Award No. 2510
Docket No. 2320
2-L&N-FO-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT A. F. of L. (Firemen and Oilers)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That under the current agreement Eugene Gore was unjustly dismissed from the service on March 14, 1953 at Nashville, Tennessee.

2—That accordingly he is entitled to be reinstated to the service and his former seniority rights with compensation for all time lost from February 19, 1953, date of suspension from service.

EMPLOYES' STATEMENT OF FACTS: Laborer Eugene Gore, hereinafter referred to as the claimant, was employed by the carrier on April 23, 1927, with a continuous seniority dating therefrom. His regular assigned hours on February 19, 1953 were 7:00 A. M. to 3:00 P. M., Monday through Friday, with Saturday and Sunday rest days.

The claimant was summoned on February 20, 1953 to appear for a preliminary hearing of the charges for 9:00 A. M., February 24, 1953, a copy of which is submitted as Exhibit A. On February 26, 1953 the claimant was summoned to appear for a formal investigation on March 2, 1953 a copy of which is submitted as Exhibit B. On request of the claimant's local chairman, the investigation was postponed and reset for March 4, 1953, and was held on that date. A copy of the hearing transcript is submitted as Exhibit C. On March 14, 1953 the claimant was furnished a copy of the discipline bulletin No. 96, dated March 14, 1953, a copy of which is submitted herewith and identified as Exhibit D. This was accompanied by a letter of same date and identified herewith as Exhibit E, advising the claimant that the bulletin applied to him.

This dispute has been handled with the proper carrier officials from the bottom to the top, with the result that the highest designated officers have declined to settle it.

The agreement effective June 1, 1944, as subsequently amended, is controlling.

way company acting in good faith, wholly true, a judgment against such company should not stand."

And in Buster v. CMStP&P, 195 F. 2nd 73, the Court said:

"Certainly on its face, the rule is a reasonable one for the proper and efficient operation of the defendant railroad. The only question to be considered, therefore, is whether or not the rule was properly administered by the defendant, through its agents, in the instant case. A careful comparison of the transcript of the company hearing and the evidence adduced in the court trial reveals them to be essentially and substantively identical. In other words, qualitatively the plaintiff offered little or nothing more here to sustain his position than he had during the previous private hearing. In view of such fact, it appears clear that the jury substituted its judgment for that of the company officials rather than devoting itself, as instructed by the Court, entirely to a consideration of whether the defendant granted plaintiff a fair hearing and, in fairness and justice, could have arrived at the result actually attained, namely, dismissal of plaintiff on the ground that he was guilty of a violation of Rule 702."

CONCLUSION

Carrier submits that claimant Gore was afforded a fair and impartial investigation, at which he was represented by the local and general chairmen of his organization, and was permitted to cross-examine witnesses, all in strict accord with discipline rule of the International Brotherhood of Firemen and Oilers agreement. And he testified that he was satisfied with the way the investigation was conducted.

Carrier further submits that the evidence presented at the investigation fully supported the serious charges against Gore, and that in view of the nature of the offense it was entirely justified in removing him from its service.

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.

Rule 16(a) provides that "when it appears necessary to discipline an employe, who has established seniority under these rules, he will be notified in writing of the exact charge against him." Pursuant thereto claimant was notified on February 20, 1953 that "you are charged with conduct unbecoming an employe, being arrested by City Officers for indecent exposure of your person and warrant issued by State of Tennessee for lewdness in public."

There is no question but that he was so arrested and such a warrant was issued. However, on March 27, 1953, a jury found him not guilty of the charge and he was aquitted. Simply being arrested upon a warrant is not proper cause for dismissal from service and that is the only miconduct charged against the claimant. His arrest upon such a charge justified a suspension from service but when he was acquitted of the charge he was entitled to reinstatement. To hold otherwise would mean that the erroneous

arrest of an innocent person was misconduct on his part justifying his discharge.

Accordingly claimant must be reinstated with pay from March 28, 1953 in accordance with Rule 16(g).

AWARD

Claim sustained to the extent stated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June, 1957.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 2510

The majority have erred in this award for the following reasons:

1—They ignore completely the basic charge upon which hearing was held and action taken, "conduct unbecoming an employe."

2—They rest determination of his guilt or innocence of that charge upon a finding of not guilty by a jury in a criminal court on a warrant charging 'lewdness in public';

3—They rationalize their findings upon a technicality which they construe to constitute such non-compliance with the discipline rule as to justify intervention in the carrier's inherent right to discharge for cause, this even though the employes took no exception in the hearing that claimant was insufficiently charged to enable him to make a full and complete defense, but proceeded to trial on the merits of the whole issue, and as to which the charge as made fully informed the claimant.

The full charge as exhibited by the employes (Exhibit B) is as follows:

"You are charged with **conduct unbecoming an employe, being arrested by City officers for indecent exposure of your person** and warrant issued by State of Tennessee for lewdness in public, February 19, 1953.

This matter will be investigated in the assembly Room, 3rd floor, Union tation, on Monday, March 2, 1953, at 9:00 A. M., and you will, therefore, arrange to present yourself at his office on the date and at the hour named, to answer such charge or charges, hear all the evidence submitted, interrogate witnesses, and be presented by fellow employes of your own selection, if desired. You may bring any witnesses you desire to testify in this case.

The charge or charges to be brought against you and the investigation to be made will be for the purpose of discipline under Article 16 of the current agreement." (Emphasis ours).

From the transcript of the hearing (Employes' Exhibit C, Carrier's Exhibit AA), and the Employes' Statement of Facts, continuance from the date set, Monday, March 2, 1953, was requested by the employes' representative and granted, and hearing was actually held on March 4, 1953, at a time acceptable to the employes.

The "exact charge" against claimant was

> "You are charged with conduct unbecoming an employe" (Employes' Exhibit B, above), and that is the charge upon which he was dismissed—Discipline Bulletin (Employes' Exhibit D)
>
> "A laborer has been dismissed from the service **for conduct unbecoming an employe.**" (Emphasis ours).

and express written notice to claimant under date of March 14, 1953 (Employes' Exhibit E):

> "The attached discipline bulletin applied to you and **refers to your conduct unbecoming an employe on the Union Station platform at or about 10:40 A. M., February 19, 1953.**" (Emphasis ours).

Conduct unbecoming an employe is per se grounds for disciplinary action if sustained by the evidence, and "being arrested for indecent exposure of his person" is an amply sufficient statement of the grounds for that charge to fully apprise him not only that his arrest but as well his "indecent exposure of his person" was the ground for the charge against him, and was so accepted in the hearing. The language was not a legal or a technical instrument, but an ordinary letter to an accused employe informing him of the exact charge against him and the basis for it, and when so construed met every requirement of the controlling agreement rule, which in pertinent part provides—

> "(a) When it appears necessary to discipline an employe, who has established seniority under these rules, he will be notified in writing of the exact charge against him; and within one week following such notice, the case will be discussed in conference between the employe concerned, his Foreman, and his Local Committee. If this discussion leads to a conclusion which meets the concurrence of the employe's representative, the case may thereupon be closed by carrying out that conclusion.
>
> NOTE: When deemed necessary by the Master Mechanic or other officer in charge, formal hearing provided for in paragraph (b) may be held first, without holding informal hearing providing for in paragraph (a).
>
> (b) If a conclusion is not thus arrived at, or if the accused employe calls for a formal hearing, such hearing will be held at a time mutually agreed upon, but within two weeks following date of the charge. At this hearing, the employe concerned may be present and hear all the evidence, may be represented by the elected committee, and will make his own arrangements for the presence of witnesses he may desire.
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> (c) Within five days after the hearing is closed the employe concerned and his representative will be notified of the decision. For the purpose of this rule, the close of the hearing shall be considered the date on which the official who held the hearing received reply from the superior officer to whom he may have forwarded the papers for advice.
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> (d) A transcript will be kept of hearing held under paragraph (b), to be signed by the employe concerned, his representative, and the officer conducting the hearing. A copy of this transcript will be furnished the employe's representative on request.
>
> (e) Between the date of charge and the time decision is rendered, the accused employe will not be suspended unless offense is considered sufficiently serious to warrant such action."

Furthermore, it will be noted that paragraph (a) of this rule provides for preliminary hearing. In the notice of preliminary hearing, held at 9 A. M., February 24, 1953, the charge was verbatim the charge in the subsequent formal hearing. Nowhere in the record does it appear that claimant or his representative raised any question in the preliminary hearing, or in the formal hearing, as to the sufficiency of the notice, or any want of compliance with the rule. On the other hand, from the transcript of the formal hearing—

> Carrier's Inspector of Police was the first witness, and testified that as a result of complaint made by three Marine Corps girls, passengers on carrier's named passenger train stopped en route in Nashville Passenger tation on a certain date, that a Negro man had exposed his person before them in front of what was identified as the station boiler room door, who, from their descriptions, appeared to have been claimant, arrangements had been made with the City Police Department to have an experienced female police officer ride the same train on February 19, 1953, upon the possibility that the offender might repeat his performance; that the policewoman reported to him and other carrier representatives, while the train was still in the station, that a Negro man had so exposed himself while standing in front of the boiler room door in her presence as she sat at a window of a sleeping car. The Inspector of Police then stated what thereafter transpired until claimant was found and identified by the policewoman in his presence as the offender. The following questions (by the officer conducting the hearing) and answers, at the conclusion of his direct statement,
>
> > "Q. Eugene Gore is charged with indecent exposure of his person on Feb. 19th, 1953. Did Mrs. Fuller, Policewoman of the City of Nashville, tell you that this man was indecent and to what extent was he indecent?
> >
> > A. She said that he had displayed his sex organs several times while the train was standing there."
>
> make crystal clear that the foundation of the charge of conduct unbecoming an employe was known to and fully understood by claimant and his representative from very beginning of the hearing. Immediately following these two questions, claimant's statutory representative was given opportunity to and did question the witness. He took no exception to the first question and answer above, but sought to raise doubt as to the policewoman's identification of claimant, whether there was any statement by the Marine Corps girls, the weather conditions on the day in question as they may have affected visibility and the clothing worn at the time by claimant.
>
> Carrier's Trainmaster at Nashville Terminal then testified to the same effect. Claimant's representative again sought by questions to raise doubt as to the certainty of identification of claimant, but the Trainmaster not only affirmed the positive identification of claimant in his presence, but further asserted that "on this particular date, February 19th, Gore **was the only laborer that was wearing a faded khaki yellow shirt**, including the coach cleaners and other laborers that I saw on the station platform, in addition to the 8 or 10 we saw in the dining car waiters' quarters." (Emphasis ours).
>
> Carrier's Chief Stationary Engineer at Nashville Terminal Boiler Room, under whom claimant worked as a laborer in the boiler room, then testified unequivocally that he did not know claimant's whereabouts between 10:25 and 10:52 A. M. on the morning in question, between which times the offense was established

by other witnesses to have occurred. Claimant's representative was given the opportunity but asked no questions.

Stationary Fireman in the boiler room then testified that he and claimant cleaned the fire about 10:25 A. M., that claimant then left the boiler room saying he was going after coffee, returned with coffee and again left the boiler room about 10:28 or 10:30, when he did not know where claimant went, and then returned "in a hurry," hung up his jumper or coat and again left the boiler room. Claimant's representative was given opportunity but asked no questions.

The city policewoman then testified in lurid detail as to the offense, and positively identified claimant. The only question by claimant's representative obviously was directed toward showing entrapment.

Claimant testified in his own defense. He interposed no objection or comment as to the insufficiency of the charge. In response to questions by the officer conducting the investigation, he admitted his arrest, and in reply to question as to why he was arrested, stated "They claimed that I was indecent somewhere, I did not know what they were talking about;" he admitted he was out on bond awaiting trial on a warrant for lewdness in public, but after accounting for his movements until he returned to the boiler room with coffee, claimed he then went to the rest room to relieve his kidneys, then went to a room identified as the dining car waiters' room and talked to the 8 or 10 coach cleaners and others gathered there for lunch, and denied he had been on the station platform. He admitted, however, returning to the boiler room and hanging up his jacket as testified by other witnesses. The record shows his admission in response to question that he had heard the testimony of all other witnesses, but notwithstanding the burden of going forward with evidence to contradict those witnesses was upon him, neither he nor his representative brought in any witness who had seen him in the toilet, nor any of the 8 or 10 men in the dining car waiters' room he claimed by way of alibi he was talking to, many if not all of whom must have known him personally. At the conclusion of his testimony he stated he and his representative were given opportunity to ask all witnesses any questions desired, that there was nothing he wished to add to his statement, and

"Q. Are you satisfied with the way this investigation was conducted?

A. Yes, sir."

His representative asked no questions.

Claimant's guilt of indecent exposure of his person before a woman passenger on carrier's passenger train while it was standing in Nashville station, and arrest by city police officers upon his identification by city policewoman, was established by uncontradicted evidence in the record of the hearing which was given him **before he was acquitted by a jury on a criminal charge of lewdness in public,** and his guilt was not questioned by the majority in discussion of this award in executive session of the division. It follows that he was guilty per se of "conduct unbecoming an employe," the charge on which he was dismissed on March 14, 1953.

Not only was there no question in the hearing as to the sufficiency of the charges, and that claimant understood them in advance of the hearing, but **the employes' submission was directed squarely to the merits.** They complained that claimant or his representative had no opportunity to question the "complaining witnesses"—the Marine Corps girls; they urged a minor discrepancy in the testimony of the Inspector of Police, and the second

observation of the policewoman of the employes congregated in the dining car waiters' room to establish with absolute certainty that there was no other employe around who even resembled the man she had seen commit the offense, as impeaching her identification; they argued the "finger" of prejudgment was on the claimant because the Inspector of Police was receptive to the idea that the description of the Marine Corps girls fitted the claimant; they challenged the identification on their assertion that the Inspector of Police said "it was rather hazy, **I would say dark,"** and reiterated that it was hazy and dark; questioned why the policewoman did not call on other passengers on the train to witness the act; and cited the jury's finding of not guilty in the criminal court proceeding on the warrant charging lewdness in public. Their rebuttal brief and oral argument in initial hearing was a reiteration of their attack **on the merits** in their original submission. Their entire case as presented in the record before the division rested on imputed conflicts in evidence in the hearing on the property, and the jury verdict in the criminal proceeding. At the conclusion of their oral argument in initial hearing before the division, the employes further asserted that claimant had brought suit for $25,000 damages for malicious prosecution and the jury had returned a verdict in his favor in an amount exceeding $8,000.

From the transcript of the hearing:

The incident of the Marine Corps girls was not the basis upon which claimant was charged. It was cited by carrier in explanation of its unusual action to bring about apprehension of the guilty party, whoever he might be. Claimant was convicted of conduct unbecoming an employe upon the uncontradicted evidence of an experienced policewoman as to a specific lurid act committed in her presence by one positively identified by her as the claimant.

The "finger" of prejudgment was not on the claimant. The Inspector of Police—carrier's special police officer—knew the employes about the terminal, including claimant. The Marine Corps girls' descriptions fitted claimant. But carrier did not act directly on that. Because of the seriousness of the offense, it set about to determine with certainty the identity of the offender. No effort was made to get the offender to entrap himself. The carrier merely set a trap for such an offender, which it owed a duty to the traveling public to do. Claimant entirely of his own volition walked into it.

The employes' assertion that at the time in question it was dark and hazy, seeking to put into question the certainty of the policewoman's identification, is absolutely false. Employes' Exhibit C (the transcript of the hearing they submitted) shows the following statement by the Inspector of Police, in reply to question by claimant's representative:

> "Q. What was the weather conditions on Feb. 19th, do you recall?
>
> A. Yes ,sir, it was rather hazy, I wouldn't say dark, and fairly cold not too much."

It is well settled by awards of this and other divisions that this Board should not resolve conflicts in evidence but, as well stated in Award No. 1809 (Referee Edward F. Carter),

> "If there is evidence of a substantial character in the record which supports the action of the carrier, and it appears that a fair hearing has been accorded the employe charged, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established."

Numerous awards hold to the same effect; see Second Division 1817, 2207 (same referee); Third Division 2621 (Referee Jay S. Parker), 2633 (Referee

Curtis G. Shake), 3112 (Referee Luther W. Youngdahl), 3342 (Referee Fred W. Messmore), 3827 (Referee James M. Douglas), 5426 (Referee J. Glenn Donaldson), to cite only a few.

Even more numerous are awards holding that this Board should be cautious in interfering with discipline imposed by the carrier. One of the earliest of these was Third Division Award No. 71 (Referee Paul Samuell) in which it was held:

> "Railroad management must accept full responsibility for the employment of its employes, and it follows that it should be allowed a reasonable amount of discretion in deciding the competency and ability of its employes. So long as the carrier management acts in good faith and without ulterior motives, and does not abuse the right and privileges of the employes under the contracts and rules and regulations existing between the employer and employe, this Board is without the right to interfere in the action of the employer in disciplining its employes."

In another early Third Division award (Award No. 135—Referee William H. Spencer), it was said:

> "Although this Board has the power to order the reinstatement of an employe, it should be very cautious in the exercise of the power. It should not exercise it unless the evidence clearly indicates that the employer has acted arbitrarily, without just cause, or in bad faith."

See also Third Division Awards 418 (Referee John P. Devaney), 892 (Lloyd K. Garrison), 3965 (Referee Fred L. Fox) in which Awards 71 and 135 are quoted with approval, 6012 (Referee Fred W. Messmore), also quoting with approval Award No. 135; Second Division Awards 153 (Referee John P. Devaney), 1814 and 1817 (Referee Edward F. Carter), to cite only a few.

These findings find full support in numerous court awards; see M.St.P.& S.S.M.Ry. Co. vs. Rock (279 U. S. 410) in which the U. S. Supreme Court say:

> "The carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

and T.&.N.O.R.Co. vs. Ry. Clerks (281 U. S. 548):

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the Carrier to select its employes or to discharge them."

Also see Virginian Ry. Co. vs. System Federation No. 40 (300 U. S. 515).

But in the face of all of this, the majority in this award turn aside from the record submitted by the employes to find a technicality in the charge upon which they interfere with carrier's action in so serious an offense, not only against the carrier's interests and duty but against public decency and morals.

In a similar case before this division (Award No. 1850—Referee Lloyd H. Bailer, in which claimant was dismissed following hearing on the charge—

> "Found picking up two bundles from concealment in coach 4019, track 8 Coach Yard at 2:55 P. M. on 5-25-52, containing 9 packages PRR coffee, 4 boxes sugar, 2 drinking glasses."

the employes contended that charge only of "picking up two bundles from concealment" was not theft, for which she was dismissed. In that case, this division, in denying the claim, held that:

> "We find claimant had good reason to know she was being charged with improper possession of carrier's property, and with intended conversion to her own use. She knew the items were carrier's property. She had no right to their possession, nor any right to convert them to her own use. It strains our credulity to accept her contention she felt she was doing nothing wrong."

and

> "In conclusion, we are of the opinion and find that carrier was neither arbitrary, discriminatory or capricious in dismissing claimant from its service, and that the claim must therefore be denied."

In Award 1402 (Referee E. B. Chappell), in which claimant, subsequent to the hearing, sought to complain of its fairness, this division held:

> "Claimant contends primarily that he was not given a fair hearing because he was not permitted to face his accuser when his testimony was given. The transcript does not disclose whether or not the foreman testified in the presence of claimant, and if he did not, no objection was made thereto by claimant or his representatives. The master mechanic who conducted the hearing makes the statement that claimant's representatives agreed to the procedure followed at the hearing and the reporter who witnessed the signatures and took the testimony verified that statement.
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> In the absence of controlling contractural provisions, as here, an accused employe having authorized representatives of his own choice present will not ordinarily be permitted to participate in a disciplinary hearing without objection as to the manner in which it is conducted and after an unfavorable result, complain of its fairness. See Awards 1251, 1334 and First Division Award 13606.
>
> In the light thereof and the record before us, we conclude that the hearing was fairly conducted and that evidence there adduced by the carrier supported the charge. Therefore, we cannot conclude that it acted arbitrarily, unreasonably or unjustly. In such a situation the Division cannot substitute its judgment for that of the carrier. See Award 1389."

In the instant claim, claimant was by his own admission in the record present throughout the testimony of all the witnesses.

In Award 1251 (Referee Adolph E. Wenke), it was said:

> "The System Federation also contends that carrier did not comply with those provisions in Rule 37 of their agreement which required that Justice, a reasonable time prior to the hearing, be apprised of the precise charges against him and that he be given a reasonable opportunity to secure witnesses and prepare for trial, and that, because thereof, a fair hearing was not had within the contemplation of the rule. These provisions are, of course, for the protection of the employes covered by the agreement and generally the record should show that they have been reasonably complied with. Here Justice, by his own choice, was represented by the acting local committeeman who either knew or should have known his rights. No objection was made that Justice had not been properly informed of the precise nature of the charges. Nor was any motion made for continuance so time might be had to secure wit-

nesses and prepare for trial, but evidence was introduced and a hearing was had on the merits. It must be presumed that Justice and his representative felt they were prepared to proceed.

Justice took his chances on the outcome of the hearing on the merits and lost. Now, after he has been found guilty of the charges against him, it will be presumed that there requirements were adequately complied with to the satisfaction of Justice and his representative and Justice will not now be permitted to complain thereof because, by his conduct, he has waived any right he might have had to do so."

The fallacy of the soundness of jury trial is almost as well known to laymen as to attorneys, and acquittal by a jury verdict on a criminal charge, with its attendant requirement of proof of guilt beyond a reasonable doubt, is not a complete exoneration, and did not establish his innocence so far as the carrier's charges of misconduct were concerned. In Second Division Award 1251 (heretofore cited), the record shows that claimant had been acquitted by a jury on a charge of criminal assault of his foreman before he was given a hearing by carrier and dismissed on a charge of assaulting his foreman. This the division completely disregarded in finding that—

"The record sustains the carrier's finding that Electrician John J. Justice assaulted his General Foreman George C. Porter on March 20, 1947, and the nature of the offense justified his dismissal from the service."

and after reviewing the issue as to fair hearing as heretofore discussed, denied the claim for reinstatement and pay for time lost.

In Third Division Award 4771 (Referee Mortimer Stone) it was said:

"A hearing on complaint of misconduct of an employe is not a criminal proceeding and recognized rules of service need not be followed except insofar as their nonobservance may indicate lack of fairness or good faith in the conduct of the hearing, nor may we substitute our judgment for that of management as to the merits of the claim investigated. Upon the management rests the obligation of safe operation of the railroad, the courteous treatment of its patrons and the working conditions of its employes. To maintain that obligation it is necessary that Carrier have the right for proper cause to discipline and to discharge. It may err in its judgment, but if exercised in good faith upon a fair hearing its judgment must prevail as part of its responsibility."

The position of this Board in such cases is well stated in Fourth Division Award 332 (Referee Henry J. Tilford) as follows:

". . . We know of no rule which would require the carrier to accept as conclusive the verdict of a trial jury in a criminal prosecution against an employe that he was not guilty of the offense for which he has been indicted, even though that offense constitutes the foundation of the charge brought against the employe by the carrier."

No purpose would be served in quoting here from other awards cited by carrier in its submission. See First Division Awards 12043, 15577; Third Division Awards 5336, 4749, 5104, 5385.

That these awards reflect sound law is to be found in court decisions. In Adams vs. So. P. Co. (266 Pac. 541), the court say:

"An employe is not entitled to have a jury decide whether or not his infraction of the rules established by his employer warrants

> dismissal. Where the reason was, from the standpoint of the railway company acting in good faith, wholly true, a judgment against such company should not stand."

See also Buster vs. C. M. St. P. & P. (195 F. 2nd 73), cited by carrier.

Verdict of the circuit court in the malicious prosecution suit was appealed by the carrier to the Court of Appeals of Tennessee, middle Section at Nashville. An opinion by Thos. A. Shiver, Judge, and concurred in by two judges, reviewed in considerable detail the evidence adduced before the trial court. From examination of this opinion, the evidence adduced at the trial was substantially the same as that in the hearing by carrier. That court found that there was probable cause for carrier's action and reversed and dismissed the complaint. In subsequent appeal, the Supreme Court of Tennessee affirmed the decision of the Court of Appeals.

It is manifest on the record that carrier did not act arbitrarily, capriciously or in bad faith, but proceeded throughout this whole matter with calm deliberation and great care and in the best of good faith to determine the guilty party beyond any possibility of doubt before it took action. What was said in one of the earliest discipline awards by this Board (3rd 71, supra, August, 1935)—

> "So long as the carrier management acts in good faith and without ulterior motives, and does not abuse the right and privileges of the employes under the contracts and rules and regulations existing between the employer and employe, this Board is without the right to interfere in the action of the employer in disciplining its employes."

has been so consistently accepted as to be axiomatic, and should have been followed in this case.

The majority's error transcends the lawful power of this Board in discipline cases.

E. H. Fitcher
J. A. Anderson
D. H. Hicks
R. P. Johnson
M. E. Somerlott