

Award No. 1795

Docket No. 1657

2-T&P-CM-'54

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

THE TEXAS AND PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That under the current agreement Carman U. C. Hamilton was unjustly dismissed from the service effective October 5, 1951 and that, accordingly, the Carrier be ordered to reinstate this employe in the service with his seniority rights unimpaired, with pay for all time lost retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: Carman U. C. Hamilton, hereinafter referred to as the claimant, was employed by the carrier as such on Apr. 8, 1949, at Sweetwater, Texas, and who held a regular assignment as a car inspector in the train yard on the third shift from 12:00 midnight to 8:00 A. M., Tuesdays through Saturdays, with rest days Sunday and Monday.

The carrier's master mechanic elected on September 26, 1951 to summon the claimant to stand trial in the car foreman's office at 10:00 A. M., Monday, October 1, 1951, and which is confirmed by copy of letter submitted herewith and identified as Exhibit A.

The investigation was held as scheduled and it was conducted by the carrier's master mechanic. A copy of the transcript thereof is submitted herewith and identified as Exhibit B. However, four days later, or on October 5, 1951, the carrier's master mechanic also made the election to dismiss the claimant from the service, which is confirmed by letter addressed to the claimant by J. H. Webb, master mechanic, copy of which is submitted herewith and identified as Exhibit C.

This dispute has been handled with the appropriate designated officers of the management with the result that the highest designated carrier officer with whom such disputes are subject to be appealed, has declined to adjust it on January 10 and again on April 10, 1952, pursuant to a conference held the previous day on the matter.

The agreement effective September 1, 1949, is controlling.

the amount of any compensation earned in outside employment during the period in question. In this connection we refer to the current agreement, Rule 22, (copy of which is on file with your Board) and Second Division Award No. 1638 which ruled on this particular point.

**THE DISCIPLINE RECORD OF THE CLAIMANT WITH THE
CARRIER DOES NOT REVEAL THAT LENIENCY
IS JUSTIFIED.**

The employees, in handling this case with the carrier, have stated that Car Foreman Elliott was discriminatory in dealing with car forces at Sweetwater, Texas. To this the carrier cannot agree and we are offering a petition marked as Exhibit F to show that the men at Sweetwater have found Mr. Elliott to be fair and just in every respect. It will be noted that the local chairman of the carmen at Sweetwater, namely Mr. W. C. Hensen, signed the petition, which was one not requested by the carrier. We are also submitting herewith as carrier's Exhibit G, a sworn statement from Car Foreman Elliott which shows that he has never at any time made a statement that it was his intention to fire anyone at Sweetwater, Texas.

The carrier has shown the employees' general chairman the discipline record of Mr. Hamilton and called his attention to the fact that about a month and a half before he was found asleep on duty he had been assessed 45 demerits for being off duty without permission and being engaged in other activities which were not in line with his duties. Mr. Hamilton signed a waiver of investigation, acknowledging such charge, under date of August 14, 1951. A copy of his letter to Master Mechanic Webb, and Mr. Webb's letter to Mr. Hamilton in connection with that case, are submitted herewith and identified as Carrier's Exhibit H and I respectively. The instant offense; the prior case referred to above, and the claimant's previous record as a whole do not justify leniency.

The carrier asserts that the employees' claim is without merit and we respectfully request your Honorable Board to so decide.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

On Wednesday, September 26, 1951, J. H. Webb, Master Mechanic, charged Carman U. C. Hamilton with "having been asleep on duty at Sweetwater, Texas, 6:30 A. M. September 26, 1951." Hearing was had thereon on Monday, October 1, 1951. By letter dated October 5, 1951, Hamilton was notified that he had been found guilty of the charge against him and that he was being removed from carrier's service.

Hamilton was last employed by this carrier as a carman on April 8, 1949. He was regularly assigned as a car inspector in the train yard at Sweetwater, Texas, with a work week from Tuesday through Saturday with a tour of duty from midnight to 8:00 A. M.

Carmen of System Federation No. 121 contend Hamilton was unjustly dismissed from carrier's service and therefore ask, in view of the provisions of Rule 22 (d) of their effective agreement, that he be reinstated in the carrier's service with his seniority rights unimpaired and with pay for all time lost.

It is first contended that the evidence adduced at the hearing is not sufficient to show claimant guilty of the precise charge made against him. Rule 22 (a) provides that an employe will be "advised of the precise charge against him." The evidence adduced shows claimant was asleep while on duty, at Sweetwater, Texas, on September 26, 1951, from shortly after 5:00 A. M. until 6:30 A. M., when he was awakened. The charge made was fully established by the evidence carrier adduced at the hearing.

It is also contended that the hearing was not fair and the kind contemplated by the parties' agreement because Master Mechanic J. H. Webb acted as jury and judge. It is true that Webb filed the charges, conducted the hearing, asked questions, determined the issues and assessed the penalty. But such acts on his part do not destroy the validity of the hearing. For a full discussion on this subject and the reason why the foregoing are proper procedure see Awards 4840, 5701 and 6103 of the Third Division. It would serve no useful purpose to repeat them here.

Was dismissal unreasonable? The charge is a serious one and claimant admitted that on one other occasion, August 1, 1951, he had been off duty in a card game. For this offense his record had been assessed 45 demerits. We do not think it can be said, under these circumstances, that it was.

It is also suggested that the record reflects Car Foreman C. O. Elliott, the principal witness against claimant, was determined to get rid of him and others and had come to Sweetwater for that purpose. We do not think the record sustains this charge.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1954.

DISSENT OF LABOR MEMBERS TO AWARD NO. 1795

The majority in their findings cite a previous charge against the claimant as reason for not considering his present dismissal as unreasonable. From the evidence introduced at the hearing on the precise charge brought against the claimant his dismissal is not justified. Evaluation of the evidence in the hearing record should have resulted in claimant's restoration to service.

Charles E. Goodlin

R. W. Blake

T. E. Losey

Edward W. Wiesner

George Wright