

Award No. 2228

Docket No. 1920

2-L&N-CM-'56

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. 91, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That under the current agreement Carman J. F. Holder was unjustly discharged from service on January 19, 1952.

2—That accordingly the Carrier be ordered to restore this employe to service with all seniority rights unimpaired and with compensation for all time lost retroactive to the aforesaid date.

EMPLOYEES' STATEMENT OF FACTS: Carman (Car Inspector) J. F. Holder, hereinafter referred as the claimant, had a regular second shift assignment on December 13, 1951 with seniority dating of 2-21-46 as carman.

After working a first shift 8-hour assignment from the overtime board, the claimant assumed the duties of a regular second shift position immediately following the first shift assignment at 3:00 P. M. working this latter assignment until relieved by the management at 10:30 P. M., December 13, 1951.

Under date of December 21, 1951, Carman Holder was charged with responsibility in connection with being under the influence of some intoxicant and not physically able to take care of his assigned duties as car inspector-repairer on second shift at Ranken Yards, St. Louis, Missouri, the evening of December 13, 1951. A copy of that citation is submitted herewith and identified as employees' Exhibit A.

As a result of charges preferred, investigation was held in the assembly room of the general foreman at E. St. Louis, Illinois, beginning at 1:30 P. M., Friday, December 28, 1951; transcript of investigation is submitted herewith and identified as employees' Exhibit B.

Under date of January 21, 1952, the carrier's master mechanic wrote the claimant advising that he was dismissed from service effective January

I, W. R. Lowe, a Notary Public in and for the County of St. Clair, State of Illinois, certify that Oscar A. Karmer, appeared before me this 16th day of February, 1955 and acknowledges that above is his statement, and signed same in my presence.

SEAL

/s/ W. R. Lowe,
Notary Public

My Commission expires Aug. 12, 1957."

Mr. Holder himself confirmed the statement of Foreman Karman concerning his actions while in our service when he wrote the master mechanic on November 23, 1952, as follows:

"I am writing you wanting to know if there is any chance of getting you to give me another chance. I sure would appreciate it if you reinstate me and try me one more time. The Company is short of men in E. St. Louis and St. Louis at present."

CONCLUSION

Carrier reiterates:

(1) That this claim is improperly before the Board and should be dismissed as it was not progressed on the property as contemplated by the Railway Labor Act and the current agreement.

(2) If for any reason this Board should consider the case on its merits, then there is ample evidence to substantiate the charges against Carman Holder. Further, that in view of the seriousness of his offense and his prior record, his dismissal was entirely justified and should stand. A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the carrier. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer. (First Division Award 14421, Referee Whiting) Also see First Division Awards 15316, 15317, and 15318, in which it was held:

"The Board is without power to pass upon the propriety of the penalty imposed or to direct the Carrier to reinstate or rehire. The principle laid down in Awards 13052 and 14421 is in all respects reaffirmed and controlling in this 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.

This is a disciplinary proceeding. It involves Carman J. F. Holder. It is contended carrier unjustly discharged Holder from its service on January 19, 1952. Because of the foregoing the organization asks that claimant be restored to carrier's service with seniority rights unimpaired and that he be compensated for all time lost.

Claimant was originally employed by carrier on February 21, 1946 at East St. Louis. On Thursday, December 13, 1951, while working on the

second shift to which he was regularly assigned, he was relieved therefrom about 10:30 P. M. Thereafter, on Friday, December 21, 1951, he was notified by a letter from E. B. Bridges, foreman, as follows:

"You are charged with responsibility in connection with being under influence of some intoxicant and not physically able to take care of your assigned duties as car inspector-repairer on second shift at Ranken Yards, St. Louis, Mo., the evening of December 13, 1951."

He was also notified by this same letter that an investigation would be held of the charges on Friday, December 28, 1951, in the conference room at the roundhouse, East St. Louis, Illinois. This investigation was held and, on Monday, January 21, 1952, carrier's Master Mechanic P. R. Mitchell notified claimant, by letter, that he had been relieved from his duties as of Saturday, January 19, 1952.

Carrier contends the claim is not here for our consideration on the merits because it was neither handled on the property within the procedures provided therefor by the rules of the parties' schedule agreement nor as contemplated by the Railway Labor Act.

After claimant was notified that he had been dismissed from carrier's service the record shows the following happened, although the organization says it carried on oral discussions in regard to the claim with officials of the carrier over a long period of time: on February 2, 1952 the organization's local chairman asked the master mechanic for a transcript of the investigation hearing, which was furnished him on February 4, 1952; on November 23, 1952 claimant wrote the master mechanic asking if there was any possibility of his getting reinstated, which request was denied; on October 13, 1954 the organization's general chairman wrote carrier's superintendent of machinery presenting the claim to him which is presently before us, which was denied on October 19, 1954; on November 5, 1954 the organization's general chairman presented the same claim to carrier's director of personnel, who by letter dated December 11, 1954 denied the claim both on its merits and because Rule 32 of the parties' agreement had not been complied with; on December 14, 1954 the organization's general chairman wrote carrier's director of personnel in reference to his letter of December 11, 1954, stating therein "that the undersigned (general chairman) on several occasions discussed this matter with both General Foreman Bridges and Master Mechanic Mitchell" and that "the handling of this matter is strictly in line with Rule 32," thereafter asking for a conference; the requested conference was held on December 28, 1954 and the general chairman was again advised the claim was being denied, both on its merits and because of the organization's failure to properly handle it under the rules of the parties' agreement; and finally, by letter dated April 19, 1955, the organization filed with the Secretary a declaration of intention to present the matter to this Division.

Section 3, First (i) of the Railway Labor Act requires disputes shall be handled on the property in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. While the Act contemplates that disputes coming under its provisions shall be handled in a prompt and orderly manner there is no provision in the Act itself limiting the time within which an appeal must be taken from the final decision of the chief operating officer of the carrier designated to handle such disputes to the Adjustment Board. Consequently, in the absence of any reasonable provision in the parties' agreement in regard thereto, any period of delay, no matter how long, in handling a grievance or dispute by appeal to the Board will not, in the absence of a showing by carrier that it has been or will be injured, damaged or prejudiced thereby, defeat it.

The parties' agreement, in matters of this nature, provides:

"Should an employe subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement

have been violated, the case shall be taken to the foreman, general foreman, master mechanic or shop superintendent, each in his respective order by the duly authorized committee or their representative, within 30 days.

If stenographic report of investigation is taken the committee shall be furnished a copy. If the result still be unsatisfactory, the duly authorized representative shall have the right of appeal, preferably in writing, with the higher officials designated to handle such matters in their respective order and conference will be granted within 15 days of application unless otherwise agreed upon." Rule 32 (a), current agreement.

"Should the highest designated railroad official, or his authorized representative, and the duly authorized representative of the employees, as provided in Rule 32 fail to agree, the case may then be handled in accordance with the Railway Labor Act." Rule 33(a), current agreement.

Since P. R. Mitchell, a master mechanic, notified claimant, in the first instance, that he had been dismissed from carrier's service, the first part of Rule 32(a) has no application here. We come then to that part of Rule 32(a) dealing with the right of appeal to "higher officials designated to handle such matters." It will be observed that no time limit is provided in regard thereto and while such appeal should "preferably" be carried on in writing the rule does not provide that it must. Neither does Rule 33(a) provide for any limit on the time in which appeal may be taken to the Adjustment Board but provides it may be handled in accordance with the provisions of the Railway Labor Act, the terms of which we have hereinbefore already discussed.

While we think, under the circumstances here shown, that the delay in handling this claim would defeat all monetary claim made, nevertheless, we do not think it precludes our consideration of the cause for Holder's dismissal.

The organization contends Holder was unjustly removed from carrier's service because the evidence adduced at the investigation does not show he was intoxicated and, because thereof, physically unable to perform his duties as a car inspector-repairman. The evidence is in sharp conflict. Trainmaster E. J. Becker, Roundhouse Foreman E. B. Bridges and Assistant Car Foreman O. A. Karmner, all of whom were present at the time Holder was taken out of service, testified to facts which fully support carrier's finding that Holder was guilty of the charges which had been made against him. On the other hand Holder, himself, and Electrician R. C. Killingsworth and Coach Cleaner A. Erwin, both of whom saw Holder on several occasions that evening, testified to the contrary. Under this situation we think the following, taken from Award 1809 of this Division, is applicable:

"There was direct conflict in the evidence. The board is in no position to resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony is for the trier of the facts to determine. If there is evidence of a substantial character in the record which supports the action of the carrier, and it appears that a fair hearing has been accorded the employee charged, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established. None is here shown. Reasonable grounds exist to sustain the determination of guilt made by the carrier."

Claimant had, at the time he was relieved, been on duty continuously for over fifteen (15) hours; immediately prior thereto he had been sick for about ten (10) days, from which sickness he had not fully recovered; it was sleeting, the wind was blowing and there was a coat of ice on the ground; and,

at the time Becker, Bridges and Karmer came to the Ranken Coach Yard where Holder was assigned, they found him performing his duties. It is true that carrier says it had previously had trouble with claimant because of his drinking habits but there is no showing that he had ever been found guilty of such a charge. Taking into consideration all of these factors, we find it is unreasonably severe punishment to permanently keep Holder out of carrier's service for what he did. We think, if he is now restored to carrier's service with his seniority rights fully restored but without allowance of any compensation for time lost, that his punishment will be adequate. We direct carrier to do so.

AWARD

Claim asking restoration to carrier's service with all seniority rights unimpaired is sustained but claim for compensation for all time lost denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September, 1956.