Award No. 4139
Docket No. 4122
2-SOU-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement Carman R. C. Cheek was improperly suspended from service November 23, 1960, and discharged from service December 6, 1960.

2. That accordingly the Carrier be ordered to compensate the aforenamed employe for all time lost November 23, 1960 to January 5, 1961.

EMPLOYES' STATEMENT OF FACTS: Carman R. C. Cheek, hereinafter referred to as the claimant, employed by the carrier at Atlanta, Georgia, was taken out of service, charged with failing to carry out instructions in connection with stopping air leak on IC 33838 in fill out of train No. 154 — North November 23, 1960. Formal investigation was held November 29, 1960, and on December 6, 1960 the claimant was notified he was found guilty as charged and was discharged from service of the Southern Railway Company. The claimant was orally notified he was being restored to service effective January 5, 1961, the carrier officer refused to furnish written notice of reinstatement. This dispute has been handled with the carrier's officers designated to handle such matters, in compliance with current agreement, all of whom have refused or declined to make satisfactory settlement.

POSITION OF EMPLOYES: It is submitted the claimant was subject to the protection of the provisions of the aforesaid controlling agreement made in pursuance of the amended Railway Labor Act, particularly the terms of Rule 34, which reads in pertinent part:

> "An employe will not be dismissed without just and sufficient cause or before a preliminary investigation, which shall be held immediately by the highest officer in charge at the point employed. If, after the preliminary investigation, the case is appealed, an in-

337	755	978	1201
375	796	1008	1218
401	804	1048	1241
574	844	1081	1268
622	899	1102	1270

The Board, being guided by the principles of prior awards, hereinabove quoted or cited, cannot do other than deny the claim and demand here presented by the Brotherhood.

CONCLUSION

Carrier has shown that:

(a) The effective agreement was complied with.

(b) The burden of proof is on the Brotherhood to prove its allegations.

(c) Claimant was not improperly suspended and discharged and does not have a contract right to be paid the compensation demanded on his behalf by the Brotherhood.

(d) The discipline imposed was not arbitrary, capricious or in bad faith.

(e) Neither the Brotherhood nor the Board has authority under the Railway Labor Act or any other law or the agreement in evidence to substitute its judgment in disciplinary matters for that of the carrier.

On the record the Board cannot do other than make a denial award.

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 were given due notice of hearing thereon.

The Claimant, R. E. Cheek, a Car Inspector at Inman Yard, Atlanta, Georgia, with over fifteen years service with the Carrier, was charged with failure to carry out his instructions on November 23, 1960, in connection with stopping an air leak on Car IC 33838 which was contained in the makeup of train 154 on track No. 4.

On November 24, 1960, the Carrier removed the Claimant from service; a hearing was conducted on November 29, 1960; and the Claimant was dismissed from service on December 6, 1960. On January 5, 1961, the Claimant was restored to service on a leniency basis.

On November 23, 1960, the Claimant in company with Car Inspector D. R. Major, was ordered to inspect the 60 to 70 cars of Train 154 and, in addition to other functions, they were told "to stop all leaks that they can hear". Upon completing the inspection of Train No. 154, the Claimant notified his foreman, Mr. C. A. Umphrey, that the inspection had been completed and was told by Mr. Umphrey "to go eat dinner".

After Train No. 154 had been moved to another spur by a yard engine, Supervisor of Car Inspection J. T. Row, out of the Carrier's Washington, D. C. office, discovered an air leak caused by a loose angle cock on Car IC 33838. He notified Mr. Umphrey, who came to the site, heard and saw the air leak and then had it repaired by Mr. Major.

The Carrier contends that the air leak existed when the Claimant made his inspection; that he was guilty as charged; and that he was derelict and remiss in performing his assigned duties and responsibilities as a car inspector.

The Organization, on the other hand, claims the air leak did not exist or was not detectable when the Claimant made his inspection; and that the Claimant was taken out of service and discharged without just and sufficient cause.

In this case, botn parties failed to develop and present, on the property, certain important facts — as is evidenced by the date contained in the three subsequent paragraphs.

A Carrier witness testified that the air leak was of such magnitude that "when I got out of the car I could hear it from the car, which would be approximately 90 to 100 feet." For the Board to support the Carrier's position in this case, namely, "to stop all leaks they can hear", the Carrier would have to show, in the record, that the air pressure of Train No. 154 was approximately the same when the Claimant inspected Car IC 33838 and when Mr. Row found the air leak.

If, when Mr. Row found the air leak, there were 90 to 100 pounds of air pressure in the air line, that would account for its marked audibility. But by the same token, if there were only 15 to 20 pounds of pressure in the air line when the Claimant made his inspection, the noise of the leaking air would be much less audible and, therefore, more difficult to detect.

The record, however, makes no mention whatsoever of the air pressure that was in the air line when the Claimant and Supervisor Row made their inspections. Consequently, it cannot be argued that the audibility of the air leak was the same during both inspections. This Board is convinced — that in such situations as the present case — identical results can only be obtained from identical conditions. Unfortunately, the record fails to indicate the volume of the air pressure when both inspections were made.

On the above facts, the Board believes it would be justified in rendering a sustaining award. However, we will add equally persuasive evidence to justify further our disposition.

First, we will exclude from our deliberations the favorable testimony of Carman Brown — lest it be said "he's the Claimant's fellow worker, so naturally he's going to support the Claimant's position".

Then, we will turn to the testimony of a Carrier witness, Foreman Umphrey. The latter testified that the Claimant worked under his supervision "approximately five to seven years"; was a qualified trainyard man; and "he has been in the past pretty thorough".

The Claimant has been in the Carrier's service for over fifteen years and we may assume, quite properly, that his employment record is an excellent one — or else the Carrier would have introduced it to buttress their position.

With all the evidence, supra, this Board is disinclined to accept the premise that the Claimant failed to inspect Car IC 33838 or that he was negligent or derelict in his duty.

Accordingly, we must rule that the Claimant was taken out of service and discharged without just and sufficient cause. The Claimant therefore, is to be compensated by the Carrier at the pro rata rate for all time lost from November 23, 1960 to January 5, 1961. Any moneys earned by the Claimant during that period are to be deducted from compensation due him from the Carrier.

AWARD

Claim sustained in keeping with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman,
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February, 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4139

The issue posed by the instant claim is whether Carrier's disciplinary decision was arbitrary, capricious, unreasonable, or discriminatory, amounting to an abuse of managerial discretion.

From the record, we believe that Carrier's action in this dispute is reasonably related to the orderly, efficient, and safe operation of Carrier's business. No evidence was presented by the Organization showing that the instructions given to the claimant by his foreman were not known or that he was unaware of the importance of properly performing his work. Nowhere in the record is the Carrier accused of discriminating against the claimant in favor of others. No claim has been made of procedural defects; therefore, the Carrier's investigation and decision may not on this account be held to have been unfair. The testimony presented at claimant's investigation by Foreman Umphrey, General Foreman Jones, Car Inspection Supervisors Row and Walker, as well as the claimant's testimony and that of his fellow workers Shue and Major, provided more than sufficient evidence to support the judgment of the Master Mechanic.

Carrier's decision to give claimant a short suspension was not unreasonably related to claimant's offense and apparently took into account the claimant's past good record. Leniency is a function of the Carrier and not of this

Board. Carrier's judgment should not be lightly regarded because of the burden it assumes as a public carrier.

For the reasons stated herein, this award is not a just determination of this dispute, for the record does establish the claimant's guilt.

Therefore, we dissent.

P. R. Humphreys
F. P. Butler
H. K. Hagerman
W. B. Jones
C. H. Manoogian