

Award No. 4407
Docket No. 4352
2-SP(PL)-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee P. M. Williams when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under provisions of the current agreement, Carman John S. Radich was suspended unjustly December 12, 1961, and dismissed from the services of the Carrier on January 8, 1962; and

2. That accordingly the Carrier be ordered to reinstate him with seniority rights unimpaired, all vacation rights, paid premiums for hospital, surgical and medical benefits for all time held out of service, paid premiums for Group Life Insurance for all time held out of service and compensated for all time lost retroactive to the aforementioned date of dismissal.

EMPLOYEES' STATEMENT OF FACTS: The Southern Pacific Company (Pacific Lines), hereinafter referred to as the carrier employed John S. Radich, hereinafter referred to as the claimant, as a vacation relief car inspector, assigned hours 2:30 P. M. to 10:30 P. M. (DST), at the Mission Bay yard, San Francisco, California, and that claimant has been in service of the carrier at San Francisco since March 15, 1952, and has maintained his position satisfactorily, since date of employment.

The carrier's representative, E. Rugani, master car repairer, summoned the claimant to appear for formal hearing at 9:00 A. M., Monday, December 18, 1961, on alleged charges of pilfering contents from Car S. P. 652242 on Track 156, San Francisco, California, on May 16, 1961 and having entered a plea of guilty to theft of interstate shipment in the United States District Court, San Francisco, Case No. 38215 Title 18, Section 659 of the United States Court.

December 15, 1961, Local Chairman, Harold Kock, addressed a letter to F. R. Olds, Master Mechanic, requesting a postponement of hearing set for December 18, 1961.

violation of carrier's rule has clearly and conclusively been established. The carrier respectfully requests, therefore, that the claim in this docket be denied in its entirety.

ANALYSIS OF CLAIM FOR "COMPENSATION FOR ALL TIME LOST"

The carrier, having already conclusively proved that the claim as submitted is, in its entirety, without merit, is confident the Board will deny it. Notwithstanding this position and in no way admitting that the carrier's dismissal of the claimant was not justified and proper, the carrier submits that in the event the Board should sustain the claim insofar as the request for reinstatement is concerned, and gives consideration to the matter of compensation for time lost, the Board should take into consideration the matter of deducting the amount earned in other employment during the period involved.

Rule 39 of the current agreement reads in part as follows:

"If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for wage loss, if any, resulting from said suspension or dismissal."

The Board has previously interpreted this rule providing for compensation for "wage loss, if any" as requiring deduction of outside earnings in computing compensation due. See Second Division Awards 2523 and 2653.

CONCLUSION

All data herein submitted have been presented to the duly authorized representatives of the petitioner and are made a part of the particular question in dispute.

The carrier here asserts that the claim in this docket is entirely without basis or merit, and therefore respectfully requests that it 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.

On December 11, 1961, Carman John S. Radich, pleaded guilty in the United States District Court for the Northern District of California, Southern Division, to the offense — theft from Foreign shipment — a violation of Title 18, United States Code, Section 659. The shipment involved was from Carrier's property and the event had occurred in the early morning hours of May 16, 1961.

Claimant was suspended from his job on December 12, 1961; the next day he was sent notice to appear for Formal Hearing in connection with

developing facts that he had violated part of Rule 801, General Rules and Regulations of the Southern Pacific Company, Form S-2292, which provides: "Employees who are — dishonest — will not be retained in service." The Formal Hearing was postponed from December 18 to December 28, 1961 at claimant's request. From the evidence adduced at the Formal Hearing the claimant was dismissed from the service of the Carrier on January 8, 1962.

The record in this case does not disclose or give to us any indication that the Carrier was discriminatory in its action against Claimant Radich or that he was treated in an arbitrary or capricious manner. In the absence of discrimination, capriciousness or arbitrary action this division has no power to substitute its judgment for that of the Carrier, nor can we re-weigh the facts to develop equities upon which to have a rescissory award.

For the reasons given above the claimant's request for reinstatement and compensation must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 5th day of February 1964.