

**Award No. 3245**

**Docket No. 2947**

**2-L&N-CM-'59**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'  
DEPARTMENT, A. F. of L.—C. I. O. (Carman)**

**LOUISVILLE AND NASHVILLE RAILROAD COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1—That under the current agreement Carman (Coach Carpenter) Albert L. O'Bryant was unjustly discharged from service on September 9, 1957.

2—That accordingly the Carrier be ordered to restore this employee to service with all seniority rights unimpaired and with compensation for all time lost retroactive to the aforesaid date.

**EMPLOYEES' STATEMENT OF FACTS:** Carman (Coach Carpenter) Albert L. O'Bryant, hereinafter referred to as the claimant, worked at the carrier's South Louisville Shops with a seniority dating of August 17, 1944, after serving an apprenticeship which started August 15, 1940.

Under date of August 19, 1957, the claimant was charged with "Improper Conduct" also "being vicious and profane" etc. He (claimant) was cited to appear in the Assembly Room, Louisville Union Station, on August 23, 1957 at 9:00 A. M. for investigation. (See employees' Exhibit A.)

On August 23, 1957 the investigation was held as scheduled and a copy of the transcript is submitted herewith, identified as employees' Exhibit B.

As a result of the investigation, the claimant was dismissed from service by the carrier. In substantiation of this, we submit herewith copy of letter from the superintendent of shops to the general foreman of the car department, identified as employees' Exhibit C.

seniority rights unimpaired, and compensated for the wage loss if any, resulting from said suspension or dismissal."

The claimant and his local chairman were properly advised prior to the investigation of the precise charges against him. They were afforded reasonable opportunity to secure necessary witnesses and were permitted to question the witnesses freely. It is true that there was some delay in preferring the charges and conducting the investigation. This was necessary, however, due to the illness of Conductor Mosley. It was not in violation of the discipline rule, and was not prejudicial to the claimant in any way.

In conclusion carrier submits that Claimant O'Bryant had a fair and impartial investigation, strictly in accord with the applicable agreement provision. The record contains substantial and convincing evidence to show that he was guilty of the charges against him. His conduct, while riding carrier's passenger train on free transportation, was inexcusable and fully justified his removal from carrier's service, and certainly indicates that he is not the type of employe the carrier should be asked to restore to its service. The disciplinary action taken by the carrier was not arbitrary, unreasonable or unjust, and should not be disturbed. In this connection attention is invited to the following excerpts from Awards 1109 and 1323 of this Division and Award 15029 of the First Division:

"This Board is loathe to interfere in cases of discipline if there is any reasonable ground on which it can be justified." (Second Division Award 1109.)

"\* \* \* It has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed." (Second Division Award 1323.)

"While under most circumstances off duty conduct is not a proper basis for discipline, it would be wholly unreasonable to say that an employe traveling on a train on free transportation from one point on his division to another point on that division where his home is located is not subject to discipline for improper conduct. Such conduct on carrier's property might prejudice the interests of the carrier and is at a time and under circumstances where it bears some relationship to his job." (First Division Award 15029.)

**FINDINGS:** The Second Division of the Adjustment Board, upon the whole record and all the evidence, find 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.

Parties of said dispute were given due notice of hearing thereon.

Granting to the carrier the right to evaluate the testimony and if it reasonably supports the charge to so find, we hold that the charge that Mr. O'Bryant attempted to do bodily harm to Conductor Mosley is supported. Although the conductor was not hurt he says that he was struck lightly once, whereupon he knocked O'Bryant down.

The carrier had the right to find that the explanation of Mr. O'Bryant of the assault was improbable although there is little to indicate that he had any ill will toward Conductor Mosley.

That part of the charge that Mr. O'Bryant used vicious and profane language can only be supported by resort to hearsay testimony.

Although it is probable that some one in the car in which O'Bryant was riding was cursing, what was said does not appear and that it was profane or vicious may not be determined. That Mr. O'Bryant was cursing is largely conjectural.

The disturbance and the cursing took place at different times, the cursing some time before the disturbance.

A number of the passengers in the same car as O'Bryant say they did not hear him curse or see him do anything to cause a disturbance. Although they say that they were dozing when the disturbance occurred, it is probable that some of them were awake when the cursing took place.

In view of the fact that a material part of the charge was not proven, the altercation not serious, attended by some extenuating circumstances, and the 17 years of unquestioned service of O'Bryant with the carrier, the punishment was too severe.

#### AWARD

Claim 1 allowed as to the discharge of Mr. O'Bryant from the service of the carrier.

Denied as to his suspension from the service as hereinafter stated in Claim 2.

Claim 2—Carried ordered to restore Carman (Coach Carpenter) Albert L. O'Bryant to service with seniority rights unimpaired upon the effective date of this award with no compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1959.