Award No. 1811

Docket No. MC-1466A-92

2-C&O-I-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

PARTIES TO DISPUTE:

VON C. HIPPENSTEEL (Carman)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Pere Marquette District)

DISPUTE: CLAIM OF EMPLOYE: The petitioner submits the following questions for the decision of the National Railroad Adjustment Board:

A. What is the proper seniority date for Petitioner at the Carrier's Wyoming Round House?

B. Was Petitioner's lay off by the Carrier on December 8, 1951, proper in light of the former's seniority date?

Mr. Hippensteel, hereinafter referred to as petitioner contends that both the contract between his bargaining representative, System Federation No. 9, Railway Employes Department, AFL, and the Chesapeake and Ohio Railway Company and the circumstances surrounding his employment at the Wyoming Yards of the Chesapeake & Ohio Railway Company (hereinafter referred to as carrier) entitle him to the seniority date in employment at the latter's Wyoming round house of September 5, 1923, his date of last hire.

Petitioner further contends that the carrier erred in April, 1950 in accepting the recommendation of System Federation No. 9 and changing his seniority standing, thus depriving him of the rights incident to the September 5, 1923, date. This error has substantially prejudiced the rights of petitioner, as evidenced by his layoff on December 8, 1951, while others with seniority dates falling after September 5, 1923, have been continued at their employment in the carrier's Round House.

EMPLOYES' STATEMENT OF FACTS: A. **Employe:** Mr. Von C. Hippensteel, petitioner herein, an employe of the Chesapeake & Ohio Railway Company, Pere Marquette District, is an employe within the terms of Sec. 151(3) of the Railway Labor Act (Title 45 U.S.C.A.).

B. **Carrier:** The Chesapeake & Ohio Railway Company, Pere Marquette District, carrier herein, is a carrier within the terms of Section 151 (1) of the Railway Labor Act, supra.

"As to the proof of the charge, this is purely a question of fact. Under such circumstances, in disputes of the character here involved, this Division is committed to the doctrine that it is not a proper function of the Board to weigh the evidence. Put differently, the evidence produced by the Carrier at the investigation, if believed, is amply sufficient to sustain the charge made. For this Board to interfere with the action taken by the Carrier under these circumstances would require us to pass upon the credibilty of the witnesses involved, a function we have consistently declined to perform. We have often said, and we think correctly, that it is not the function of this Board to substitute its judgment for that of the Carrier or to determine what we might have done if it had been our duty to make the decision in the first instance. We interfere only where an examination of the record reveals that the action taken was unjust, arbitrary, or unreasonable. Where the evidence produced in support of the charge, if believed, is sufficient to sustain it, even though there may be evidence directly in conflict, the imposition of discipline cannot be said to be unjust, arbitrary or unreasonable. It is not the function of this Board to weigh the evidence or to determine the credibility of witnesses. If there is substantial evidence in the record to support the charge, even though contradicted, the Carrier's action in assessing discipline cannot be said to be arbitrary or capricious. See Awards 2621, 5946, 4068."

Inasmuch as the organization's claim in behalf of Car Cleaner Williams is entirely without merit, it 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.

Claimant was a car cleaner employed by the carrier in its Mott Haven Yard in New York City, New York. On April 9, 1953, he was charged with assaulting his assistant foreman and inflicting injuries necessitating hospital treatment. After a hearing, claimant was found guilty and dismissed from the service of the carrier affective May 5, 1953. Claimant contends that he was unjustly dismissed and requests reinstatement with pay for all time lost.

The foreman states that he entered car Red Desert at about 11:30 A. M. on April 6, 1953 and found claimant working in the ladies room of the car. He questioned the correctness of the methods used by claimant in cleaning the car. He says that claimant did not answer him until he had repeated his question at which time claimant swore and used obscene language which was directed at the foreman. He accused the foreman of picking on him. The foreman ordered him to report to the general foreman. The foreman says that as he was leaving the car, claimant assaulted him from his rear, placed his right arm around his neck and throat, and struck him in the face several times with his left fist.

The story told by claimant is that the foreman came in and questioned his method of doing his work. He says he did not answer the foreman until he asked him about it the third time. He states that the foreman then ordered him to report to the general foreman. On the way out of the car, claimant says that the foreman pushed him and that he grabbed the foreman by the collar to keep from falling. He says that the foreman then turned and

clinched with him and that the foreman tried to trip him with his foot. Both men suffered injuries. After the scuffle, claimant went back to his work until Assistant Foreman Roman and a Mr. Wilkie came for him.

The statements of the two participants are in conflict. There are facts and circumstances, however, that corroborate the foreman's story. In the first place, claimant refused to answer the foreman's questions when the latter came into the car as he is required to do. He does not deny cursing the foreman and using obscene language toward him—merely stating that he did not remember doing so. He did not report to the general foreman as he was told to do and remained in the car until the assistant foreman came for him. When asked by the assistant foreman why he choked and punched the foreman, he said the foreman was picking on him. He did not deny choking or punching the foreman. At the general foreman's office he at first refused to make a written statement. He later made a written statement in which he did not deny striking and choking the foreman. It is plain that he refused to give the general foreman all the details of the incident on the day it occurred.

It is clear to us that claimant and not the foreman was the aggressor. If it had been otherwise, there is no reason why claimant should not have told the general foreman the facts. He did not do this. He now tells a story which would indicate that the foreman was the aggressor. The evidence does not support any such conclusion. The evidence was clearly sufficient to sustain the finding of the carrier that claimant physically assaulted his foreman. A dismissal from the service is warranted for such an offense.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23d day of July, 1954.