

C O R R E C T E D

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8256
Docket No. 7677
2-MP-CM-'80

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

Parties to Dispute: { System Federation No. 2, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated Rule 32(a) of the Controlling Agreement when they arbitrarily and unjustly dismissed Carman B. H. Bradley and C. Whitmire, North Little Rock, Arkansas, September 10, 1976.
2. That the Missouri Pacific Railroad Company be ordered to compensate Carman C. Whitmire as follows:
 - (a) For all wages lost from September 10, 1976 until he was reinstated January 19, 1977;
 - (b) Made whole for all health and welfare and insurance;
 - (c) Made whole for pension benefits, including railroad retirement and unemployment insurance;
 - (d) All holiday pay and all other overtime he would have received until he was returned to work.
3. That the Missouri Pacific Railroad Company be ordered to compensate Carman B. H. Bradley as follows:
 - (a) For all wages lost from September 10, 1976 until he was reinstated April 25, 1977;
 - (b) Made whole for all health and welfare and insurance;
 - (c) Made whole for pension benefits, including railroad retirement and unemployment;
 - (d) All holiday pay and all other overtime he would have received until he was returned to work.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act 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.

Claimants were employed by Carrier as Carmen at North Little Rock, Arkansas. On August 6, 1976, Claimant Bradley held a regular assignment as driver of an emergency road truck operating out of the Car Department. Such trucks are sent out on the line to repair bad order cars. On August 6, 1976 Claimant Whitmire was first out on the overtime board and he was called to assist Driver Bradley on an emergency road call. On that date a freight car (ACFX 15650) had been set out at Bierne, Arkansas due to failure of a journal. Claimants Bradley and Whitmire responded to that call and commenced repairs on the freight cars. While they were working, one of the hydraulic jacks gave way causing the car to fall and the jack handle flew out and struck Claimant Whitmire in the face causing a severe injury. Following the accident Carrier's Vice President of Engineering issued a Memorandum to supervisory personnel under date of August 18, 1976, pertinent parts of which read as follows:

"Recently one of our carmen suffered a very painful and potentially serious injury when he was struck on the face with the handle of a track jack. The events that lead up to this accident are as follows:

Two carmen on a wheel change truck were sent out to a wayside station to take care of a hot box. They had left their terminal without a journal jack. They decided that they could rebrass this box as the journal was not scored so they placed a 50-ton jack under the coupler to take the weight of the car off the truck and then placed a track jack under the side frame to take the weight of the truck off the R-4 journal. The track jack did not have the proper jack handle -- instead it had an octangular bar. There was no hand brake set on the car and no proper blocking under the wheels to keep the car from shifting. There was no wood between the jack head and the coupler to prevent a metal-to-metal contact. The net result was that the car moved and the 50-ton hydraulic jack slipped and was broken which resulted in a sudden load on the track jack causing the handle to fly out and strike the carman in the face. This sorry tale of woe involving improper tools and improper workmanship could very well have ended up becoming a fatality."

One week later, under date of August 24, 1976, Claimants were cited for investigation as follows:

"North Little Rock, Arkansas
August 24, 1976.2/q

File: Investigations

Messrs: C. Whitmire
B. H. Bradley

"Please arrange to report to the Office of Master Mechanic 400 Yard Ramp, North Little Rock, Arkansas at 9:00 a.m., Wednesday, September 8, 1976, for formal investigation to develop the facts and place your responsibility, if any, for your allegedly conducting yourself in a careless and imprudent manner while working on Car ACFX 15650 at Bierne, Arkansas at approximately 6:45 pm, August 6, 1976, resulting in a personal injury to Carman Whitmire.

If you desire witnesses or representation, you must arrange therefore in accordance with applicable schedule agreement."

Following their formal investigation on September 9, 1976 Claimants were advised by letters dated September 10, 1976 of their dismissal from service as follows:

"Dear Sir:

You are hereby advised that your record has this date been marked dismissed account of conducting yourself in a careless and imprudent manner while working on car ACFX 15650 at Bierne, Arkansas, at approximately 6:45 p.m., August 6, 1976, resulting in a personal injury to Carman Whitmire and your violation of General Rule "L", basic rule 216, paragraph (c) and (d), and basic rule 217 of the Uniform Code of Safety Rules. Your record now stands dismissed."

On September 27, 1976 the instant claims were filed for their reinstatement. Carrier returned Claimant Whitmire to service on January 19, 1977 and Claimant Bradley on April 25, 1977. In Carrier's words, it returned the employees to service when it concluded that they had been "sufficiently disciplined". Carrier maintains that the differential in the periods of suspension is justified because Bradley was more experienced and because he had a poor prior safety record. The claims for retroactive reinstatement and damages for time of dismissal to dates of actual reinstatement were not settled on the property and have been appealed to this Board.

It is well settled that when a Carrier's disciplinary action is challenged under a contract provision like Rule 32, the Carrier has the burden to show the following: 1) The employee was accorded a fair and impartial investigation; 2) The record contains substantial evidence to support a conclusion that the employee was guilty as charged; and, 3) The discipline imposed was appropriate in the circumstances of the case. In the present case the amount of discipline was in effect, reduced by Carrier, from dismissal to suspension without pay. The quantum of discipline, as such, is not challenged in this case but the fairness of the investigation and the evidence of wrongdoing are questioned by the Organization. We find persuasive, the Organization's contention that the Carrier prejudged the Claimants' guilt and effectively removed the possibility of a fair and impartial investigation when the Vice President of Engineering circulated the memorandum of August 18, 1976, supra, in which he announced his conclusions regarding their culpability. Moreover, it is our judgment that Carrier has failed to prove by probative evidence on the record that Claimants conducted themselves

in a "careless and imprudent manner". Carrier's entire case is built upon after-the-fact speculation deduced from circumstantial evidence found at the scene of the injury on the day after the accident. The claims must be sustained but the measure of damages is established contractually by Rule 32(d).

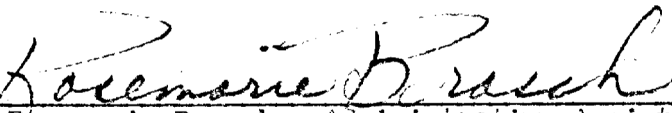
A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of March, 1980.