery, Alabama. Under date of July 23, 1949, the claimant received a letter from Master Mechanic F. V. Sherman charging him with cursing, abusing and physically threatening General Foreman W. C. Carr on July 15, 1949 and setting the date of July 28, 1949 at 2:00 P. M. for investigation, a copy of which is submitted herewith and identified as Exhibit A. The claimant requested a postponement of the investigation on July 27, 1949 to enable him to secure the necessary witnesses and after discussing the question with Terminal Train Master W. P. Glover and Special Agent Frank Stallings, he was advised a continuance was granted and when he was ready for the investigation to advise Chief Clerk M. C. Sylvest which was done a few days later by the claimant in the presence of Local Chairman W. L. Davis and they were advised by Chief Clerk Sylvest that he would advise Mr. Glover and after a few days the claimant returned and was advised that Mr. Glover said it was too late, that the papers already had been sent in. It was then learned that a hearing was held on July 28, 1949 without the claimant, his representatives, or witnesses present which resulted in the discharging of the claimant by Master Mechanic F. V. Sherman in his letter August 23, 1949, a copy of which is submitted herewith and identified as Exhibit B. The claimant was subject to be returned to the service of the carrier at Montgomery, Alabama on September 1, 1949 in accordance with his seniority.

The case was handled from bottom to top with carrier officials designated to handle these affairs without affecting a settlement of this dispute.

The agreement effective September 1, 1943, as subsequently amended September 1, 1949, is controlling.

In conclusion, the carrier submits:

1. That Crowe and his local chairman were apprised of the charges against him in accordance with Rule 33 of the agreement and charges were delivered to Crowe personally at 12:40 P. M., July 25, 1949, as shown by Exhibit CC.

2. That Crowe was advised what he should do in event he desired the investigation postponed as shown by Exhibits BB, CC and DD, but he chose to ignore that advice and wilfully refused to attend the investigation.

3. That the evidence presented in the investigation conducted on July 28, 1949, showed conclusively, by the statements of General Foreman Carr and Machinist Burton that Crowe was guilty of the charges against him and the offenses were such as to fully warrant his dismissal.

4. That while there was no violation of the agreement, the carrier agreed to comply with the request made on behalf of Crowe that he be given an opportunity to present his side of the case by permitting him to read the statements made by Mr. Carr, Mr. Burton and Mr. Stallings, in the investigation conducted July 28, 1949, and have those men present for Crowe or his representative to ask them any questions they desired and that others involved be permitted to question Crowe or any witnesses that he may desire to have present to the extent necessary. However, Crowe and the organization then declined to go into any further hearing of the case, unless Crowe were restored to service and paid for time lost notwithstanding that he has not stood for service under the agreement and there is no basis under the agreement for any claim for pay for time lost.

5. Crowe has demonstrated by his actions, as brought out in the investigation conducted on July 28, 1949, by his wilfull refusal to attend investigation on that date, and by his refusal to go into any further hearing of the case, that he is not the type of employe that the carrier should be requested to continue in its service.

For the reasons stated the claim in its entirety should be declined. The attention of the Board is invited to Award No. 1251 of this Division, dated June 29, 1948, in a similar case.

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.

Prior to May 25, 1949, claimant was employed by the carrier as a boilermaker at Montgomery, Alabama. On that day he was furloughed in force reduction. On July 15, 1949, claimant contacted W. C. Carr, general foreman, on the company's property, and precipitated an altercation with him. This resulted in charges being filed and an investigation being held. As a result of the investigation, claimant was found guilty of cursing, abusing and physically threatening W. C. Carr, general foreman, on the date charged and he was dismissed from the service.

The evidence clearly sustains the charge. We cannot say that this discipline imposed was excessive. The only question to be determined is whether claimant was accorded a fair hearing within the meaning of Rule 33, current agreement.

The record shows that charges were preferred on July 23, 1949, in proper form. The investigation was set for July 28, 1949, at 2:00 P. M. Notice of the hearing and a copy of the charges were delivered to claimant

by F. M. Stallings on July 25, 1949 at 12:40 P. M. Claimant received for the notice and charges, and advised that he would be present. On the morning of July 27, 1949, claimant contacted Terminal Trainmaster Glover about the investigation and the possibility that he might want a postponement. It will be noted that Terminal Trainmaster Glover is the officer who was assigned to conduct the investigation. On July 27, 1949, claimant called F. M. Stallings by telephone and asked for a postponement. Stallings advised claimant that he had no authority to grant his request and that he should take the matter up with Terminal Trainmaster Glover or W. C. Carr, general foreman. Stallings, however, informed Glover of the request for postponement. Glover thereupon sent Stallings to contact claimant and advise him that if he desired a postponement it would be necessary to take it up through General Foreman Carr's office. Claimant refused to do this. The investigation was held and claimant or his representative did not appear. There is some evidence in the record that claimant believed that a postponement had been granted. The undisputed evidence of Stallings that he definitely explained the necessity of further action to obtain a postponement would appear to dissipate the credibility of latter statement.

The record further shows that although carrier would not agree that the investigation was improperly held, it was willing to permit claimant to produce any evidence he had and to interrogate the witnesses that had already testified. Claimant refused to do this unless he was reinstated and paid for time lost. The carrier would not do this, and the appeal to this Board resulted.

We think the investigation was fairly held. Claimant knew that a postponement had not been granted and he refused to take the necessary steps to obtain one. He is in no position to complain about the investigation being held in his absence. In addition to the foregoing, carrier offered to permit claimant to produce any evidence he may have had. This he refused to do unless he was first reinstated. His demand that he be first reinstated was not justified. If he had any evidence to submit, he should have done so when the carrier offered the opportunity. It would then have been in the record for the consideration of this Board, even though it might not have otherwise benefited him.

Although we sustain the action of the carrier in dismissing claimant from the service, there are certain mitigating circumstances which ought to be considered. In the first place, it must be conceded that the indefinite furloughing of an employe who is dependent upon his position for a living, is a matter of extreme importance to him. This claimant had service rights with this carrier extending over a period of thirty-four years. The record shows no previous occasion upon which discipline had been assessed. There is evidence in the record from which it can be inferred that claimant did not intend to default at the investigation. We think a fair consideration of the case in all its aspects leads to the conclusion that the purposes of discipline have been accomplished and that claimant could be returned to service without injury to the carrier and the service it performs.

AWARD

Claimant restored to service with seniority rights unimpaired without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1951.