

**Award No. 4438**

**Docket No. 4395**

**2-NYC-FO-'64**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

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

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 54, RAILWAY EMPLOYES'  
DEPARTMENT, A. F. of L. - C. I. O. (Firemen & Oilers)**

**THE NEW YORK CENTRAL RAILROAD, SOUTHERN DISTRICT  
(CCC&StL Ry Co)**

**DISPUTE: CLAIM OF EMPLOYES:**

1. That under the current agreement L. R. Hiatt was unjustly suspended effective as of August 18, 1961 and unjustly dismissed October 27, 1961.
2. That accordingly the Carrier be ordered to:
  - a) Return the aforementioned to service with seniority rights unimpaired.
  - b) Compensate the aforementioned for all time held out of service, and
  - c) Make the aforementioned whole for all benefits flowing from the current agreement.

**EMPLOYES' STATEMENT OF FACTS:** Laborer L. R. Hiatt, hereinafter referred to as the claimant, was employed as such in the car department (passenger shop), Beech Grove, Indiana, June 7, 1961, transferring from the transportation department where he entered service in 1920.

Under date of August 22, 1961, General Foreman F. E. Britton directed a letter to the claimant advising him he was suspended from his position as Laborer in the passenger car department, Beech Grove shops, effective as of August 18th, 1961 and notifying him to appear for investigation at 1:30 P.M. August 24th on stated charges.

Hearing was opened as scheduled on August 24th at which time the claimant requested a postponement for two weeks, after which a postponement was granted and hearing adjourned until notice.

Hearing was rescheduled for September 1, 1961 by the carrier in letter of August 29, 1961 and investigation held with the claimant absent.

General Foreman Britton, in letter dated September 5, 1961, advised the claimant that because of his failure to appear at the investigation on Sep-

sion. It was not intended that this rule should operate so as to permit the employe to receive double compensation, which would be the case if no deduction or offset were made for the amount that the employe actually earned during his period of discharge or suspension from the carrier's service.

There has never been any dispute on this property where settlements are made in accordance with the provisions of Rule 14 referred to in the foregoing.

In addition, Awards of the Adjustment Board have recognized the justification for such deduction for outside earnings.

**CONCLUSION:** Considering the nature of the offense, claimant's refusal to perform his duties, and the short period of service the claimant had in the mechanical department, the disciplinary action was not unreasonable.

The claim is without merit and carrier respectfully requests that your Board deny it in its entirety.

All facts and arguments presented herein have been made known to the employes either orally or by correspondence in the handling of the claim.

**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.

Laborer L. R. Hiatt, the Claimant, a Carrier employe since 1920 worked in the Transportation Department on June 7, 1961, when he was employed in the Carrier's Car Shop at Beech Grove, Indiana.

On the morning of August 17, 1961, the Carrier stated that the claimant would not accept a work reassignment. The Claimant asked for and received permission to have that afternoon off so that he could contact his Union Representative.

On August 22, 1961, the Carrier addressed a letter to the Claimant notifying him that he had been suspended, effective August 18, 1961, because of "insubordination and failure to report to work on August 18th and 21st without reporting your reasons for your absence". In that letter the Carrier ordered the Claimant to appear for an investigation at 1:30 P.M. on August 24, 1961. At the investigation, the Claimant requested and received a two weeks' postponement. The investigation was rescheduled for September 1, 1961, and when the Claimant failed to appear his name was removed from the Laborers' Seniority Roster of the Mechanical Department effective August 18, 1961.

As a result of the Organization's protest, the Carrier scheduled another investigative for 1:30 P.M. on October 27, 1961. After the hearing, which the Claimant attended, he was dismissed from the Carrier's service on October 27, 1961.

The pertinent portions of the rules cited by the parties are as follows:

Rule 1 "These rules govern \* \* \* employes in \* \* \* Car Department \* \* \* of the following classes:

"Group 3. All shop—classified and carmen laborers, including those performing work of the following character:

"\* \* \* Material men ( \* \* \* Car Departments)."

Rule 14(a) "Employes subject to discipline will be advised of the cause of such action in writing. No employe will be disciplined without first being given a fair and impartial hearing. \* \* \*."

Rule 26 "In case an employe is unavoidably kept from work he will not be discriminated against. An employe detained from work \* \* \* shall notify his foreman as early as possible. \* \* \*."

The Organization contends that:

- 1) the claimant could not be "insubordinate when he requests time off at the time of the reassignment and such request is granted by the General Foreman";
- 2) the claimant could not "possibly be guilty of failure to report to work on August 18th and 21st" because his suspension was effective August 18, 1961.

The Carrier, on the other hand, contends that:

- 1) the "claimant refused to accept an assignment of work that is identified in Rule 1 of the Firemen & Oilers' Agreement as that of Group 3 employes";
- 2) "On succeeding work days, he absented himself from work without notifying the Carrier as required by Rule 26 of the applicable Agreement."

There might be some justification for the Carrier's position had the Carrier not suspended the Claimant effective August 18, 1961. That act not only deprived the Claimant of his position but also made the Carrier's charge against the claimant of failure "to report for work on the next two work days" a contradiction. Furthermore, the Board is convinced that the Investigation Transcript doesn't even prove that the Claimant refused the job—as evidenced by the following:

Mr. Stevenson: "Mr. Britton, did Mr. Hiatt refuse to accept the reassignment by telling you that he would not accept it?"

Mr. Britton: "He did."

Mr. Stevenson: "Do you recall just what Mr. Hiatt said at that time?"

Mr. Britton: "The words were—that he would like to have some time off when he was notified he was to take that job and I granted him permission to have that afternoon off."

The semantic significance of the words used by Mr. Britton, in answer to Mr. Stevenson's second question, cannot even be constrained to imply a re-

fusal. Accordingly the Board must rule in favor of the Organization and sustain the claim. Any money earned by the Claimant in other employment during his suspension from service must be deducted from compensation received in the instant claim.

#### 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 26th day of February 1964.

#### DISSENT OF CARRIER MEMBERS TO AWARD NO. 4438—NYC-FO

This award is erroneous on two counts.

The Findings state in part:

\* \* \* "There might be some justification for the Carrier's position had the Carrier not suspended the Claimant effective August 18, 1961. That not only deprived the Claimant of his position but also made the Carrier's charge against the claimant of failure 'to report for work on the next two days' a contradiction." \* \* \*

In this instance what the majority refused to take account of was the fact that the suspension notice was written on August 22, 1961 to be effective as of August 18, 1961.

This suspension notice was made **after** the claimant absented himself from work without permission on August 18th and August 21st, without notifying the carrier as required by Rule 26.

The Findings further state:

\* \* \* "Furthermore, the Board is convinced that the Investigation Transcript does not support the Carrier's charge of insubordination. In fact the record doesn't even prove that the Claimant refused the job—as evidenced by the following:

Mr. Stevenson: 'Mr. Britton, did Mr. Hiatt refuse to accept the reassignment by telling you that he would not accept it.'

Mr. Britton: 'He did.'

Mr. Stevenson: 'Do you recall just what Mr. Hiatt said at that time?'

Mr. Britton: "The words were—that he would like to have some time off when he was notified he was to take that job and I granted him permission to have that afternoon off' "

It is obvious from the above the majority did not give consideration to all of the transcript of investigation but instead pounced on what they wanted and not on the whole record.

After the hearing officer (C. Stevenson) established that the reassignment of work given to the claimant was work falling within the confines of the scope rule of the applicable agreement by receiving affirmative answers from Mr. White, the claimant's representative at the investigation, the following excerpts are taken from the transcript;

\* \* \*

"Stevenson: Did Mr. Hiatt say he would not accept?

Britton: Yes, he said he would not accept the reassignment."

\* \* \*

"Stevenson: Mr. Hiatt, did you refuse to accept the reassignment?

Hiatt: I did not."

\* \* \*

"Stevenson: Mr. Hiatt, did you perform any work at all on the reassignment?

"Hiatt: Not on the reassignment job."

\* \* \*

It is quite apparent from the above that Hiatt, the claimant, did not perform any work on the reassignment which was given him prior to noon on August 17th. He did ask for and receive permission to be off from noon of that day but the record shows the carrier's officer did not give permission to claimant for time off other than the afternoon of August 17, 1961.

The award is improper and we dissent.

H. K. Hagerman

F. P. Butler

P. R. Humphreys

W. B. Jones

C. H. Manoogian