

Award No. 5821

Docket No. CL-5789

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

Pedro Espinet, Station Baggage-man, Pennsylvania Station, New York, New York, New York Division, be returned to service with all rights unimpaired and compensated for all monetary loss sustained dating from July 7, 1950, until adjusted. (Docket N-293.)

OPINION OF BOARD: This case involves a claim of the System Committee of the Brotherhood on behalf of Pedro Espinet who was separated from the service of the Carrier effective as of July 7, 1950.

Claimant Espinet was charged as follows by the Carrier:

"Overstaying lunch period 20 minutes (2:45 A. M.—3:25 A. M.), July 7, 1950. Returning from lunch period at 3:25 A. M., July 7, 1950, in unfit condition to work. Using threatening language to Ass't. General Foreman on July 7, 1950."

On July 19, 1950 a trial was held on the above quoted charge and after deliberation, the Carrier dismissed claimant from service on July 28, 1950.

The Petitioner contends that the evidence submitted at the trial failed to prove the claimant employe guilty as charged by the Carrier. Furthermore, the Petitioner contends that there were certain defects in the trial procedure to the prejudice of Espinet.

The Carrier contends that the evidence fully sustained the charge; that claimant was late in reporting back to his job and that when he did report, certain threats were made by him to the Assistant General Foreman. Under these circumstances the Carrier argues that it was fully justified in dismissing Espinet from service.

A careful review of the trial record does not reveal any defects in the procedure which can be said to have been prejudicial to the claimant. While a question can be raised properly with respect to the admissibility of Carrier's Exhibit "F", the fact remains that the Carrier's action in dismissing claimant was taken some four weeks prior to the existence of Exhibit "F", and hence was not influenced by the Exhibit.

Complaint has been made of the inclusion of claimant's Discipline Record in the record. This objection is well founded to the extent that such record cannot be considered in determining the guilt of claimant on the charges posed in the instant case. However, the Discipline Record can be appropriately considered with respect to the measure of penalty once guilt is clearly established.

The evidence of record does establish that claimant reported back to his position from lunch some 20 minutes late on the date in question. The evidence indicates also that he was in "an unfit condition to work". The reasons for such unfitness are not so firmly established by the record, although there is evidence that he was in some measure under the influence of alcohol.

The third charge with respect to the use of threatening language allegedly addressed to the Assistant General Foreman is based almost entirely upon the testimony of Assistant General Foreman Michal himself, which testimony is denied by claimant.

A review of the record in this case shows that a penalty was in order since the guilt of claimant was established with respect to certain of the charges. There remains for consideration the question of whether dismissal from service was the appropriate penalty in view of the nature of the offenses.

In view of the facts and circumstances disclosed by the record, a penalty as severe as dismissal from the service was drastic and arbitrary. Therefore claimant should be reinstated with seniority rights unimpaired, but without pay for time lost.

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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier's assessment discipline was arbitrary and drastic.

AWARD

Sustained to the extent indicated in the above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of June, 1952.

DISSENT TO AWARD NO. 5821; DOCKET NO. CL-5789.

This Award restores to service, without pay for time lost, a Station Baggagehandler (Mail Handler), who had been dismissed after a proper trial, because of "Overstaying lunch period 20 minutes (2:45 A. M.—3:25 A. M.), July 7, 1950. Returning from lunch period 3:25 A. M., July 7, 1950, in unfit condition to work. Using threatening language to Ass't. General Foreman on July 7, 1950". The record here clearly shows a service record with Carrier of less than 5 years with a series of previous charges and discipline and obvious failure to mend his ways.

The author of this Award establishes that:

"The evidence of record does establish that claimant reported back to his position from lunch some 20 minutes late on the date in question. The evidence indicates also that he was in 'an unfit condition of work.' The reasons for such unfitness are not so firmly established by the record, although there is evidence that he was in some measure under the influence of alcohol."

and then totally unexplained and in our opinion unreasoned decides:

"In view of the facts and circumstances disclosed by the record, a penalty as severe as dismissal from the service was drastic and arbitrary. * * *"

Abnormal conduct on the part of an employe can only be dealt with as a matter of discipline and a Carrier being responsible for the acts of its employes must retain a free hand, except as it limits itself by an Agreement, in the employment, discharge and disciplining of its employes. There is no question here of the Agreement Rules respecting proper notice of charges and trial, before disciplinary action, being completely complied with.

This Award in effect usurps the authority of the Management without assuming any of its responsibility or liability because it is a substitution of an opinion of the majority of this Board for that of the responsible Carrier officers and this we should not do.

This Award further ignores the many precedent awards exactly to point, cited in the case.

The late Honorable Joseph B. Eastman, a lifetime student of the transportation industry, a member of the Interstate Commerce Commission for many years and Co-ordinator of Transportation under the 1933 Act, was certainly the most prominent proponent of the amendments to the Railway Labor Act, which created the Adjustment Boards, was of the opinion that these Boards should not interfere in matters of discipline.

In testifying at a hearing on these amendments before the Senate Committee on interstate commerce, Mr. Eastman said:

"It seems to me that such a national board, if it were wise, ought to make it perfectly clear at the outset that it will not interfere in matters of discipline, unless it has an exceedingly good case, and all doubtful cases after it has made that policy clear, would not be referred, I assume, to the National Board."

For these reasons this Award is erroneous and we dissent therefrom.

/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp