# Award No. 4106
# Docket No. CL-4081

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Jay S. Parker, Referee

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## PARTIES TO DISPUTE:

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

## THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that The Ogden Union Railway and Depot Company and/or its Officers, after granting Mr. L. E. Goucher permission to be absent from duty May 14, 1947, arbitrarily and capriciously imposed the penalty of dismissal upon Mr. Goucher, withholding him from the service of the Company from May 21, 1947, until June 17, 1947, on which latter date they reinstated him to his position without prejudice to this time claim, which penalty was unreasonable, unjustified and wholly unwarranted; and

The Ogden Union Railway and Depot Company shall now compensate Mr. L. E. Goucher for full wage loss suffered as a result of such dismissal.

OPINION OF BOARD: L. E. Goucher entered the service of the Carrier August 25, 1928, and on all dates in question, held the position of Manifest Clerk, hours 6 P. M. to 2 A. M. About 5 P. M. on Wednesday, May 14, 1947, he called the Yard Office where he worked by telephone and stated he would not be able to report for duty on such day. L. G. Bitton, the Assistant Chief Clerk, authorized to act on communications of that character was temporarily out of the office so Goucher gave the information to Clerk Esterholdt, then on duty, and requested that he have Bitton return the call so that he would know the matter was taken care of. Within the hour Goucher was called and advised by Bitton to be at work in time to protect his job as he would be unable to lay him off because there were no men available to protect his position. Goucher insisted on being laid off. Thereupon Bitton, who had received instructions from his Superior Office to get in touch with him in case of any man laying off that particular day, advised Goucher he would contact the Chief Clerk. After talking to such official, and at about 6:05 P. M., Bitton called Goucher again and told him he would be unable to lay him off and that he would have to show up for work as there was no way out of it. Goucher then stated he could not show up because of sickness and they would have to lay him off. Bitton then said he would have to write the matter up and turn it over to the Chief Clerk. Goucher answered it would have to be that way. Bitton then marked Goucher as laying off and called another employe who filled his position and was paid on an overtime basis.

On May 17, 1947, Goucher was charged with failure to protect his assignment at 6 P. M. May 14, 1947. After notice, investigation and hearing, which are not here in question, the charge was sustained as made and Goucher was dismissed from the Carrier's service. Thereafter and on June 17 following

the Carrier advised Goucher he had been reinstated to his former position without prejudice.

The claim is fully stated in the ex parte submissions. The Brotherhood contends the action of the Carrier as therein set forth was arbitrary, capricious, unreasonable, unjustified and wholly unwarranted and in violation of the hereinafter quoted provisions of the existing Agreement, viz:

Rule 30, which so far as here involved, reads:

> "No employe shall be disciplined or dismissed without a fair hearing by his supervising officer * * *."

Rule 36, pertinent portions of which provide:

> "Employes will be granted leave of absence when they can be spared without interference to the service. * * *"

At the outset it will simplify the issues to refer to certain contentions advanced by the petitioner which, while they should be mentioned, are lacking in substantial merit and can therefore be summarily disposed of.

The first of these is a contention that, as charged in the formal statement of claim, Goucher was granted permission to be absent from duty on the date in question. This phase of the claim is not sustained by the record. Quite to the contrary, it reveals that Goucher was positively and definitely advised he would not be given permission to lay off.

Another such claim is that Rule 30 requires a specific charge and that the instant one is so general in its terms that Goucher could not know to what it referred. Conceding for our purposes Claimant's position with respect to what the rule requires is well taken, we fail to see how the instant charge need or could be any more definite. A charge of failure to protect an assignment at an hour and on a date certainly can only mean one thing and that is that the holder thereof was not on the job and giving it required attention. Such a charge and a general charge of insubordination are not comparable. Therefore, Award 3011 on which petitioner relies to sustain this position is not in point or entitled to consideration.

Thus it appears the sole and only issue is whether, when tested by the principles established by our Awards, the record discloses evidence sufficient to require the sustaining of the Carrier's order of dismissal. To properly determine that question we must have before us and keep in mind the principles to which we have just referred.

Long ago this Division definitely determined its function in discipline cases. In Award 1497, it said:

> "It is not the function of this Board to review the judgment of the Management in a case of discipline. We can set aside the action taken only where it is so clearly wrong that we can say there has been an abuse of discretion. Award 891. See also Awards 71, 232, 280, 1310."

This Division's policy with respect to cases of such character was also established early in its existence. See Awards 71, 135, 1848, 1996, 2216, 2632, 3984 and Award 2769, where such policy is stated thus:

> "In its consideration of claims involving discipline, this Division of the National Railroad Adjustment Board (1) where there is positive evidence of probative force will not weigh such evidence or resolve conflicts therein; (2) when there is real substantial evidence to sustain charges the findings based thereon will not be disturbed; (3) if the Carrier has not acted arbitrarily, without just cause, or in bad faith its action will not be set aside; and (4) unless prejudice or bias is disclosed by facts or circumstances of record it will not substitute its judgment for that of the Carrier."

With minor questions out of the way and general principles applicable to a review of discipline cases stated, we turn to the factual situation on which the issue depends.

Nothing is to be gained by an extended review of the record. It suffices to say that when it is carefully examined and analyzed it reveals substantial evidence to support the obvious finding on which the Carrier's order of dismissal was based, namely, that Goucher's failure to protect his position was not due to illness as he stated in his telephone conversation and as he testified at the hearing but that on the contrary such illness was feigned for the purpose of making it possible for him to attend an employe's party, which he concedes he did attend, during part of the hours he would have had to have been at work on his regular assignment had he not laid off and failed to report for duty on the evening in question. That, conceding there was evidence to the contrary, is sufficient to require the upholding of the Carrier's action unless the record furnishes some affirmative evidence from which we can say the Carrier acted arbitrarily and capriciously and without regard for the fundamental rights of its accused employe.

The Brotherhood asserts this appears from the fact that Carrier had been engaged in an active campaign for the reduction of excess overtime at its Ogden Yards and by its action was merely trying to carry out its program regardless of the true factual situation in the instant case. This assertion, if true, is based on conclusion, conjecture and speculation so far as the record is concerned and hence furnishes no ground for the finding required to permit the setting aside of the Carrier's action.

It is next argued the severity of punishment for the offense charged is sufficient to permit and require a reversal of such action. We do not agree. Conceding, as is pointed out, the punishment might have been lighter we cannot say, once it is concluded—as here—the evidence supports a finding illness assigned as a reason for a lay off was feigned instead of real, that a Carrier in the exercise of the discretion vested in management cannot dismiss an employe from service for wilful failure to protect his assignment.

We have searched in vain for evidence establishing that the Carrier's dismissal of this employe was arbitrary or capricious and therefore must conclude that its action, severe as it was, cannot be disturbed.

In reaching the conclusion herein announced we have not been unmindful of an additional contention advanced to the effect Goucher could have been spared without interference to the service and hence under Rule 20 the Carrier was obliged to permit him to lay off. This contention has also received consideration. Without laboring it further it can be said to have been rejected for the reason the record does not warrant the factual construction given it by the Brotherhood.

**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 the record facts do not disclose a situation which would justify this Division in modifying or setting aside the Carrier's disciplinary action.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.