

Award No. 3900

Docket No. 3666

2-AT&SF-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William E. Doyle when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. — C. I. O.
(Carmen)**

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Carman B. J. McKinney was unjustly dismissed from the service of the Carrier on October 9, 1958 at Clovis, New Mexico.
2. That accordingly the Carrier be ordered to reinstate the Claimant to service with all rights unimpaired and with compensation for all time lost retroactive to and including October 9, 1958 and to continue.

EMPLOYES' STATEMENT OF FACTS: B. J. McKinney, hereinafter referred to as the claimant, was employed by The Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as the carrier, as a carman at Clovis, New Mexico, where the Carrier maintains a repair track and forces.

The claimant was regularly assigned to the first shift, work week of Monday through Friday, rest days of Saturday and Sunday.

On Wednesday, October 8, 1958, Foreman J. W. Lee and the claimant entered into an altercation at approximately 8:50 A. M.

As a result of the altercation, the claimant was given formal notice, dated October 9, 1958, to appear for formal investigation October 13, 1958, to develop the facts and place his responsibility, if any, in connection with fighting on duty about 9:00 A. M. October 8, 1958 in violation of Safety Rule 4 and Rules 21 and 22 of Form 2626.

The investigation notice was postponed upon the request of the local chairman, E. E. Carter, and later postponed until 1:30 P. M. Friday,

to do, as he has a right to discuss with and criticize an employe's work. In response to this criticism claimant became abusive, using violent and obscene language, and threatened the use of physical violence. He was insubordinate to his superior.

Discipline is a necessary adjunct between employes and their superiors in order to have proper relations between them. An employe must be obedient to the orders of his superior. If he has complaints to make there are proper methods for doing so. See Rule 31 of the parties' effective agreement. After sixteen months of service it is apparent that claimant has much to learn in this respect. We find the dismissal fully justified by the facts shown in the record."

See also Second Division Awards Nos. 1253, 1659, 1812 and 2897.

In conclusion, carrier asserts —

In the light of all the facts, there can be no basis for doubt that Mr. McKinney was guilty of the charges preferred against him and that such guilt was well established by the investigation record. This is substantiated by his own testimony, as well as that of Foreman J. W. Lee. Moreover, the testimony of both participants clearly establishes the fact that Mr. McKinney was the aggressor inasmuch as he left the interior of the car and descended to the ground for the purpose of attacking Foreman Lee. The serious nature of the offense fully justified his dismissal. Carrier asserts that the claim on behalf of Mr. B. J. McKinney is without support under the agreement, has no merit whatsoever and should be denied in its entirety.

Without prejudice to the position of the carrier that it was justified in dismissing the claimant for reasons which are stated hereinabove, carrier desires to further state that if this claim is sustained, and the carrier emphatically asserts that the employes' claim does not merit such a decision, any allowance for wage loss should be less amounts earned in other employment, pursuant the provisions of Rule 33½, paragraph (d), of the current shop crafts agreement reading:

"If the final decision shall be that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with seniority rights unimpaired, and **compensated for the net wage loss, if any**, resulting from said suspension or dismissal." (Emphasis ours.)

Attention in that connection is also directed to Second Division Awards 2811, 2653 and 1638, Third Division Awards 6074 and 6362, and Fourth Division Award 637.

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.

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

In the employes' submission two points are advanced for reversal of the decision sustaining the charge and ordering dismissal. These are first, that McKinney, the discharged employe did not receive a fair and impartial hearing and secondly, that the numerous discrepancies in the testimony require determination by the Board that the dismissal was improper and unjust.

The main procedural objection arises from the examining of McKinney at the outset. We are unable to see any merit in this objection. The proceedings are not criminal and while it might be better practice for the carrier to present its independent evidence first and then hear the respondent employe, we are not aware of any rule requiring that this be the order of proof.

An examination of the entire record fails to disclose substantial variations or discrepancies. It is apparent from the testimony that McKinney was not acting in self defense. True, he contends that Lee, the foreman, rushed toward him, but at the time McKinney was inside the car. There was no threat actual or apparent of injury to him justifying the attack which he made.

There was a great deal of testimony showing various instances of abuse of the men on the part of Lee. He apparently cursed and swore at them quite freely. This testimony serves to establish that Lee was poorly regarded by the men and that there was much bad will toward him. It perhaps explains why McKinney acted as he did. It does not, however, furnish a legal justification for his conduct. It could only serve to bring the facts to the attention of Carrier.

The evidence disclosed a brutal attack on Lee by McKinney. This occurred on carrier property during working hours and arose out of attempts by Lee, crude though they might have been, to supervise McKinney. The evidence considered in a light most favorable to McKinney does not establish legal justification.

We must also conclude that the circumstances fully justify the penalty which was imposed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of December, 1961.