

Award No. 5211
Docket No. 5025
2-CMS tP & P-CM-'67

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. 76, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Carman T. A. Machione was unjustly dismissed from service on July 15, 1964.
2. That accordingly the Carrier be ordered to:
 - (a) Reinstate the claimant with all rights and seniority unimpaired, including but not limited to, insurance, both health and life and any monetary loss sustained by not having such insurance, vacation and holiday pay.
 - (b) Make claimant whole for loss of wages and any other benefits from July 15, 1964 until such time as case is settled.

EMPLOYEES' STATEMENT OF FACTS: The above named claimant, hereinafter referred to as the claimant, was employed as Carman-Car Inspector for the Chicago, Milwaukee, St. Paul and Pacific Railroad, hereinafter referred to as the Carrier, at it's Western Avenue Freight Yard, Chicago, Illinois, with seniority date of October 25, 1954.

Under date of May 25, 1964, District Master Mechanic, Mr. W. C. Gage, directed a letter to claimant advising him to appear at the Western Avenue Coach Yard Office at 10:00 A. M. Daylight Saving Time, May 29, 1964 for formal investigation on a charge set forth in the letter, a copy of which is submitted herewith, and identified as Exhibit A.

Under date of May 29, 1964, District Master Mechanic, Mr. W. C. Gage, directed a letter to claimant advising him to appear at the Western Avenue Coach Yard office at 10:00 A. M., Daylight Saving Time, June 1, 1964 for formal investigation on a charge set forth in the letter, a copy of which is submitted herewith, identified as Exhibit B.

On page 9, Mr. Machione testified that when he left his partner (Mr. Baliga) he went to couple up the air hoses on track 7, yard 2 and after doing this he went to lunch. Track 7, yard 2 is where Union Street cars are placed. In other words then, Mr. Machione testified, on page 9, that before going to lunch he worked Union Street cars, yet in his deposition (page 11) Mr. Machione indicates he worked on the Union Street cars after returning from lunch.

From a review of the transcript of the investigation, including the portions specifically mentioned above, the Carrier submits there can be no doubt about the fact that the evidence sustains the charges preferred against Mr. Machione and determines his responsibility in connection therewith.

Board Awards of all four Divisions of the National Railroad Adjustment Board as well as the various Special Boards of Adjustment have consistently held that when evidence is sufficiently substantial and supports the charges, even though it may be contradicted, the discipline based thereon will not be disturbed. In this regard, we wish to direct attention to but 2 of those Awards:

SECOND DIVISION AWARD 2996

"While there was conflicting testimony adduced at the investigation of the charges against the claimant, there was substantial evidence to reasonably support the decision of the carrier. Under such circumstances we may not substitute our judgment for that of the carrier."

SECOND DIVISION AWARD 3700

"The record discloses that Claimant was afforded a fair and impartial hearing: the evidence sustained the charge against him, and the penalty imposed was not excessive.

We find no persuasive reason for disturbing the Carrier's judgment in this case."

The Carrier submits that there can be no doubt but what the responsibility of Mr. Machione in connection with the serious charges preferred against him was fully developed and in view thereof the Carrier further submits that the discipline assessed was neither unjust, arbitrary or unreasonable, but rather, under the circumstances prevailing, was justified and warranted and we respectfully request that the Carrier's action not be disturbed and the claim denied.

(Exhibits not reproduced.)

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 claim is that Claimant was unjustly dismissed from the service on July 15, 1964. He was reinstated on September 14, 1964, with seniority rights unimpaired, but without pay for the time lost, and the question here is whether he should be compensated.

Notice was given Claimant of an investigation "for the purpose of developing the facts in you allegedly leaving your assignment during the regular working hours without proper authority on May 24, 1964, 5:35 P. M. Central Standard time."

The evidence at the hearing showed that the time in question was daylight saving time rather than standard, but no one was prejudiced or misled by the error, and no point is made of it.

The record contains evidence that Claimant was seen to enter his car at the west end of the freight yard at 5:35 P. M., and leave the railroad premises, and that he was seen to return in it at 6:20 P. M. However, Claimant denied that he had used his auto to leave the yard, and stated that he was working on the property except during his 20 minute lunch period. Thus we have a direct conflict of evidence.

As this Division said in Award No. 2996:

"While there was conflicting testimony adduced at the investigation of the charges against the claimant, there was substantial evidence to reasonably support the decision of the carrier. Under such circumstances we may not substitute our judgment for that of the carrier."

This principle has been so well settled for so many years as not to be further debatable. Since the record contains adequate evidence to sustain the Carrier's action the claim must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June, 1967.