

Award No. 4529
Docket No. 4431
2-GTW-FO-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 92, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Firemen and Oilers)**

GRAND TRUNK WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Classified Laborer Sim McArthur was unjustly suspended from the service September 27, 1961 and unjustly discharged from the service by letter dated August 6, 1962, effective, June 25, 1962.

2. That accordingly, the Carrier be ordered to:

(a) reinstate Classified Laborer Sim McArthur to the service with all rights unimpaired, including, seniority, vacation, health and welfare benefits and life insurance.

(b) compensate Classified Laborer Sim McArthur for all time lost account being unjustly suspended and unjustly discharged from the service.

EMPLOYEES' STATEMENT OF FACTS: Classified Laborer Sim McArthur, hereinafter referred to as claimant, was employed by the Grand Trunk Western Railroad Co., hereinafter referred to as the carrier, on February 25, 1944 at Port Huron, Michigan and maintained continuous employment relationship with the carrier until discharged by carrier by letter dated August 6, 1962, effective June 25, 1962.

During his off duty hours on September 21, 1961, claimant, while driving his car from Mt. Clemens, Michigan, to his home in Port Huron, Michigan, was stopped by the Richmond police for violating a "Stop or Detour" sign, issued a summons and released. On September 22, 1961, claimant was arrested and charged with possession of narcotics.

On September 23, 1961, claimant appeared at carrier's round house office and made request for his vacation to commence on Sept. 23, 1961 and his request was granted. Claimant's vacation ended October 4, 1961.

The record clearly shows that the charges which resulted in the claimant's suspension and subsequent discharge from carrier's service, were conclusively sustained by the evidence developed at the July 26, 1962 investigation. It is further obvious from the employes' August 30, 1962 and September 13, 1962 letters of appeal that no rule has been cited by the employes, as having been violated as the result of the carrier's suspension and discharge of the claimant. Carrier, therefore, submits that the employes have failed to establish any basis for their contention that the claimant was unjustly suspended and discharged.

It has been held on a number of occasions by the Second Division of the National Railroad Adjustment Board, that where the carrier has not acted arbitrarily, without just cause, or in bad faith, the judgment of the Board in discipline cases will not be substituted for that of the carrier. In second Division Awards 2787 and 3092, this position was stated as follows:

"Award 2787

Findings: * * *

* * * Many awards have established that we are not triers of the facts; that our duty is to establish only that the fair hearing required by the rules has been given, and not to substitute our judgment for those who have had the direct and immediate opportunity to evaluate the witnesses and their evidence. Thus, leniency is a prerogative which is not available to this Division, much as we might desire to recognize the personal qualities, family problems, veteran status, or union affiliations of any grievant."

"Award 3092

Findings: * * *

Was the penalty of dismissal justified? We think the language contained in Award 1692 of this Division is persuasive.

"The question then remains, was the penalty imposed excessive? This and other Divisions of the Board have often said that they would not substitute their judgment for that of carrier unless its action in that respect can be said to be arbitrary, unreasonable, or unjust."

In the absence of any showing of a rule violation or unjust actions on the part of the carrier in this case, the instant claim should be denied and carrier requests that this board so 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 waived right of appearance at hearing thereon.

The Division finds, without passing on some of the questionable procedures

of this disciplinary matter, that, in the light of all the facts of record, the discharge of the Claimant as an undesirable employe on account of his having been convicted for the possession of narcotics, is such an extreme sanction that it must be regarded as an unreasonable exercise of managerial discretion.

The evidence discloses that the claimant was an employe of the Carrier for more than 16 years without having a blemish on his work record prior to his suspension after his arrest; and by admission of his Foreman, the claimant was a good worker who never caused any trouble. The record further reveals that after the Claimant pleaded *nollo contendere*, he was convicted of the charge of possessing narcotics and placed on five years probation and assessed \$200 for the cost of the trial. The claimant was not sentenced to serve any time in jail. The record also reveals that the claimant had no known record of being a user or peddler of narcotics. He had explained, without being successfully contradicted, that the marijuana found in his car by the police had been left there by unknown companions whom he had picked up in a bar while he was on his day of rest.

The Division concludes that, while under all the facts of record, the disciplinary sanction of discharge from service is not warranted, nevertheless the claimant should not be completely exculpated for his laxity of conduct. The discharge is, therefore, converted into a two year suspension without pay, with seniority unimpaired, to run from September 27, 1961 to September 27, 1963. The claimant is to be restored to duty as of September 28, 1963, with pay, but with deductions made for all outside earnings and statutory unemployment compensation received from September 28, 1963 to the date of his re-instatement. The request for life insurance and health and welfare benefits are denied for the period of the suspension.

AWARD

Claim sustained except as modified by the 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 June, 1964.

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when the interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 4529,
DOCKET NO. 4431

NAME OF ORGANIZATION: System Federation No. 92, Railway Employees' Department, A. F. of L. - C. I. O. (Firemen & Oilers)

NAME OF CARRIER: Grand Trunk Western Railroad Company

QUESTION FOR INTERPRETATION AS PRESENTED BY ORGANIZATION: Does the language contained in the findings of Award No. 4529, reading:

"The Division concludes, that while under all the facts of record, the disciplinary sanction of discharge from service is not warranted, nevertheless the claimant should not be completely exculpated for his laxy of conduct. The discharge is, therefore, converted into a two year suspension without pay, with seniority unimpaired, to run from September 27, 1961 to September 27, 1963. **The claimant is to be restored to duty as of September 28, 1963, with pay, but with deductions made for all outside earnings and statutory unemployment compensation received from September 28, 1963 to the date of his re-instatement.** The request for life insurance and health and welfare benefits are denied for the period of the suspension." (Emphasis added)

and the award reading:

"Claim sustained except as modified by the above findings" —

entitle the carrier to deduct the amount of \$451.00 received by claimant, as statutory unemployment compensation from the Michigan Employment Security Commission, from the amount due him under the award and retain same for its own benefit, when the claimant is required by law to reimburse the Michigan Employment Security Commission in the amount of \$451.00 drawn in unemployment benefits during the period for which carrier is required to pay him under the terms of the award.

FINDINGS: With regards to the meaning of the following language of the above captioned Award:

"The claimant is to be restored to duty as of September 28, 1963, with pay, but with deductions made for all outside earnings

and statutory unemployment compensation received from September 28, 1963, to the date of his re-instatement.”

The Division states that it intended, that in the event the claimant received any statutory unemployment benefits for the period of time in question and there existed a legal responsibility to pay back these benefits to the appropriate statutory body, that this should be done.

Accordingly, the Division directs that, in the interim, the sum in question should be held in escrow pending a determination upon whom has devolved the legal responsibility to make said reimbursement to the appropriate statutory body.

Upon ascertaining this fact, i.e., the devolution of the legal responsibility upon either the carrier or the claimant, the sum in question should then be released to the party having the aforementioned legal responsibility with a contemporaneous notice to the statutory body that the sum in question is being so released.

Referee Jacob Seidenberg, who sat with the Division as a Member when Award No. 4529 was rendered, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 9th day of July, 1965.