

Award No. 2618

Docket No. 2444

2-L&N-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'
DEPARTMENT, AFL (Carmen)**

**LOUISVILLE AND NASHVILLE RAILROAD COMPANY
(Nashville Terminals)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Louisville and Nashville Railroad Company—Nashville Terminals—elected on January 16, 1956 to unjustly dismiss from its service Carman Helper (Oiler) G. E. Hollis because of improper consideration of the indisputable facts of testimony of December 29, 1955.

2. That the Louisville and Nashville Railroad Company—Nashville Terminals—be ordered to

(a) Restore this employe to all seniority rights unimpaired because of the aforesaid unjust action against him.

(b) Compensate this employe for all loss of wages arising out of his unjust dismissal, retroactive to January 16, 1956.

EMPLOYEES' STATEMENT OF FACTS: The Louisville & Nashville Railroad Company (Nashville Terminals), hereinafter called the carrier, employed G. E. Hollis as a carman helper at the Nashville Terminals, whose seniority dating is March 29, 1947 and his current assignment was in the train yard as a car oiler on the 3:00 P.M. to 11:00 P.M. shift.

Carman Helper (Oiler) G. E. Hollis, hereinafter referred to as the claimant, after going to work at 3:00 P.M. Saturday, December 17, 1955, became seriously ill and which necessitated his going home at approximately 4:45 P.M. without permission only because his foreman could not be located, and who thereafter had to call a doctor for relief. After relief was obtained he then returned to his position at approximately 10:00 P.M.

the responsibilities of his job. Certainly there is nothing in the record covering Claimant Hollis' dismissal, or in his prior record as shown above, to indicate that the carrier should have done anything other than remove him from its service or that any leniency toward reinstatement or rehire of this individual should be shown. Therefore, carrier strongly objects to any change in the discipline administered in this case, and urges that its dismissal of claimant be upheld. In this connection attention is invited to the following excerpts from awards of this and other Divisions of the National Railroad Adjustment Board:

"This Board is loathe to interfere in cases of discipline if there is any reasonable grounds upon which it can be justified." (Second Division Award 1109)

". . . it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed." (Second Division Award 1323)

"In proceedings such as these we do not examine the record of testimony to determine weight of credibility. We look for substantial and satisfactory support, and when that is found our inquiry ends. Awards upon this point are so numerous as to make citation of any of them unnecessary." (First Division Award 14552)

". . . Our function in cases of the kind here involved, as we understand it, under Awards of this Division of the Board so well known and established that they require no citation or further consideration, is not to pass upon the credibility of the witnesses or weigh the evidence but to determine whether the evidence is substantial and supports the charges as made. If it is we cannot substitute our judgment for that of the carrier and it is our duty to leave its findings undisturbed unless it is apparent its action is so clearly wrong as to amount to an abuse of discretion." (Third Division Award 5401)

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 employees 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.

Grievant was discharged for leaving his job as Carman Helper (Oiler) without permission. He alleges that the reason was emergent (asthmatic attack) and that despite efforts he could not reach his foreman. A fast freight was being made up by grievant and his fellow employees at the time.

The testimony is in sharp conflict in respect to several pertinent facts. We must recognize, as do reviewing courts, that the hearing officer is in a better position than the reviewing body to judge the truthfulness of a witness'

statements by having the opportunity to personally observe the witness' demeanor while testifying.

We find adequate basis in this transcript of hearing for the determination of the issues against the grievant and we have no cause to set aside such findings.

Grievant was relieved and sent home on December 17, 1955. He received his notice of hearing on December 23 and the hearing "was held as scheduled or on a date agreed to by the parties, December 29, 1955." (Employes' submission p. 2.) He was fully advised of his hearing rights and expressly told that he could bring any witnesses that he may desire to have testify in the case.

In the face of this advice the following colloquy appears in the record:

Q. (By Mr. Griffin, his representative) Mr. Hollis, do you have any proof that you went home on December 17, 1955, about 5:00 P.M. or later?

A. I do.

Q. Who could you prove this by, Mr. Hollis?

A. I could prove it by my wife.

Q. Is your wife present today, Mr. Hollis?

A. She is out in the car.

Q. Did you tell me that you had rather your wife not appear as a witness in this investigation if it were possible to refrain from doing so?

A. I did.

Q. Do you have any proof that you did see a doctor on December 17?

A. I do.

Q. Can you at this time produce that proof if called for?

A. I can.

In the Organization's submission criticism is directed at the carrier's highest reviewing officer, the Director of Personnel, for being "disinterested" in "exploring the underscored facts" before rendering his final decision. We must remind that the burden was upon the Grievant at the time of hearing to produce any and all available evidence to excuse his absence from work. The mere assertion that he, the Grievant, could produce certain proof does not transfer the burden of producing it to the carrier. We have no right to consider Organization's Exhibits F, F-1 and F-2 which were not part of the hearing record. Our function and authority is to review the record upon which disciplinary action was based by the carrier and not upon a submission brief containing new or different evidence. Testimony of the character contained in said exhibits is subject to cross-examination and the presentation of such evidence in the method attempted here denies the carrier's representative such oppor-

tunity. Furthermore, the exhibits contain evidence that the Grievant possessed at the time of hearing and stated that he could produce. It was in no sense newly discovered evidence. Why he failed to produce it timely is not explained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of September, 1957.