Award No. 4228
Docket No. 3940
2-MP-CM-'63

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. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Car Inspector Carl Grasso was unjustly dismissed from the service of the Missouri Pacific Railroad Company on July 18, 1960, for allegedly failing to protect himself with blue flag protection on June 15, 1960.

2. That accordingly, the Missouri Pacific Railroad Company reinstate Car Inspector Grasso with seniority and vacation rights unimpaired and pay for all time lost from his assignment on the basis of what he would have earned had he not been dismissed from service on July 18, 1960.

EMPLOYES' STATEMENT OF FACTS: Car Inspector Carl Grasso, hereinafter referred to as the claimant, is employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at Omaha, Nebraska. The claimant has been an employe of the carrier for approximately 23 years and on June 16, 1960, he received letter from master mechanic, Mr. E. E. Dent, to report to the office of the general car foreman at 10:00 A. M., June 21st, 1960, for formal investigation to develop the facts and place responsibility for alleged failure to properly protect himself with blue flag protection while performing duties as car inspector on Grace Street Track No. 8 at approximately 10:25 A. M., June 15, 1960.

In line with the master mechanic's instructions, the claimant, with his representatives, reported to the general car foreman's office at the designated time to stand investigation as outlined above.

Mr. J. M. Pulliam, vice-general chairman, took exception to the interrogating officer, Mr. E. E. Dent, questioning the accused ahead of carrier

that the only switch engine working was in another yard and, in the other case, that the claimant was discriminated against because of his activities in the Brotherhood Railway Carmen of America. The claimants asked for leniency and were reinstated prior to initiating their claim for time lost. Contrast their attitude with that of the claimant in this dispute who has refused to admit any wrongdoing. Claimant's attitude has not changed. He has sued the general car foreman in a civil suit. There is no reason for extending leniency to the claimant. The discipline assessed was not harsh, arbitrary or capricious. Under the well established principles of your Board, there is no reason for your Board disturbing the action taken by the carrier.

But is it not necessary for your Board to consider these questions. The matter must be considered closed because the decision of the superintendent was not timely rejected nor was his decision timely appealed as required by Rule 31 (b). Although the claim must be denied for failure to comply with the time limit rule, we have nevertheless gone on to show that claimant was given a fair and impartial investigation before administering discipline as required by Rule 32. Substantial evidence was adduced at the investigation to prove that claimant violated safety instructions as charged. We have also shown that your Board in Awards 107 and 118 has refused to disturb the action of this carrier in administering discipline under identical circumstances. Claimant in failing to comply with the carrier's instructions also failed to fulfill his obligation under Rule 43 of the shop craft agreement, reading

"PROTECTION OF EMPLOYEES:

RULE 43. (a) Employes will carefully observe the rules of the Company, designed to avoid accident and personal injuries."

This claim must 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 were given due notice of hearing thereon.

The record contains evidence sufficient to sustain the charge, and this Division is not in position to weigh the evidence and determine whether ts weight might have justified a different conclusion.

We find that the objections raised under the time limit rule were waived or condoned by the manner in which the claim was handled on the property, and that the manner of conducting the hearing was not unfair nor prejudicial to claimant's rights.

The record indicates some laxity in observance of blue flag protection, and a rather abrupt change in policy which made claimant's discharge an excessive, arbitrary and capricious penalty. Award 2623, 2653 and 2851. Under the circumstances we consider the penalty excessive to the extent exceeding claimant's suspension beyond the time needed to make this award effective.

AWARD

Claim sustained to the extent that the dismissal constituted an excessive penalty and that claimant be restored to duty with all rights unimpaired, but without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June, 1963.

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

INTERPRETATION NO. 1 TO AWARD NO. 4228

DOCKET NO. 3940

NAME OF ORGANIZATION: System Federation No. 2, Railway Employes' Department, A. F. of L. — C. I. O. (Carmen)

NAME OF CARRIER: Missouri Pacific Railroad Company

QUESTION FOR INTERPRETATION: "Does the language in Award No. 4228, reading:

> 'The record indicates some laxity in observance of blue flag protection, and a rather abrupt change in policy which made claimant's discharge an excessive, arbitrary and capricious penalty. Awards 2623, 2653 and 2851. Under the circumstances we consider the penalty excessive to the extent exceeding claimant's suspension beyond the time needed to make this award effective.
>
> 'Claim sustained to the extent that the dismissal constituted an excessive penalty and that claimant be restored to duty **with all rights unimpaired,** but without pay for time lost.' (Emphasis supplied).

"when considered in conjunction with part 2 of the Claim of Employes, reading:

> '2. That accordingly, the Missouri Pacific Railroad Company reinstate Car Inspector Grasso with seniority and vacation rights unimpaired and pay for all time lost from his assignment on the basis of what he would have earned had he not been dismissed from service on July 18, 1960.'

"mean that the Claimant is entitled to compensation in lieu of vacation earned in the years 1959 and 1960, but not taken account vacation rights could not be exercised during the period of improper and unjust discharge."

Claimant was discharged on July 18, 1960; on June 17, 1963, this Division rendered Award No. 4228, finding the discipline excessive under the circumstances of the case and ordering his restoration to duty with all rights unimpaired, but without pay for time lost.

The request for an interpretation now raises the question, not argued during the progress of the claim, whether claimant should, under the award restoring his rights unimpaired, be given pay in lieu of his 1960 and 1961 vacations. His 1960 vacation was earned in 1959, but not taken before his discharge in July, 1960. His 1961 vacation was earned before his discharge in 1960, but was not taken because he was not working in 1961. This Division's Award No. 4228 found his discharge excessive, but in effect held his suspension warranted up to that time. It thus held that he was properly suspended for the period from July 18, 1960, to December 31, 1961, during which he would have received his 1960 and 1961 vacations if he had been working. Not having worked, nor having been entitled to work, during that period, he had no employment from which those vacations could have been taken.

The question is whether he is entitled to pay in lieu of those vacations; if so, he should receive it under the award, which sustained the claim in full, except for pay for time lost.

As matters of enforceable right on any date, both paid vacations, and pay in lieu thereof, exist purely by virtue of contract, namely, the Vacation Agreement of December 17, 1941, with any amendments effective on that date.

On July 18, 1960, the only provisions for pay in lieu of vacations were Article 5 of the Vacation Agreement, and Article 8 of that Agreement, as amended by Section 5 of the Agreement of August 21, 1954.

Article 5 provides for pay in lieu of vacations "if a carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service." It is clearly inapplicable here.

Article 8, as amended, then provided for pay in lieu of vacations in only two contingencies; first, to an employe retiring under the provisions of the Railroad Retirement Act; and second, to or for a surviving widow or dependent minor children of an employe who died before receiving a vacation for which he had qualified. This Board has, of course, no authority to amend the parties' agreement by adding further provisions for pay in lieu of vacations.

However, the parties themselves did so by Section 2 of the National Agreement of August 19, 1960, which further amended Article 8 of the Vacation Agreement, effective as of September 1, 1960. As so amended it provided further that "if an employee's employment status is terminated for any reason whatsoever, * * * he shall **at the time of such termination** be granted * * * pay for vacation earned in the preceding year or years and not yet granted, and the vacation for the succeeding year if the employe has qualified therefore under Article 1." (Emphasis supplied.)

If that provision had been in effect on July 18, 1960, when claimant was discharged, he would have been entitled to pay in lieu of 1960 and 1961 vacations; but the provision was not adopted until August 19th, and did not become effective until September 1st, 1960.

This Board has no power to amend the August 19, 1960 Agreement so as to make it effective on July 18, 1960, forty-four days before the date agreed upon by the parties, and thirty days before it was adopted.

It is not material whether claimant's discharge is considered to have become a suspension by virtue of the Award; for the sole question is whether, under the parties' agreement, claimant was, on July 18, 1960, entitled to pay in lieu of 1960 and 1961 vacations.

The question must be answered in the negative.

Referee Howard A. Johnson, who sat with the Division as a Member when Award No. 4228 was rendered, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November, 1963.