

Award No. 3463

Docket No. CL-3403

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: (a) Claim of the System Committee of the Brotherhood that the Carrier violated and continues to violate the terms of Agreement No. 7 when they permanently disqualified Mr. W. W. Soar, effective September 6, 1945, from assignment to any position of foreman at any of its warehouses or merchandise piers; and

(b) That Mr. W. W. Soar shall now be returned to his position of Freight House Foreman, General Agent's Department, 23rd Street Freight Depot, Newport News, Virginia, and paid for all wage loss sustained and that his record be cleared of said permanent disqualification.

OPINION OF BOARD. This dispute is before the Board on a joint submission; however, each party submits separate Statements of Facts. The facts, and the contentions of the respective parties are set forth in the submissions where it appears above. We will make brief reference thereto as occasion requires.

On August 10, 1945, a Packard automobile was tendered at the freight house, Newport News, Virginia, for shipment to St. Louis, Missouri, at which time Bill of Lading was executed. This automobile was loaded and forwarded on August 14, 1945. Warehouse Foreman W. W. Soar used this automobile without authority of the Carrier on the nights of August 10, 11 and 12, 1945. A Board of inquiry held an investigation and at the conclusion thereof found in substance that Warehouse Foreman W. W. Soar was at fault for the unauthorized use of an automobile which had been delivered into the custody of the Carrier. A verdict was rendered disqualifying Soar as a Freight Warehouse Foreman. He was removed from this position September 5, 1945, and assigned to a lesser position which he accepted.

The claim of the Brotherhood is that the Carrier violated and continues to violate the current agreement by permanently disqualifying Soar "from assignment to any position of foreman at any of its warehouses or merchandise piers".

In discipline cases previous awards are helpful but not generally controlling because of the disparity in the facts in each case. The general rule applicable has been stated so often it is now almost axiomatic:—"This Divi-

sion is committed to the rule that it will not interfere with disciplinary measures unless it appears the carrier acted in bad faith, arbitrarily, capriciously or upon a fundamentally wrong basis". Award 1632. In Award 1310, this Board committed itself as follows:

"We think demotion was a proper method of discipline when the offense was serious enough that the Carrier could not be considered arbitrary if it had decided a dismissal, and the employee accepts the lesser position even though under protest. It may be considered as a lesser included discipline embraced in dismissal. The employee could have refused to accept the demotion which would have resulted in what would have been equivalent of a dismissal.

"While, by accepting the demoted position, he does not waive his right of appeal from discipline enforced, it must be treated as if he were appealing from a decree dismissing him from service. If a dismissal could not in this case be considered unreasonable, certainly a lesser discipline dictated by consideration of leniency cannot be so considered * * *"

Thus, it is apparent that demotion of an employee by a carrier as a measure of discipline has been approved. In the instant case, the automobile in question had gone into the custody of the Carrier by virtue of the Bill of Lading. Soar had no authority from the Carrier to use it and by using it, he was guilty of an infraction of the rules of the Carrier. By his conduct, in the event of accident or by some other means, had damage to others accrued, there would be a legal question as to the liability of the Carrier. We find by a search of the record some mitigating circumstances.

A Mr. Bakewell and Mr. Lawton, bearing some family connections, brought the automobile to the freight depot to ship it back to the owner, Mr. Orthwein, also connected with the Bakewell family in some manner. Mr. Orthwein had loaned Bakewell the car to use on a trip. Upon arriving at the depot, they met Soar; he inspected the car, made notations of record with reference to its shipment. In a conversation Lawton told Soar to take the car home, take care of it and keep it there, rather than have the car stand out unused on the ramp. Bakewell, who was shipping the car, assented and agreed to Lawton's idea. Soar did take the car and used it, parked it in a parking lot on occasions. His use of the car was not extensive and it was not damaged or abused. It is true that Soar did not have the owner's consent.

Apparently, Soar felt that if he took the car under such circumstances, it would be all right. He readily admitted his error at the investigation. Assuming the mistake he made was an honest one, he still would be entitled to be disciplined. We conclude the Carrier was well within its prerogative by applying demotion as a means of discipline; having so determined, the claim for pay made by Soar must be denied. We further believe Soar should not be restored to his former position as Freight Warehouse Foreman.

We are convinced that under the circumstances and from a review of the record; that permanent disqualification of Soar, forever in the future, utilizing his seniority rights to attempt promotion, is an abuse of discretion on the Carrier's part and is harsh and severe. See Award 913.

For the reasons stated herein, the discipline meted out by the Carrier should be modified to conform to the Opinion.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the discipline should be modified in accordance with the Opinion.

AWARD

Discipline to be modified in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of March, 1947.