Award No. 1817

Docket No. 1722

2-AT&SF-CM-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Carman Helper-Oiler Ernest Maki has been unjustly removed from service since July 15, 1953.

2. That accordingly the carrier be ordered to reinstate this employe to his seniority, vacation and other rights unimpaired with compensation for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: Carman Helper-Oiler Ernest Maki, hereinafter referred to as the claimant, was first employed by the carrier on October 3, 1940 as a roundhouse laborer at Chicago, Illinois. The carrier then, on April 3, 1942, promoted the claimant to the position of a coach cleaner and next elevated him on May 11-12, 1942 to the position of a carman helper-oiler in the Corwith Yard whereat he remained on the day shift with a seniority date of May 11, 1942 as a carman helper until he was removed from the service at 3:30 P. M. Wednesday, July 15, 1953.

The carrier's master mechanic summoned the claimant by written notice dated June 15, 1953 to stand trial the next day, or at 10:00 A. M. on June 16, 1953, on an alleged charge of intoxication on duty June 14, 1953, as contained in the copy thereof submitted herewith and identified as Exhibit A. This final investigation, however, was held on Wednesday, June 17, 1953, instead of the day previous (June 16) and a copy of the transcript thereof is submitted herewith and identified as Exhibit B.

The carrier's master mechanic made the final election to remove this claimant from the service at the close of his shift on Wednesday, July 15, 1953 and which is affirmed by a copy of letter dated at Corwith, July 15, 1953, submitted herewith and identified as Exhibit C.

This dispute has been handled up to and with the highest designated officer of the carrier to whom such appeals are subject with the result that on more than one occasion he has declined to adjust it.

this contention of the Carrier upon authority of Cases 85 and 87 of Decisions of Railway Adjustment Board No. 1 and Decisions 943 and 1618 of Train Board of Adjustment, Western Division. In those cases it is held that the employe is entitled to recover the amount he would have earned had he not been laid off without deduction of wages actually earned from other sources during the period he is laid off. However sound those decisions may be they have been superseded by the decisions of this Board above mentioned, i.e., Award 5862 of the First Division and Award 1314 of this Division. Under the rule 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."

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 Employes, by Luther E. Rhyne, a member of the said Brotherhood and an officer thereof, being its General Chairman of Employes 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): (Emphasis ours.)

"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.

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.

Claimant was employed as a carman helper (oiler) at carrier's Corwith Yard, Chicago, Illinois. On June 17, 1953, claimant was given a hearing on a charge that he was intoxicated while on duty on June 14, 1952. Claimant was found guilty of the offense and dismissed from the service of the carrier. The organization contends that claimant was unjustly removed from service and demands pay for all time lost.

The record is sufficient to sustain the following findings of fact: Claimant was assigned to work from 7:30 A. M. to 3:30 P. M., Tuesday through Saturday with rest days Sunday and Monday. He reported for work on June 14, 1953 at 7:30 A. M. So far as the record shows he was fit for service at that time and showed no evidence of being intoxicated. About 9:00 A. M. Foreman Auge observed claimant in the yard about 200 feet south of the 38th Street crossing. He was staggering. He had a peculiar look in his eyes and his face had peculiar expression. He did not smell any odor of liquor but stated positively that claimant was drunk. He called Acting Foreman Prochaska who directed Foremen Fortune and Myscofski to investigate. Prochaska talked

with claimant earlier and was told by claimant that he was sick—that he had gas on his stomach. Prochaska told him he was free to go home but he elected to remain on the job. Fortune and Myscofski found claimant standing between two cuts of cars in a dazed condition. He had difficulty in understanding what was said to him. He had the odor of liquor on his breath. It was difficult for him to walk and the two foremen helped him across the rails to the oil shanty. He was turned over to special officer Nielson who testified to claimant's unsteadiness of gait, that he had a dazed look in his eyes, a small amount of froth on his lower lip and a smell of wine on his person. Nielson stated that he appeared to be intoxicated. No one saw claimant take a drink and no liquor was found in his possession.

Claimant says that he was all right until after he worked a couple of trains when he began to feel bad. He says he had "gas on his stomach." He thought he would be all right and continued to work. He says he took a walk to the 38th Street Crossing, a place where he had no duties to perform, because he thought it would help him. He states that he is afflicted with diabetes for which he takes shots. He was under a doctor's care but did not go to him for three days after the incident in question. He says he did not have a drink of intoxicating liquor that day. No claim is made that claimant was suffering from an overdose of insulin as argued. Claimant at all times said he was suffering from gas on the stomach caused by something he ate. No medical evidence is provided to enlighten the Board as to the likelihood of his story.

Claimant was not in condition to work at the time in question. Risk of personal injury to the claimant and and other employes was incurred by his condition. Damage to carrier's property could have resulted. There was conflict in the evidence but is clearly supports the position of the carrier. It is not our function to pass upon the credibility of witnesses or determine the truth of conflicting evidence. We adhere to the rule that if the evidence is substantial and supports the charges we will not disturb the findings unless it is affirmatively made apparent to us that the carrier's action is so clearly wrong as to amount to an abuse of discretion. The Railway Labor Act does not prohibit a carrier from discharging employes for inefficiency or bad conduct. Nor does the collective agreement prohibit such action. It does limit the carrier to the extent that it may not arbitrarily or capriciously deprive an employe of his seniority rights. The carrier is held responsible for the safety of its employes and property and the public. Its right to guard against hazards which affect property damage and safety of employes and the public, cannot be questioned. It is only when it becomes arbitrary and unreasonable in its relation to its employes that this Board has authority to order corrective measures. We find no evidence of arbitrary or unreasonable action in the dismissal of this claimant.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July, 1954.