



Award No. 5674
Docket No. 5520
2-SP(PL)-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Mrs. Marjory A. Norwood, Coach Cleaner, was unjustly treated when she was dismissed from service on August 30, 1966, after 23 years with the Carrier.
2. That the Carrier be ordered to:
 - (a) Restore the aforementioned Coach Cleaner to service with all service and seniority rights unimpaired, and be compensated for all time lost retroactive to August 30, 1966.
 - (b) She be granted all vacation rights.
 - (c) Carrier assume and pay all premiums for hospital, surgical and medical benefits, including all costs for life insurance.
 - (d) Carrier pay into the Railroad Retirement Fund the maximum amount that is required to be paid on active employees for all time she is held out of service

EMPLOYEES' STATEMENT OF FACTS: Coach Cleaner Marjory A. Norwood, hereinafter referred to as the Claimant, was employed by the Southern Pacific Company (Pacific Lines), hereinafter referred to as Carrier, and at the time of dismissal had above 23 years of service at Carrier's Mission Road Coach Yard, Los Angeles, California.

Claimant under date of August 5, 1966 was notified by Master Mechanic T. O. Siegmund pursuant to Rule 39, current agreement, that formal hearing was to be held in office of General Foreman, Mission Road Coach Yard, at 9:00 A.M., PST, Thursday, August 18, 1966, in connection

All data herein submitted have been presented to the duly authorized representative of the petitioner, and were made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which may have been or will be filed ex parte by the petitioner in this case, to make such further answers as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this the carrier's initial submission.

Oral hearing is desired only in event such a hearing is requested by the representatives of the petitioner.

(Exhibits not reproduced.)

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 waived right of appearance at hearing thereon.

Claimant, a coach cleaner with twenty three (23) years' service, was dismissed from the service of Carrier on August 30, 1966, following a formal hearing pursuant to Rule 39 of the Agreement between the parties, for violation of Rule 801 of Carrier's General Rules and Regulations, the pertinent part of which reads as follows:

"Employees who are . . . vicious, will not be retained in the service."

Petitioner contends that claimant be reinstated with all service and seniority rights unimpaired, including vacation rights, and that the Carrier pay compensation for all time lost as well as premiums for hospital, surgical and life insurance retroactively with additional payments to the Railroad Retirement Fund on behalf of claimant.

In the first instance, Petitioner contends that claimant was denied a fair and impartial hearing because the hearing officer also was the responsible officer of the Carrier who actually dismissed the claimant; an assistant hearing officer also was in attendance during the formal hearing; and the stenographic record of the proceedings furnished the employes' representative was inaccurate and erroneous. Analysis of Rules 38 and 39 of the applicable agreement, which pertain to grievance procedures and disciplinary proceedings, fails to reveal any language which might be construed as prohibiting the hearing officer from subsequently signing a letter of dismissal in the absence of prejudicial conduct during the formal hearing. Furthermore, the presence of an assistant hearing officer during the formal hearing does not appear to have prejudiced the rights of the claimant. (First Division Awards Nos. 17008 and 16968.) As to admitted errors in the stenographic record of the proceedings furnished the employe's representative, two discrepancies were agreed upon by the parties and corrected on the property and a third discrepancy expressly cited by Petitioner has been duly noted by

this Division. Careful review of the entire transcript requires us to conclude that all of these errors in the transcript were minor, and do not constitute sufficient grounds for vitiating the entire proceeding. In view of the foregoing, we find that the claimant was not denied a fair and impartial hearing, and that the dispute is properly before us for consideration on the merits.

Although the record in this case discloses certain factual inconsistencies, it is apparent that claimant sought to prevent Carrier's foreman from leaving a certain railroad car by stepping down steps which claimant was in the process of cleaning on August 4, 1966. It is undisputed that Claimant resisted said foreman's effort to use the steps on which she was working, and that she was pushed to the ground, either in a vertical or horizontal position. Immediately thereafter, the foreman walked away, and the claimant struck him on the head with a baggage car roller, the impact of which split his hard hat.

Claimant was duly notified of the charges against her, and the formal hearing was held on August 18, 1966. The gravamen of the Petitioner's case is that claimant's action was provoked by Carrier's foreman, who allegedly pushed the claimant to the ground, and that the claimant's assault on said foreman constituted self-defense. Moreover, Petitioner urges that the penalty imposed was excessive and unreasonable, in view of provocation and claimant's long and satisfactory record for twenty-three (23) years.

After careful review of the entire record, we must conclude that claimant's attack on the Carrier's foreman with a baggage car roller following the altercation on the steps of the railroad car did not constitute self-defense, and was inexcusable despite provocation. Even if claimant was pushed to the ground by physical force, the foreman had walked away from the scene, and the claimant was in no physical danger when assault on said foreman occurred. The agreement between the parties contains grievance procedures which should have been pursued by claimant if she considered herself unjustly treated by the foreman and the physical violence on her part cannot be condoned under any circumstances.

In light of the apparent provocation which immediately preceded claimant's attack on the foreman, as well as her long and satisfactory service, the ultimate penalty imposed by Carrier appears unduly harsh and excessive, despite the gravity of the proven charge against the claimant. Even though the Carrier has broad latitude in the matter of assessing discipline, the peculiar circumstances involved in this case support reinstatement of claimant with all service and seniority rights unimpaired, but without compensation for time lost and other monetary relief sought by Petitioner.

AWARD

Claim sustained as modified by the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April, 1969.

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