Award No. 4201
Docket No. 3957
2-JackTerm-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 50, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

JACKSONVILLE TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier failed to comply with the procedural requirements of Article V of the August 21, 1954 agreement and accordingly the claim shall be allowed as presented.

2. That under the current agreement, Car Cleaner Robert Guyton was unjustly suspended on March 2, 1960 and unjustly dismissed from the service on March 17, 1960.

3. That accordingly, the Carrier be ordered to reinstate Robert Guyton to the service with seniority rights unimpaired and compensate him for all time lost resulting from the aforesaid unjust suspension and dismissal.

EMPLOYES' STATEMENT OF FACTS: Car Cleaner Robert Guyton, hereinafter referred to as the claimant, was employed by the Jacksonville Terminal Company, hereinafter referred to as the carrier on April 10, 1943 as a car cleaner at Jacksonville, Florida, whereat and in which position he was regularly employed until dismissed from service on March 17, 1960.

Claimant's work week and assigned hours of service immediately prior to his dismissal were 4:00 P. M. to 12:00 Midnight Wednesday through Sunday, rest days Monday and Tuesday.

Upon reporting to work at 4:00 P. M. Wednesday March 2, 1960 claimant was called to the office of Master Mechanic Arthur C. Herrington for the purpose of extracting a statement for the permanent records of the carrier about an incident to which claimant witnessed at the car washer on February 27, 1960. During the course of discussing the February 27th incident for the purpose of extracting desired information for the statement, Master Me-

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 charge in this case against claimant read:

> ". . . intemperance, whereas, you reported to work at 4:00 P.M. Wednesday, March 2, 1960 under the influence of intoxicants."

On that date he had been suspended and, after a full investigation on March 7, 1960, he was dismissed from the service of the carrier on March 17, 1960. In later appeal correspondence on the subject, it appears that the carrier based said dismissal not only upon the fact that claimant was under the influence of an intoxicant on March 2, 1960, but on account of claimant's entire service record.

The claim of the employes on behalf of claimant contains three averments of which we will first consider, the second, namely:

> 2. "That under the current agreement, Car Cleaner Robert Guyton was unjustly suspended on March 2, 1960 and unjustly dismissed from the service on March 17, 1960."

From a close study of the entire transcript, we do not believe it can be said that there was not substantial evidence to support the finding of the carrier that claimant was under the influence of intoxicants as charged. See Award 1817 of this division where a similar case was exhaustively reviewed. Here, likewise, we find no evidence of arbitrary or unreasonable action in assessing the penalty of dismissal as a result of the investigation in the instant case. Complaint is made of carrier's reviewing claimant's personal service record. It appears clear that this was done after, not before, the claimant was adjudged under the influence of intoxicants as a result of evidence adduced at the investigation. As was said in Award 2134:

> "This was entirely proper, not as a basis for determining the guilt or innocence of clamant as to the present charges made against him but as a basis for determining the extent of the discipline it was proper to impose upon him. . . ."

And it could be remarked that, conversely, it would be most unfortunate if an employe's past record of excellent service could not be consulted when considering the possibility of leniency in fixing a penalty.

However, the first paragraph of Employes' claim poses quite a different consideration. It reads:

> 1. "That the Carrier failed to comply with the procedural requirements of Article V of the August 21, 1954 agreement and accordingly the claim shall be allowed as presented."

As mentioned above, claimant's dismissal took place March 17, 1960. Then, after correspondence appealing to carrier's General Foreman, the Master

Mechanic and the Assistant General Manager, an appeal by the General Chairman of the Brotherhood of Railway Carmen of America in behalf of claimant was addressed to the President & General Manager of Carrier on August 4, 1960. As a result, a conference was held in the latter's office to discuss the case before final decision. On September 19, 1960, the President & General Manager wrote as follows to the General Chairman of the Carmen:

> "This has reference to conference held in my office at 10:00 A.M. September 15th pursuant to your request for reinstatement of Robert Guyton, Car Cleaner, dismissed from the service March 17, 1960.
>
> "As discussed in conference I cannot agree to your request."

Thereafter, pursuant to a request of the General Chairman of the Carmen which was granted by the President & General Manager of carrier, a further conference was held November 17, 1960, following which the General Chairman again received a letter from the President & General Manager merely informing him as before: "As discussed in conference, I cannot agree to your request."

It is, therefore, beyond contradiction that the carrier did not, in the words of Article V of the Agreement of August 21, 1954, Section 1(a), "within 60 days from the date same is filed, **notify whoever filed the claim or grievance** (the employe or his representative) **in writing of the reasons for such disallowance.**"

On March 16, 1961, the General Chairman of the carmen wrote to the President & General Manager of the carrier requesting allowance of the claim of Car Cleaner Robert Guyton for reinstatement with seniority rights unimpaired and compensation for all time lost (paragraph 3 of Employes' Claim). A letter in reply on March 24, 1961 from the President & General Manager to the General Chairman declined the request in its entirety.

Thus, this Board has before it for decision the same question that was presented in Award 3312. There it was said:

> "In view of the foregoing, it must be held that Carrier failed to comply with the procedural requirements of Article V, Section 1(a) of the August 21, 1954 Agreement to which these parties are signatory. That provision states that if the individual filing the claim is not notified as prescribed therein, 'the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.' In view of the clear mandate of this provision, we have no alternative but to sustain this claim."

Accordingly, we hold that the instant claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June, 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4201

In this dispute the essential facts are not in dispute. The evidence contained in the record of the investigation was substantial in support of the findings of the Carrier that claimant was under the influence of intoxicants as charged. Likewise, the Division found "no evidence of arbitrary or unreasonable action by the Carrier in assessing the penalty of dismissal as a result of the investigation in the instant case."

In the handling of this dispute, the Organization raised a procedural issue in alleging that the Carrier failed to comply with the provisions of Article V, 1 (a), of the National Agreement of August 21, 1954, when, they allege, the Carrier's President and General Manager in his letter of September 19, 1960, to the General Chairman of the Carmen did not include in this letter the reasons for disallowance of the claim.

The Organization contends that the President and General Manager's statement — "As discussed in conference I cannot agree to your request" — does not constitute a valid reason for declining the claim under those provisions of the National rule here quoted in pertinent part: "Should any such claim * * * be disallowed, the Carrier shall * * * notify whoever filed the claim * * * in writing of the reasons for such disallowance."

The quoted language does not require detailed or specified reasons for disallowance. A basic and valid reason for denying the claim did appear in the President-General Manager's letter of September 19, 1960, to the General Chairman.

Certainly, the National rule is violated if **no** reason for declination is given or where **no decision** is rendered, or for **failure to meet the time requirements.** None of these violations occurred here. Accordingly, the Division erred in its findings that the Carrier violated the Agreement.

Apparently the Division has found in its opinion that there was perhaps a technical violation of the literal language of Article V, 1 (a), of the Agreement. Should this be the reason, then the reason is too superficial, for it fails to probe behind the language of the rule for the basic intent of the parties when they wrote the August 21, 1954 National Agreement. The Division's reasoning also fails to apply a cardinal tenet of contract construction, namely, the rule of reason principle that if alternate constructions are possible, the more reasonable one should be selected.

Recent Awards 11231 and 10400 of the Third Division refused to default the claims upon the basis that the denial in writing was insufficient in not setting forth a reason for the claim's denial. Referee Mitchell said in Award 10400:

> "We will not discuss the question of whether this question was raised in time by the Employes because the record shows that during the handling of this claim on the property the Carrier's officials notified claimant and representative of the reasons for denying the claim."

It is interesting to note that in Award 10400 the letter of the Carrier denying the claim gave this reason:

"After a full discussion, you were informed that we do not view this as a violation of the applicable agreement."

which is quite similar to the reason given by the Carrier in the instant dispute as found in Carrier's Exhibit "U":

"As discussed in conference, I cannot agree to your request."

Recent Awards 3627 and 3884 of this Division, with Referee Carey, involve Article V, Section 1 (a), and from Award 3884 we quote:

"* * * we think the employes have misinterpreted the meaning of Article V. When the Vice General Chairman wrote Master Mechanic Byrne on April 25, he had complete knowledge of the evidence and the reasons for the carrier's action in respect of the claimants. He knew the contents of the transcript of the investigation which was the sole basis for the discharges. His letter clearly disclosed such knowledge. Under the circumstances, the plain meaning of Mr. Byrne's letter of April 30 is that he disagreed with Mr. Roe's position about the sufficiency of the evidence to sustain the discharges, and the propriety of holding the hearing at the time and place mentioned. The situation did not require a categorical denial of Mr. Roe's claim because that position on the part of Mr. Byrne was implicit in the letter. We think the requirement of Article V was sufficiently satisfied * * *."

In this dispute the mapority has misinterpreted the meaning of Article V. Furthermore, the majority in failing to stipulate in the award — less outside earnings — has ruled contra to the principle universally declared by our courts and in many awards of every Division of the N.R.A.B., that the measure of damages for a breach of an employment contract is the difference between what the employe would have earned if continued in his employment and the amount he has actually earned from other sources up to the time of his trial.

For the reasons herein discussed, we dissent.

P. R. Humphreys

F. P. Butler

H. K. Hagerman

W. B. Jones

C. H. Manoogian