

Award No. 3965

Docket No. CL-3927

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

LOUISVILLE AND NASHVILLE RAILROAD CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that Mr. J. B. Michel, Depot Ticket Clerk, New Orleans, La., shall now be reinstated with seniority rights unimpaired and be reimbursed for wage loss suffered retroactive to April 11, 1946, on which date he was dismissed for "irregularities in sale of tickets at New Orleans, La. on January 24, 28, 30, 31, and Feb. 2, 1946."

OPINION OF BOARD: The claimant, J. B. Michel, began work with the Carrier here involved, on January 1, 1910, as a student operator. Two years later he was promoted to the position of Telegraph Operator. On June 23, 1918, he was made Ticket Clerk at New Orleans, Louisiana, where he worked for about two years. He was then promoted to the position of Depot Ticket Agent at the same point, a subordinate official position, where he remained until September, 1944. At this time he was demoted, and then, after some complaint, accepted demotion to his former position of Ticket Clerk in the same office. The record indicates that he was, at that time suffering from ill health, and on September 14, 1944, he was granted a thirty day leave of absence on account thereof.

Claimant worked as Ticket Clerk in the New Orleans Office until early in 1946. In late 1945, his attention was called to the existence of certain irregular practices in his work of selling tickets, which he promised to correct. On December 22, 1945, the Carrier received notice of an alleged irregularity in the sale of a ticket, which it attributed to Claimant, and an investigation was ordered which began on January 24, 1946, and ended on February 4 following. It disclosed irregularities on the part of Claimant, in the sale of tickets on January 24, 28, 30, 31 and February 2, 1946, consisting mainly of failure to show the time limit of the ticket, and the sum paid therefor, but involving overcharges and undercharges in one or more instances as to each, but not in sums indicating an intent to defraud the purchaser or the Carrier. The report of the investigation was forwarded to the Louisville Police offices of the Carrier, and on February 7, 1946, was turned over to the Carrier's General Manager. On February 15, 1946, the Claimant was notified of the charges and required to appear for an investigation to be held on February 21, 1946, at which time Claimant appeared and had the assistance of H. C. Skinner, a General Chairman of the complaining organization. The docket shows that the claimant admitted the truth of the charges against him, and, aside from this, the charges were amply sustained by the testimony taken on the hearing. Claimant was dismissed from service on April 11, 1946.

The claim when first submitted, October 27, 1947, was merely for reinstatement, with seniority rights unimpaired, and to be reimbursed for any wage loss suffered. No objection was made therein as to procedure, but the question had been raised on the investigation hearing aforesaid. After the original claim was filed, however, the same was amended to include a charge that the Carrier violated Rule 19 (a) of the Agreement, in that it failed to give Claimant notice of the investigation aforesaid within ten days after its knowledge of the charges involved therein. There is no merit in this amended charge. The Carrier cannot be held to have knowledge of the charge until it received a report from which it could formulate the charge, and the docket clearly shows that the necessary report was received by the Carrier's General Manager on February 7, 1946, and Claimant was notified on February 15 following, with hearing held six days later, all in full compliance with Rule 19 (a) of the Agreement.

This leaves for decision the question of whether the Carrier improperly exercised its discretion in dismissing the claimant from its service on April 11, 1946, under the circumstances shown by this docket.

In one of the early awards of this Division, No. 71, a rule was laid down, which, in principle, though not always in practice, has been adhered to throughout the years. In that award it was said:

"Railroad Management must accept full responsibility for the employment of its employees, and it follows that it should be allowed a reasonable amount of discretion in deciding the competency and ability of its employees. So long as the carrier management acts in good faith and without ulterior motives, and does not abuse the right and privileges of the employees under the contracts and rules and regulations existing between the employer and employee, this Board is without the right to interfere in the action of the employer in disciplining its employees."

The award from which we have quoted contains the clear implication that in certain cases this Board has the right to interfere, and that this is true is made very clear in Award No. 135 of this Division, wherein it is held:

"Although this Board has the power to order the reinstatement of an employee, it should be very cautious in the exercise of the power. It should not exercise it unless the evidence clearly indicates that the employer has acted arbitrarily, without just cause, or in bad faith."

We do not think we would be justified in citing the numerous awards of this Division, supporting the principles laid down in the two early awards, from which we have quoted. There have been many awards wherein the action of Carriers in this type of case has been disapproved, and reinstatement and other relief granted; but in all such cases, there is recognition of the rule announced in Awards Nos. 71 and 135, and the action of the Board in such cases based on some supposed arbitrary, capricious or unfair conduct, or some supposedly excessive punishment, on the part of the Carrier, depriving the employee of a fundamental right under his contract with his employer. Therefore, unless we can see that the Carrier has, in the present case, acted arbitrarily, capriciously, from ulterior motives, or in bad faith, its action in dismissing one of its employees, after due notice, presentation of specific charges, and a fair hearing, conducted within the rules of the Agreement, this Board cannot properly interfere.

We cannot see from the docket before us that the act of the Carrier in dismissing the Claimant from its employ was either arbitrary, capricious, or lacking in good faith. The facts disclosed by proof, and Claimant's own admissions, show him to have lost his competency to perform the exacting work his position required. It is quite clear that at one time, and up to about 1944, Claimant was a competent employee. His record of service and of promotions show that. But it is evident that about 1944 something happened to lessen his efficiency. Whether it was due to poor health or other causes, we do not know. He was demoted at that time. In November, 1945,

he was admonished as to his failure to properly perform his duties, and he promised improvement. In December 1945, his work was again called in question, and an investigation followed. That investigation disclosed many errors and irregularities in his work, within the period covered thereby, which, in connection with the other and former errors shown, lead us to believe that his carelessness and incompetency was persistent. In such circumstances, what could the Carrier do in its own interest and that of the public? We think it was justified in displacing the Claimant, and in securing a competent employe to perform the exacting work of Ticket Clerk. Naturally the case enlists human sympathy, and it may be contended that the punishment was too severe. It should not be treated as a punishment. The Claimant has simply lost his competency to satisfactorily perform his work, and the Carrier, as a practical matter, cannot be asked to hold him in its employ. The docket does not indicate any character of work the Claimant could do efficiently, and his case has become a social problem, the burden of which the Carrier should not be called upon to carry.

Award No. 3567 of this Division was a case where a stenographer was dismissed for incompetency, and a claim based thereon was denied. We think that award fully sustains our position.

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 Employe involved in this dispute are respectively carrier and employe 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 there was no violation of the Agreement, and the dismissal of the Claimant was justified by the showing made.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of June, 1948.