

Award No. 261

Docket No. 242

2-MP-CM-'38

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 2, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That H. R. McPherson be reinstated with seniority rights unimpaired and compensated for all time lost subsequent to his dismissal from service September 8, 1937.

EMPLOYES' STATEMENT OF FACTS: On the morning of August 13, 1937, H. R. McPherson, employed as car inspector by Missouri Pacific Railroad at El Dorado, Arkansas, his assigned hours of duty being from 3:00 P. M. to 11:00 P. M., called up over the telephone his immediate supervisor, Foreman Middleton, asking him for permission to lay off for a few days. Foreman Middleton, in granting the request, stated it was O. K. with him to lay off, that Jarvis, the extra man, would be glad to get a few days work. That evening, August 13, H. R. McPherson departed on Missouri Pacific train No. 843 for Monroe, State of Louisiana, and while on train between El Dorado, Arkansas, and Monroe, Louisiana, he met a former acquaintance, a Mr. Marshall, who was a resident of Monroe and on his way home. On arrival at Monroe, Mr. Marshall invited H. R. McPherson to spend the night with him. After a brief visit to Mr. Marshall's home they both walked uptown to secure supper, following which Mr. Marshall introduced McPherson to his various acquaintances around town. When they got ready to return home Mr. Marshall called a taxicab and about the time the taxi arrived two strangers appeared on the scene and began contending that the taxi was theirs, that they had just called it. In order to avoid trouble, Marshall and McPherson got in to the back seat of cab whereupon the two strangers got in to the front seat, and as the taxi proceeded to drive off, the two strangers in the front seat began cursing and abusing Marshall and McPherson in the back seat, finally jumping over on top of them. At this point the taxi driver stopped, then got out and opened rear door to order the two strangers out and when he did, all four fell out on street.

About this time two city policemen on their regular tour of duty came by, and, noticing the melee, they arrested and took all four to headquarters. By this time McPherson was practically semi-conscious from the beating he had received, as well as loss of blood. Subsequently police filed two charges against him: "Did conduct himself in a loud and boisterous or drunken manner, contrary to Ordinance No. 2535. Did fight without lawful cause contrary to Ordinance No. 2536". H. R. McPherson was required to make cash bond of \$7.50 on each count. Not having the required amount of money in his possession, it was necessary for him to borrow the money that he was

There is no agreement between the carrier and employes that in any manner whatsoever imposes upon the carrier an obligation to share with the employes and/or their representatives its right of disciplining employes for infractions of rules and/or practices considered inimical to the interest of the carrier.

Beside the question of agreement, the carrier does not wish to convey any idea upon your Honorable Board that it is unmindful of the obligation it assumes for the just imposition of discipline upon the employes, nor the inescapable limitations found in the terms of its agreement with the employes as to procedure prior to the assessing of discipline. Discipline is necessarily a managerial function of the carrier, at least the measure thereof is unquestionably in the hands of the management, made necessary by the rigid rules under which railway transportation is conducted.

Employes occupying what in railroad language is classified as hazardous occupations, such as mechanics in shops and roundhouses where they are constantly working about machinery, etc., must of necessity be men physically and mentally able at all times to reasonably protect themselves and their co-workers from injuries and the company property from promiscuous damage.

Railroads are greatly dependent upon the transportation business it derives from local communities and the morals of its employes probably has more influence upon such business in local communities than any other line of business.

In the instant case one of the carrier's employes, notwithstanding the fact that he may have been temporarily absent from duty for a few days, became involved in a situation on the streets of the City of Monroe to the extent that caused his arrest for violation of city ordinances. There is no question of his guilt as corroborated by the City Court's records (carrier's Exhibits Nos. 2, 3, and 4) and the measure of discipline imposed by the carrier on its employes for their acts that are inimical to the best interest of the carrier, is certainly not a subject for adjudication by your Honorable Board. The right of your Honorable Board to pass upon whether the carrier fulfilled its obligations as to methods of procedure established by agreement between the carrier and employes is unquestioned; however, in this case there is no allegation from the employes that the carrier in any manner whatsoever violated its contractual relations with the employes in the procedure followed in disciplining Mr. McPherson but they are questioning the measure of discipline applied, and as heretofore stated the management of this carrier feels that this is a question beyond the powers of your Honorable Board to rightfully interfere.

OPINION OF THE DIVISION: The facts in this case are as follows: Inspector H. R. McPherson of El Dorado, Arkansas, a shop employe at that point, was arrested on the streets of Monroe, Louisiana, August 13, 1937, for conducting himself "in a loud, boisterous, or drunken manner upon the streets" and because engaged in a fight "without a lawful cause." He posted bond in the amount of fifteen dollars and returned to his home in El Dorado, forfeiting the bond. McPherson was on a leave of absence from his work at El Dorado at the time.

The carrier held the required hearings, under the rules of agreement between the company and the union, and discharged McPherson on September 8, 1937, for violation of the employment agreement laid down by the carrier. That agreement requires that persons seeking employment sign in their application an agreement as follows:

"To observe all rules and regulations governing the service to which I may at any time be assigned. To maintain strict integrity of character, to abstain from the use of intoxicating liquors and to perform all duties to the best of my ability."

McPherson signed this agreement when he took employment with the carrier on August 1, 1922.

The carrier contends that this Division of the National Railroad Adjustment Board has no jurisdiction in this matter, because it has no right to change a rule under the provisions of the National Railway Labor Act, which gives to the National Mediation Board jurisdiction over matters relating to the changing of rules. The employees contend, on the other hand, that the rules referred to in the law are not carrier's operating or employment rules, such as the one in question, but rules established by joint agreement between the carrier and the employees.

The evidence discloses that McPherson drank some liquor and later engaged with a companion in a fight with two strangers over the possession of a taxicab which McPherson and his companion had called. The fight occurred in the taxicab and the driver hailed policemen who arrested McPherson and his companion, charging them with acting in a boisterous or drunken manner and engaging in a fight without cause. No trial was held, because the bond of fifteen dollars was forfeited and, consequently, there is no evidence that McPherson was drunk, although it is admitted that he had been drinking and, thereby, violated the employment agreement which he had signed; that agreement is violated by drinking and it is not necessary to prove intoxication to prove a violation.

The issue then is on the question whether the carrier had the right to discharge McPherson for drinking when he was off duty on a leave of absence in a city in another state than that of his residence and wholly unrelated to the business of the carrier. First, it is necessary to consider whether this Division has jurisdiction under the terms of the Act, which provides that the National Mediation Board shall handle disputes concerning "changes in rates of pay, rules, or working conditions not adjusted by the parties in conference." The rule in question is a carrier's operating rule and is not the sort of rule referred to in the Act. The Act plainly intended that the term "rules" meant those that were worked out by joint agreement. The National Railroad Adjustment Board has jurisdiction over grievances and, in this case, the grievance consists of the discharge of McPherson, because he drank liquor in violation of the employment agreement. This Division has jurisdiction of this matter as a grievance under the Act and we come to the question whether the carrier could properly discharge McPherson for the act in question. That the carrier would have the right to lay down rules governing drinking or intoxication, while in service or on company property or in such place or manner as would have a direct effect on the carrier's business, there can be no doubt. On the other hand it is equally clear that the discharge of a man, for drinking in a place and manner wholly unrelated to the business of the carrier, and not in any way directly affecting the carrier, cannot be sustained. If the carrier could discharge a man for this reason, the carrier could put into its employment agreement anything that it saw fit to put in and employment and seniority rights might be reduced to a nullity if the carrier saw fit to exercise its power of discharge arbitrarily.

The employment agreement quoted must be considered as limited to employees in actual employment and not to the employees when they are off duty, off company property or on leave of absence, and in no way affecting the business of the company. An examination of the wording of the rule, as contained in the agreement signed by McPherson, indicates that the intention was to confine it to work which relates to the business of the carrier. The paragraph begins with a reference to rules and regulations governing the services to which the employee is assigned. It ends by referring to the performance of duties. The other sentences of the paragraph must, necessarily, relate to rules and regulations governing the service and duties of employees. To hold that an employee could be discharged for drinking, as in this case, would make an absurdity of seniority—the most valued possession of an employee. Under such an interpretation, a man with years of seniority might be discharged for taking a glass of liquor in a public or a private place. The discharge of a man for such a reason cannot be sustained in equity.

FINDING: 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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 29th day of September, 1938.