

Award No. 4500
Docket No. 4401
2-SOU-MA-'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.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Machinists)**

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Machinist M. E. Earnhardt was unjustly discharged from service on May 8, 1962.
2. That accordingly the Carrier be ordered to restore this employe to service with all seniority and service rights unimpaired and with compensation for all time lost retroactive to and including April 29, 1962, upon which date he was removed from service pending formal investigation.

EMPLOYEES' STATEMENT OF FACTS: M. E. Earnhardt, hereinafter referred to as the claimant, was employed by the Southern Railway Company, hereinafter referred to as the carrier, as a Machinist at the Atlanta, Georgia Shops with a seniority date of September 11, 1961. The claimant began work with the carrier as machinist helper in 1937. Prior to his discharge he has worked for the carrier as machinist helper, locomotive fireman and machinist.

On April 29, 1962 the claimant held a regular position at the carrier's Inman Yard Shops, Atlanta, assigned hours 3:00 P.M. to 11:00 P.M., rest days Tuesday and Wednesday. On Sunday, April 29, 1962 at 2:45 P.M., Assistant Round House Foreman H. B. Buckner went to a room at the Inman Yards Shops which is maintained for the employes, there he found the claimant and the two engaged in a conversation relative to the claimant being given an investigation for an alleged violation of the so called "clock rule". The claimant, not being under pay at the time, attempted to leave the room, whereupon Mr. Bruckner struck him on and about the head with a deadly weapon, namely, a 10 inch Stilson-crescent wrench. Immediately following this incident, and without the offer of medical examination or aid, the claimant was subjected to the rigors of a preliminary investigation, which, as will be shown in the position of employes, was within itself, in violation of the current agreement.

“ * * * The Board is without power to pass upon the propriety of the penalty imposed or to direct the carrier to reinstate or rehire. The principle laid down in Awards 13052 and 14421 is in all respects reaffirmed and controlling in this case.”

Mr. Earnhardt, having been dismissed for just and sufficient cause, and his employment relationship terminated, does not have any enforceable right by agreement or otherwise to be reinstated or rehired by carrier. Whether carrier is to rehire Earnhardt is a matter left solely to its discretion. Carrier has no intention of rehiring Earnhardt. He was not a loyal, faithful and efficient employe. He was dismissed for just and sufficient cause. The board cannot in these circumstances order the carrier to rehire him, because it is without authority to do so.

Under the Railway Labor Act, by virtue of which the Board functions, and the principles of prior board awards, carrier was fully justified in dismissing Earnhardt and refusing to rehire him under any circumstances. The board cannot substitute its judgment for that of the carrier.

CONCLUSION

Carrier has shown that:

- (a) The effective agreement was fully complied with by carrier.
- (b) The charge against Earnhardt was proven and he was suspended and subsequently dismissed for just and sufficient cause.
- (c) The principles of prior board awards support carrier's action and its position and limit the authority of the board.
- (d) Earnhardt's employment relationship having been terminated for just and sufficient cause, his reinstatement or rehire is a matter left solely to carrier's discretion.
- (e) Carrier has no intention of rehiring Earnhardt and the board is without authority under the Railway Labor Act by virtue of which it functions to order carrier to rehire him. He has no enforceable right under the agreement or otherwise to be rehired.

Carrier having exercised its managerial prerogatives in dismissing Earnhardt for just and sufficient cause and having acted in good faith without bias or prejudice in doing so, the board 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.

The Claimant M. E. Earnhardt, whose seniority date was September 11, 1961, was employed as a Machinist on the 3:00 P.M. to 11:00 P.M. shift—Thursday through Monday—at the Carrier's Inman Yard Shops at Atlanta, Georgia. The Claimant had prior service with the Carrier as a Fireman and as a Machinist's Helper.

On Sunday, April 29, 1962, at around 2:45 P.M. the Claimant and Assistant Round House Foreman H. B. Buckner had an altercation in a Round House office. Immediately following the altercation General Foreman R. R. Ray, Jr.,—when the Claimant refused to come to his office—conducted a preliminary investigation at the Round House and then suspended the Claimant from service pending a formal investigation.

On May 3, 1962, a formal investigation was conducted by Master Mechanic J. O. Brown, Jr. The Claimant was charged with "failure to comply with instructions, leaving job before quitting time, and assaulting a supervisor of the Southern Railroad".

The Carrier found the Claimant guilty as charged and on May 8, 1962, Master Mechanic Brown notified the Claimant of his discharge by Certified Mail.

The Organization contends that the Claimant "was unjustly discharged from service on May 8, 1962".

The Carrier contends "that the effective agreement was fully complied with, that the charge against Earnhardt was proven and he was suspended and dismissed for just and sufficient cause".

Because the evidence offered on the charge of "assaulting a supervisor of the Southern Railroad" is in serious conflict, the Board dismisses that charge from further consideration.

As for the remaining charges of "failure to comply with instructions" and "leaving job before quitting time", an objective analysis and evaluation of the Investigation Transcript indicates that the weight of the evidence supports the Carrier's position.

The Investigation Transcript reveals the following determinative data:

- (1) On April 14, 1962, at 10:57 P.M., when General Foreman J. C. Durham arrived at the Round House to deliver a Social Security Card to the Claimant, he learned that the Claimant had already checked out.

Also on April 14, 1962, Foreman Buckner reportedly told the Claimant not to check out before 11:00 P.M.

- (2) On April 15, 1962, General Foreman Durham—in the presence of Foreman Buckner—informed the Claimant that he was supposed to be working until the check out time at 11:00 P.M. before washing up and changing his clothes.
- (3) On April 28, 1962, when Round House Foreman B. H. McMichael observed Claimant about to leave Carrier's premises in his car, he so informed Foreman Buckner.

The latter went out to the Claimant's car and warned the Claimant that he was again violating the time clock instructions, he (Buckner) had given to the Claimant on April 14, 1962.

Foreman McMichael then reportedly checked the Claimant's time card and found it had been punched at 10:57 P. M. on April 28, 1962.

The above evidence leaves little doubt that the Claimant repeatedly failed to comply with instructions and did leave the job before quitting time on several occasions.

Accordingly, the Board rules that the Claimant was not unjustly discharged, from service on May 8, 1962.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of May, 1964.