

Award No. 2491

Docket No. 2327

2-MP-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the 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:

1. That under the current agreement Mrs. Inez Maxwell was unjustly dealt with when she was dismissed from service on December 13th, 1955.

2. That accordingly the Carrier be ordered to restore the Claimant to service with seniority rights unimpaired and paid for all time lost, including vacation rights.

EMPLOYES' STATEMENT OF FACTS: The claimant was employed as coach cleaner on July 13, 1943, serving the carrier in this capacity for over twelve years, i.e., until she was cited for investigation for failing to protect her assignment, sleeping while on duty and directing violent and abusive language toward her supervisor on the morning of November 22, 1955. These charges directed against the claimant are set out in Master Mechanic L. Bechel's letter of November 25, 1955.

While the investigation was scheduled for 9:30 A. M., November 30, in the master mechanic's office, postponement was requested by the claimant due to her representative being out of town and the investigation was resumed at 9:30 A. M. the following day, December 1, in the office of the master mechanic. However, due to one of the carrier's witnesses being unable to appear, it was agreed by both sides to again postpone the investigation until all witnesses could be present and the investigation was re-scheduled for 9:00 A. M., December 6, at which time the investigation was conducted, and we herewith submit and make part of the Employees' Statement of Facts the investigation transcript.

On December 13, 1955, Superintendent H. Jones notified the claimant by letter that she was being dismissed from service account of sleeping while on duty and we herewith submit Superintendent Jones' letter of December 13, wherein the charges set out in Master Mechanic Bechel's letter of November 25, were modified and only one charge, sleeping on duty, was given as the reason for the claimant's dismissal from service.

"On the other hand, the claimants themselves admitted they were lying down on benches in the caboose between Harvey and Highlawn. The Engine Foreman J. B. Parker, however, testified that he took the conductor's board and put it up against the back of the desk and reclined against it. Whether claimants were asleep or not it seems undisputed that upon arrival at Highlawn, Engine Foreman Parker and his helpers were not in performance of their duties."

Again in Third Division Award No. 4683, claimant, a waiter-pillow attendant, was denied reinstatement following his dismissal from the service on a charge of "sleeping on duty, failing to carry out instructions of train conductor, not providing proper service on train 9. . . ." Although the claimant denied the charges, yet based upon the evidence adduced at the hearing, the Board, with the assistance of Referee Mortimer Stone denied claim for reinstatement and held as follows:

"We find no evidence or arbitrary action or caprice in the discharge of claimant, and consequently could not, properly, if we would, substitute our judgment for that of the Management."

In addition to the foregoing, see Second Division Awards No. 1541, No. 1795 and Fourth Division Award No. 1008 to the same effect.

There is no basis for disturbing the discipline administered Claimant Maxwell; accordingly request for her reinstatement with seniority rights unimpaired and pay for all time lost should be denied.

FINDINGS: 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.

At the hearing on this docket, and in the argument of this discharge case, both parties placed their principal reliance upon the transcript of the evidence taken at the investigation hearing, which was held pursuant to Rule 32 and which provides:

"(a) No employe shall be disciplined without a fair hearing by a designated officer of the railroad."

This transcript is typical, and presents the familiar problem of how to determine the existence or non-existence of a "fair hearing," without the Board having an opportunity to meet the witnesses face to face to observe their demeanor, and hear from their own lips those significant nuances which cannot be written into a cold black and white record.

In the transcript (P-10) appears the testimony of the claimant. This misleading recital of facts is a classic example of an instance where the truth might be obvious to an observer at the hearing, but a reviewer could be left in some doubt when only the written word of the transcript is available for decision. However, in view of the nature of the facts recited, it is probably best that this Board was not a witness of the occurrence and must now take its understanding from the written record. It is as follows:

"Between 3:00 and 3:30 I goes upstairs, and I find some of the other girls up there. I changed my wet wash clothes and went to the rest room during that time Mr. Schwalbert knocked on the door and

asked who was in there Mrs. Knuckles said I am in here, at that time I was taking off my wet clothes, after taking them off, I said to her, are you ready, it is the general procedure that we all go back down on train and knowing that, after I removed my clothes and asked her if she was ready, we came out of the dressing room, Mr. Schwalbert at that time was standing against the door."

On the other hand a transcript sometimes discloses an admission or claim which coupled with other witnesses' answers leads clearly to the truth.

An instance of this also appears in the present record. The claimant says the foreman struck her on the arm with his lantern. The foreman admits nudging her arm with his knee. The employe representative later described it as kicking. But in trying to conclude what really happened we attach some significance to the claimant's own statement appearing on the same page 10 of the transcript wherein she states:

"I was seated on the rear seat of the head coach with my arm resting on the outside of the seat."

Under such circumstances the knee of a passerby and the arm of one seated in a dark coach might be reasonably expected to come in contact without being an assault.

Another example of a common problem confronting a reviewing board is also conspicuous in this transcript which contains a bare denial of any previous discipline of the employe. It is extremely doubtful that the claimant was a perfect employe for twelve (12) years, but when asked if she had ever been disciplined before, the claimant replied in the negative and the carrier never did introduce any evidence of previous discipline.

In this same vein, it is noted that the foreman gave his testimony from a prepared statement. The occurrence, in which he played a principal part, had occurred only two weeks previous to the day of the investigation, and it is difficult to understand from our distance why he would need to "read from notes."

Finally, another fact is worth noting. When the foreman found the claimant reclining he ordered her to work. There was no effort then to take her card. It was two (2) hours later, when the foreman went upstairs and partly opened the dressing room door and after the claimant issued forth, that the differences between the principal participants resulted in the violent exchange of conversation and the ultimate surrender of the time card. Yet this element of the charge was not pursued in the investigation or depended upon in the carrier's conclusion.

Mindful of our responsibility, which is to make awards in disputes growing out of grievances or out of the interpretation or application of agreements, cognizant also of the body of precedent in discipline cases, and considering finally the entire transcript before us here, this Board finds an element of unfairness in the ultimate penalty of discharge assessed against this claimant employe of twelve (12) years' standing, who has no previous recorded disciplinary action against her. We find the claimant should be reinstated fully, but without back pay.

AWARD

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 11th day of June, 1957.