

Award No. 3933

Docket No. 3687

2-SAL-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

SEABOARD AIR LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the controlling agreement, Carman Clayton McCumbers was both unjustly suspended on September 23, 1958 and discharged from the service on October 28, 1958.

2. That accordingly, the Carrier be ordered to reinstate aforesaid employe with seniority rights unimpaired and compensated for all wages lost as the result of said unjust suspension and discharge.

EMPLOYEES' STATEMENT OF FACTS: Clayton McCumbers, hereinafter referred to as the claimant has been employed by the carrier approximately 16-years and has been a carman since September 4, 1952, West Jacksonville Shops, Jacksonville, Florida. His regular assigned hours were first shift, 7:30 A. M. to 4:00 P. M., Monday through Friday, when he was held out of service on the morning of September 23, 1958 after reporting for duty, and was notified by letter on September 24, 1958 from Mr. E. P. Bledsoe, Shop Superintendent that he was being charged from absenting himself from his work position on Monday September 22, 1958 without permission and an investigation will be held in his office on Wednesday, October 1, 1958 at 10:00 A. M.

On October 1, 1958 the claimant was given an investigation copy.

On October 28, 1958 the claimant received notice of his dismissal from service.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have declined to make satisfactory adjustment.

The Agreement effective March 10, 1923 as subsequently revised is controlling.

POSITION OF EMPLOYEES: On September 22, 1958 the claimant went to

"motivated by necessity." Carrier's action in dismissing claimant is further supported by Second Division Awards 1666 and 2044 in similar cases; also First Division Award 14864.

The National Railroad Adjustment Board has consistently held that it is not the function of the Board to substitute its judgment for that of the carrier 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.

As the record shows, the handling on the property turned to a request for the reinstatement of Carman McCumbers on the basis of leniency, which leniency request was denied. Of course, a request for reinstatement on the basis of leniency clearly indicates the employe was not improperly or unjustly disciplined. It is simply a plea that he be given another chance on the basis that the discipline administered has served its purpose, he has learned his lesson, and it is felt he will make a good employe. Such reinstatement is a managerial prerogative and the National Railroad Adjustment Board has no authority to order the reinstatement of a dismissed employe as a matter of leniency.

There being no basis for sustaining the claim and ordering the reinstatement of claimant under any conditions, the claim should be denied.

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.

Parties to said dispute waived right of appearance at hearing thereon.

The claim is that Claimant was unjustly suspended and dismissed from the service.

Rule 19 provides that an employe unavoidably kept from work shall not be discriminated against but that he shall notify his foreman as early as possible.

Rule 33 provides that no employe shall be disciplined without a fair hearing, but that

"Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule."

Claimant's lunch period was from 12:00 to 12:30, and he did not return that afternoon nor notify his foreman that he would be absent. When he reported next day he was sent to the General Foreman's office, questioned about his absence and suspended pending a hearing, after which he was discharged.

His defense was that on arriving home he found his wife in great pain and rushed her to the doctor's office. The doctor stated that he had been treating her for an apparently continuing illness and that **they were at his**

office between 2:00 and 3:00 o'clock that afternoon. The record shows that the distance from the Shops to Claimant's residence was 1.2 miles, with a normal driving time of 4 minutes, and from his residence to the doctor's office 1.6 miles, with a normal driving time of 6 minutes; and that there was a phone in Claimant's residence as well as one at the doctor's office. There is no showing of an emergency condition justifying his failure to notify his foreman by telephone.

His record, which pursuant to notice of investigation was introduced, included letters from four different supervisors over a 3½ year period, the last only six weeks before this occasion, showing that he had repeatedly absented himself without notice, twice for extended periods, had been warned and had promised to give proper notice of absences, but had reported late for work, had failed to discover aid brakes cut out and broken brake beam truss rod and brake beam, had failed to have with him new cotter keys for use in adjusting piston travel, with the excuse that he did not know where they were kept, and had been warned that to continue as a car inspector he must report on time, properly prepared for work, and must take an interest in it.

Under these conditions the Carrier's action was justified, and Claimant should not be reinstated, to the detriment of another employe.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January, 1962.

DISSENT OF LABOR MEMBERS TO AWARD 3933

Rule 19 provides that an employe unavoidably kept from work shall not be discriminated against but that he shall notify his foreman as early as possible. Claimant stated that his failure to return to work on the afternoon in question was due to his wife's illness. He says that "it's a question of the head and not of the heart that I neglected calling."

The discipline imposed was unquestionably influenced by letters read into the record at the hearing involving circumstances which had nothing to do with the claimant's absence from duty on the afternoon in question. The past record of an employe cannot rightfully be used for the purpose of determining the employe's guilt or innocence of the offense charged and on which the hearing is being held.

There is no showing that claimant's absence constituted a proper case for suspension pending a hearing. By proper cases must be meant cases of a serious nature, not a small infraction of the rules of the current agreement. The offense here charged was not of such a serious nature that it was a proper case for suspension pending a hearing.

There is nothing in the record to support the majority's finding that "Under these conditions the Carrier's action was justified, and Claimant

should not be reinstated, to the detriment of another employe." It should have been found that under these conditions the Carrier's action was not only unjustified and to the detriment of the claimant but in violation of the intent and purpose of Rules 19 and 33 of the controlling agreement.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink