Award No. 4208
Docket No. 4077
2-SOU-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. 21, RAILROAD 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. G. Rivers and J. E. Slaughter were improperly removed from service July 12, 1960 and discharged from service July 20, 1960.

2. That accordingly the Carrier be ordered to compensate the aforementioned employes for all time lost July 12, 1960 - July 27, 1960.

EMPLOYES' STATEMENT OF FACTS: Carman R. C. Rivers and J. E. Slaughter, hereinafter referred to as the claimants, employed by the carrier at Birmingham, Alabama, were taken out of service July 12, 1960, charged with "not properly performing the duties of a Car Inspector as per instruction."

Formal investigation was held July 18, 1960. On July 20, 1960 the claimants were notified they were being discharged from the service of the Southern Railway. Claimants were verbally notified they were being restored to service July 27, 1960.

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.

The agreement effective March 1, 1926, as subsequently amended is controlling.

POSITION OF EMPLOYES: Article 5 of the National Agreement dated August 21, 1954, reads in pertinent part:

"(a) All claims or grievances must be presented in writing by or on behalf of the employes involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurence on which the claim or grievance is based. Should any such claim

a fair and impartial hearing. The record further shows that the decision of the Carrier to dismiss the Claimant from its service was not arrived at arbitrarily, capriciously or from motives of prejudice. Therefore, the Carrier having exercised its discretionary power to discharge the Claimant, this Board has no power or right to substitute its judgment for that of the Carrier, nor to determine what we might or might not have done had the matter come to us initially."

Award No. 1275, Referee Sembower:

"* * * we cannot interfere where no material error appears in the transcript of the proceedings and there is such basis for the discipline that it cannot be said to have been arbitrary, unreasonable, or in bad faith * * *."

Also see the following additional awards of the Fourth Division:

257	671	901	1124
264	677	912	1152
337	755	978	1201
375	796	1008	1218
401	804	1048	1241
574	844	1081	1268
622	899	1102	1270

The discipline administered having been imposed in good faith without bias or prejudice and there being no evidence of arbitrary or capricious judgment, the Board should follow the principles of the cited awards and refrain from substituting its judgment for that of the Carrier.

CONCLUSION: Carrier has proven that:

(a) The claim and demand presented by the brotherhood are barred by the agreement in evidence and the Board has neither power nor authority to assume jurisdiction. The claim should therefore be dismissed by the Board for want of jurisdiction.

(b) Claimants were not improperly suspended and dismissed and they have no contract right to the compensation demanded on their behalf by the Brotherhood.

(c) The discipline administered was not imposed as a result of arbitrary or capricious judgment or in bad faith. Carrier's action is fully supported by the principles of awards of awards of all four Divisions of the Board.

The claim, being barred by the agreement in evidence, should be dismissed by the Board for want of jurisdiction. If, despite this fact, the Board should assume jurisdiction, it 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.

This is a claim by Carmen R. G. Rivers, and J. E. Slaughter for compensation for time lost due to alleged improper removal from service July 12, 1960, until July 29, 1960, when they were restored to service on a leniency basis. For proper consideration of the questions raised, both factual and procedural, it seems best to review the record in some detail.

On July 10, 1960, the Frisco Railroad declined to accept in interchange at Birmingham, Alabama, from the Southern Railway Company two cars, a box car IC 3444 and a hopper car IC 72838, because of excessive brake cylinder piston travel which exceeded 10 inches on each car and therefore constituted a penalty defect under the Safety Appliances Act. So the next day, July 11th, the two cars were returned for repair to Norris Yard, a classification yard maintained by Carrier approximately 10 miles from the Frisco interchange. There, C. E. Niles, acting as a relief foreman supervising car inspectors, conveyed specific instructions, which he had received from his superiors, to Car Inspectors Ireland and Rivers (the latter being one of above named claimants) that the piston travel on above two cars be adjusted within the prescribed limits before the yard engine departed with cars for delivery to the Frisco. The other of the two claimants, Car Inspector Slaughter, who was working with Car Inspector Rivers, took up the brakes on the box car IC 3444, according to his testimony in a transcript of evidence taken at an ensuing investigation. Car Inspector Rivers testified that he took up "the box car one hole"; that both he and Slaughter were working together on the box car. However, there was some variance in the testimony about which man worked on which car, if both cars were worked upon, for Slaughter said he took up the brakes on the box car and Rivers took up the brakes on the other, "the car behind it." Whereas, Rivers testified: "The hopper car was not touched." It was also claimed that Acting Foreman Niles said the two cars in question were O.K.

Later the Frisco interchange cut was placed on the designated Frisco interchange track where Master Mechanic C. A. Frick and Foreman J. D. Campbell observed that the car IC 3444 had been adjusted to within the prescribed limits but that the piston travel on car IC 72838 was 12 inches. In order that this car not be rejected again by Friesco, Foreman Campbell himself adjusted the brake cylinder piston travel within proper limits.

A preliminary investigation was held July 12, 1960 during which Car Inspectors Rivers and Slaughter were charged with not properly performing their duties as car inspectors while on duty July 11, 1960, in having allowed car IC 72838 to leave Norris Yard for delivery to the Frisco in interchange with brake cylinder piston travel 12 inches long. They were suspended pending an investigation held thereafter on July 18, 1960, and were dismissed from the service July 20, 1960. On July 29, 1960, they were advised by the Master Mechanic that, the discipline having served its purpose, they were being restored to the service on a leniency basis. They each lost eleven days before return to service.

On July 23, 1960, Mr. W. H. Higgins, the Local Chairman of Carmen, addressed a letter to the Master Mechanic demanding, on behalf of Carmen Rivers and Slaughter, their reinstatement to service without impairment to rights and with pay for time lost. According to the Master Mechanic, he replied to that letter on July 27, 1960 declining the Local Chairman's request Mr. Higgins states he never received said answering letter. We have examined copies of exhibits, attached to Carrier's original submissions, from two affiants, one who states that she received such letter in dictation from Mr. C. A.

Frick, the Master Mechanic, and typed it, and the other affiant who states that on that date, July 27, 1960, he deposited a sealed envelope (contents unknown to him) addressed to Mr. W. H. Higgins, Local Chairman, Carmen, in a letter-box located in the Car Foreman Office at Norris Yard, Irondale, Alabama, said box being captioned "W. H. Higgins".

There was no further communication between the parties with reference to the claim until October 10, 1960, when the Local Chairman in a letter to the Master Mechanic demanded that claimants be paid for time lost as a result of their dismissal from service. Attention was first called to the Local Chairman's letter of July 23, 1960 mentioned above, then the request continued as follows:

> "Due to my not receiving a reply from you disallowing payment for time lost, I ask that you comply with sixty day limitation clause of controlling agreement and allow claim as presented."

Carrier counters such demand by reference to the same agreement and alleges that said claim is barred by Section (b) of Article V of the Agreement of August 21, 1954, which in pertinent portion provides:

> "(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed * * *."

Specifically in this regard, Carrier points out that Local Chairman Higgins' letter presenting the claim was dated July 23, 1960; and further, as mentioned above, that the Master Mechanic declined the claim by letter dated July 27, 1960 and that thereafter, not only was the claim not appealed within 60 days after notice of disallowance, but the Master Mechanic was not notified by the Local Chairman in writing within that time that such decision of disallowance was rejected; each said requirement being set forth in said agreement.

So here we have each party claiming non-compliance by the other with the terms of the Agreement of August 21, 1954, in each instance because of failure to act within the time limits specified thereby. The Carrier says it did comply and produces evidence so indicating; however, the sworn statement of the Local Chairman, Mr. Higgins, says no such letter was received by him. Also, on the other hand, the Organization asserts that because there was no rejection of the claim filed July 23, 1960, there was of course nothing from which to appeal.

Faced with such an impasse, we do not find it possible to apply the procedural provisions of the Agreement of August 21, 1954. The record gives us nothing to permit a finding that the Carrier did not comply with the time limits prescribed in said agreement. Like-wise, nothing therein permits a finding that the Organization was dilatory in its proceedings. We do not believe that either party could properly be penalized by rigid application of these procedural rules under the facts of the record here presentd. It could however be suggested that such situations might well be avoided in the future by specifying the use of certified or registered mail, "return receipt requested", when complying with the requirements as to written communications between the parties.

Turning from the procedural questions involved herein to a consideration of the case on its merits, we believe from a careful review of the facts that beyond doubt the claimants failed to perform their duty and did not carry out specific instructions to adjust brake piston travel on car IC 72838, a defect which Foreman Campbell later discovered and remedied. The resulting investigation was fairly and impartially conducted pursuant to the agreement and from the entire record it would appear that the disciplinary action taken by Carrier was in no sense arbitrary, capricious or in bad faith.

AWARD

Claim denied.

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.

LABOR MEMBERS DISSENT TO AWARD 4208

The majority erred in their failure to give proper weight to the facts of record before the Division in this case.

The testimony of Acting Foreman Niles, appearing on pages 8 and 9 of the transcript of investigation attached to the carrier's original submission clearly and completely absolves the claimants of all the charges of failure to perform their assigned duties as car inspectors and the claim should have been sustained.

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

James B. Zink

E. J. McDermott