Award No. 3703
Docket No. 3187
2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, Car Helper R. J. Wills, Jr. was unjustly dismissed from the service of the Missouri Pacific Railroad Company on March 31, 1957.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to reinstate the employe to service with all service rights unimpaired and with pay for all time lost since March 31, 1957.

EMPLOYES' STATEMENT OF FACTS: Mr. R. J. Wills, Jr., car helper, hereinafter referred to as the claimant, was employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at Monroe, Louisiana on May 10, 1950. The claimant worked in the capacity of car helper on the repair track and car oiler in the train yards and was upgraded to carman on April 1, 1952, which covers a period of nearly five (5) years. His work was always satisfactory and he had no previous trouble until cited for investigation on March 27, 1957, at 9:30 A. M.

Charges were made by supervision of the carrier against the claimant to the effect that he was alleged to have used profane and abusive language to Car Foreman Rogers about 8:15 A. M., March 12, 1957. The investigation was originally set for 10:00 A. M., March 18, 1957, but was postponed until March 27, so the claimant would have an opportunity to secure representation of his choice.

It should be noted that the claimant was a train yard employe working from 11:00 P. M. to 7:00 A. M. and was off duty at the time the incident occurred.

Following the investigation, the claimant was notified under date of March 31, 1957, notice bearing the signature of Superintendent Barksdale, that he was dismissed from the service of the carrier.

In reviewing the investigation transcript, your Honorable Board will

but to deny the request for reinstatement. This record is devoid of any reason for this Division altering the decision of the carrier. Therefore, the claim must 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.

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

Claimant Wills was dismissed from the Carrier's service on March 31, 1957, following an investigation hearing on the charge of having used profane and abusive language to Car Foreman Rogers. The Employes maintain that he was unjustly dismissed in contravention of the provisions of the collective bargaining agreement and seek his re-instatement with all service rights unimpaired and with pay for the time lost. The Carrier contends that Wills' guilt was clearly established and that the discipline is justified.

The material facts are simple and in their essential aspects not seriously disputed. Wills had been employed by the Carrier at Monroe, Louisiana for almost seven years, working in various capacities as carman helper and upgraded carman. His employment record was spotless up to the incident of March 12, 1957 which resulted in this claim. At the time in question Wills was working as a train yard employe on the 11 P. M.-7 A. M. shift and had completed his tour of duty when the incident involved occurred in the train yard at about 8:15 A. M., on March 12, 1957.

The transcript of the testimony given at the investigation hearing discloses that Wills, perhaps not without some reason, was concerned about the application of provisions of an agreement concerning seniority rights of temporarily advanced carmen helpers after completion of a certain number of days of service as an upgraded carman. Wills believed that in some cases certain employes had been run around others, contrary to seniority principles, and that he may have been a victim of such conduct. In this frame of mind he engaged in a discussion of the subject with his Local Chairman when Car Foreman Rogers approached and was brought into the conversation as the result of a question addressed to him by Local Chairman Taylor. After Rogers joined the discussion group, Wills' irritation, at the impairment (as he believed) of his seniority rights, gradually increased to the point where he expressed the opinion that Rogers was two faced. Rogers and Taylor testified that Wills called Rogers a G-D liar. Wills testified that he did not remember calling Rogers a liar but did call him two faced.

Wills also testified that before he expressed his opinion of Rogers he had asked the Car Foreman about one or more instances in which Wills thought junior men had been placed on the Carmen's seniority list ahead of others, but that Rogers did not answer his inquiries.

As we have seen, the investigation resulted in Wills dismissal from service. We are not unmindful of the sound doctrine expressed in many Awards that it is not our function to substitute the Board's judgment for that of the

Carrier in disciplinary cases, and that we should be reluctant to interfere in such matters unless it is clearly shown that the Carrier's action has been arbitrary, capricious and unreasonable. We are also mindful of the rule that in cases such as these an employe may not be disciplined without just and sufficient cause. We do not condone insubordination but, in the circumstances of this case, note that claimant was not on duty; nor, in customarily accepted sense, did he defy duly constituted authority or disobey lawful orders. We disapprove of the use of vulgar or profane language, but recognize that an aggravated situation may give rise to stronger language than may ordinarily be expected.

From a careful review of the record we conclude that the Carrier did not adequately appraise the pertinent facts and circumstances involved and that it gave insufficient weight to the fact that claimant was not on duty and had served the Carrier honorably and without prior offense for seven years. We therefore find that the discipline imposed was of such severity as to indicate arbitrary, capricious and inequitable judgment, and therefore the Claimant was dismissed without just and sufficient cause. He is entitled to be re-instated with all service rights unimpaired and with pay for all time lost, less all earnings from other sources since March 31, 1957.

AWARD

Claim sustained per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March, 1961.

DISSENT TO AWARD 3703, DOCKET 3187

This Award, adopted by the majority, consisting of the five labor members of the Board and Referee James P. Carey, Jr., is patently erroneous, which necessitates this dissent.

This fact may be demonstrated by pointing out that the majority correctly understood that Claimant Wills was dismissed from the Carrier's service following an investigation hearing on the charge of having used profane and abusive language to Car Foreman Rogers. Reference to the testimony contained in the transcript of investigation, made a part of the record, conclusively established that the charges preferred against the claimant were sustained. For example, Car Foreman R. O. Rogers testified:

> "He (meaning the claimant) told me that I was goddam liar and two faced." (Page 2 of the transcript)

Car Inspector E. B. Turner, who witnessed the incident which resulted in the claimant's dismissal, testified, on page 6 of the transcript, concerning what was said by the claimant, and by reason of the vile language employed and the viciousness with which it was used, we have restrained ourselves from making it a part of the record in this dissent. We do repeat, however, the testimony of Car Inspector Turner to the effect that in answering a question from Car Foreman Rogers, the claimant stated,

"I think you are a goddamed liar and are two faced."

The claimant, himself, with considerable candor, repeated, on page 4 of the transcript, the exchange of conversation in which he engaged, and he quoted himself as saying,

> "I said 'You're goddamed right, I think you are two faced.' 'Just about as two faced as anybody I ever saw.'"

The occurrence during which the foregoing language was indulged by the claimant was characterized by the majority as a "discussion group," which is pure sophistery. The language contained in the transcript cannot be so characterized.

But the majority committed a grievous error even though, as stated by them, they were mindful of the sound doctrine expressed in many Awards that it is not the function of the Board to substitute its judgment for that of the Carrier in disciplinary cases, and went on record as not condoning insubordination nor the use of vulgar or profane language. Having given recognition to these virtues however, the majority then noted "that claimant was not on duty" and seized upon this fact, which not in dispute, to conclude that " * * * the Carrier did not adequately appraise the pertinent facts and circumstances involved and that it gave insufficient weight to the fact that claimant was not on duty * * * ." From this flimsy structure, the majority jumped to the conclusion that the discipline imposed was "capricious and inequitable" and that the claimant was dismissed "without just and sufficient cause." It apparently escaped the majority that to reinstate the claimant with all service rights unimpaired and with pay for all time lost, even though the Carrier was credited with earnings from other sources during the period of dismissal, is tantamount to saying that the claimant was without any guilt whatsoever, but, on the contrary, was set upon by an arbitrary and capricious management. We respectfully submit that such conclusion cannot be based upon the record in this case.

Since the majority gives such geat weight to the fact that claimant was not on duty, we here point out that when on duty the claimant was subject to the supervision of Car Foreman Rogers and that he had not left the property at 8:15 A. M., the time of the occurrence here in question, having worked the 11:00 P. M. to 7:00 A. M. shift.

The fact that the claimant was not on duty is no justification for the use of vile, abusive and vicious language, which the record clearly shows he did use toward his foreman, and all Divisions of the National Railroad Adjustment Board have recognized this fact. So that there can be no mistake, we here refer to a few awards where the Board refused to substitute its judgment for that of the carrier in disciplinary cases where the claimant was not on duty at the time of the occurrence which resulted in the administration of discipline.

In Award No. 1542, Second Division, the foreman reprimanded the claimant for not doing a day's work, at which the time the claimant told the foreman that he was crazy, didn't know what he was talking about and then called him a vile name. Notwithstanding the fact that the claimant was not on duty, the majority found that the claimant was insubordinate to his superior and denied the claim for reinstatement.

In Award No. 1884, Second Division, the claimant was dismissed for engaging in the practice of soliciting personal injury cases among carrier's employes in behalf of outside attorneys. Although it is not clear whether

this activity occurred on or off duty, the majority held that claimant improperly used his employment relationship for the purpose of furthering a course of action clearly inimical to the interest of his employer and denied the request for reinstatement.

Award No. 2204, Second Division, involved felonious conduct while off duty and off company property, yet the majority denied the request for reinstatement.

In Award No. 3253, Second Division, the carrier discharged an employe for soliciting and handling litigation against the carrier in claimant's capacity as a lawyer. Here, again, the activities occurred while off duty, yet the majority denied request for reinstatement.

In Award No. 5104, Third Division, a Pullman porter was denied reinstatement although the conduct resulting in his dismissal occurred while off duty and off company property.

Award No. 5707, Third Division, denied request for reinstatement of an employe who had been dismissed account being under the influence of intoxicating liquor while off duty and off company property.

In Award No. 5757, Third Division, the Board denied request for reinstatement of an employe who was dismissed for being drunk and disorderly while off duty but on company property.

Award 8993, Third Division, denied reinstatement to an employe who had been dismissed for drinking and causing a general disturbance on one of carrier's trains while claimant was on vacation.

Award 15029, First Division, denied request for reinstatement of an employe for improper off-duty conduct while traveling on one of carrier's trains.

Award 16265, First Division, denied request for reinstatement of a brakeman who was dismissed for an offense which occurred while off duty at a company rooming house.

Award 16570, First Division, denied reinstatement for an employe dismissed after being found guilty of the use of intoxicants while off duty.

Award 16785, First Division, denied request for the reinstatement of a switchman who was discharged because he testified falsely in court in regard to a material issue in a personal injury suit against the carrier while the claimant was off duty.

Award 16853, First Division, denied request for reinstatement of a conductor who had been dismissed for intoxication and insubordination while off duty.

The claimant was dismissed after having been found guilty of using profane and abusive language to a car foreman under whose supervision he worked at Monroe. The mere fact that the misconduct of which the claimant was found guilty occurred while off duty does not and cannot afford a proper basis for the majority to substitute its judgment for that of the Carrier and order the Carrier to again enter into employment relationship with the claimant. In effect, the award may lead this employe and other employes to

believe that they may hold their temper about anything their supervisor does that might irk them during their on-duty time, and then, when they check out, before leaving the property they might go and vent their feelings with viciousness and profanity on the head of their supervisor and get away with it.

The record shows that there is no evidence that the discipline administered by the Carrier has served its purpose or that the claimant recognized the gravity of his misconduct. An injustice has been perpetrated upon the Carrier by the action of the majority in sustaining the claim in Award No. 3703.

For these reasons, we dissent.

William B. Jones
David H. Hicks
H. K. Hagerman
P. R. Humphreys
T. F. Strunck

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when the interpretation was rendered.)

INTERPRETATION NO. 1. TO AWARD NO. 3703 DOCKET NO. 3187

NAME OF ORGANIZATION: System Federation No. 2, Railway Employes' Department, A. F. of L. — C. I. O. (Carmen)

NAME OF CARRIER: Missouri Pacific Railroad Company.

QUESTION FOR INTERPRETATION: Do the words in Award No. 3703, "Claim sustained per findings," and that part of the Findings reading as follows:

> "We therefore find that the discipline imposed was of such severity as to indicate arbitrary, capricious and inequitable judgment, and therefore the Claimant was dismissed without just and sufficient cause. He is entitled to be reinstated with all service rights unimpaired and with pay for all time lost, less all earnings from other sources since March 31, 1957,"

entitle the claimant, after he served 1,040 days as an upgraded Carman, to a retroactive date which he would have earned had he not been unjustly dismissed?

The carrier and employes have been unable to agree about the application of Award No. 3703 and the employes request interpretation of the pertinent portion of the findings therein concerning the measure of relief granted the claimant who was held to have been unjustly dismissed. Specifically the finding in question was that

> "the claimant was dismissed without just and sufficient cause (and) he is entitled to be re-instated with all service rights unimpaired", etc.

The claimant was dismissed March 31, 1957. He was subsequently by Award No. 3703 ordered re-instated in the carrier's service as of that date. The inquiry is — what were his service rights with the carrier on March 31, 1957?

The initial submission in Docket No. 3187 alleged that Claimant Wills was upgraded to carman on April 1, 1952. It appears that thereafter he continued to maintain such status over a period of five years.

An Agreement effective August 1, 1953 between the carrier and the Brotherhood provides in Section 3 (b):

> "A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1,040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1,040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman as of the date so employed but will automatically lose seniority as a helper."

The carrier represents that when claimant was dismissed on March 31, 1957 he had accrued 953 days of service as an upgraded carman and upon completion of 87 additional days in such upgraded capacity thereafter he would have been entitled to invoke the benefits of Section 3(b) of the above mentioned agreement. Thus presumably claimant would have become eligible to acquire seniority as a carman on or about August 1, 1957 if he had not been dismissed. The fact that he had accrued such a substantial amount of credit as an upgraded carman at the date of dismissal affords substantial basis for the presumption that he would have exercised his contractual option. The employes assert that when claimant was dismissed on March 31, 1957 he lacked approximately 40 days to establish seniority as a carman.

In applying the Award, the Carrier restored Claimant Wills to service on March 17, 1961 and afforded him the opportunity to work as a temporarily advanced helper as and when work as carman was available. The carrier shows that claimant completed 1,040 days of service as an upgraded carman on August 24, 1961. The employes maintain that when claimant completed 1,040 days of service as an upgraded carman in 1961 subsequent to his restoration to service pursuant to Award No. 3703, he was entitled to acquire seniority as a carman retroactive to August 3, 1957 on the apparent assumption that claimant made his choice in writing in accordance with the provisions of Section 3(b) of the Agreement mentioned.

We interpret the import of the Board findings in Award No. 3703 to be that claimant was to be restored to the same position in the service of the carrier as he was on March 31, 1957, insofar as the carrier was capable of satisfying that directive. As of March 31, 1957 claimant lacked some number of days service as an upgraded carman to qualify for seniority as a carman. He was deprived of the opportunity to complete such days of service in 1957 as the result of his wrongful discharge. When he was restored to service in 1961 and thereafter completed the required days of service as an upgraded carman to round out the required 1,040 days called for by the Agreement, and provided he expressed his choice in writing to acquire seniority as a carman, his seniority date as such should have been made retroactive to the applicable date in 1957. In this way the claimant will be re-instated with service rights unimpaired. Such application of the spirit and intent of the Award in no way interferes with the seniority rights of other carmen. They are left in precisely the same relative seniority position as they would have been if claimant had not been wrongfully dismissed. If claimant were given a carman's seniority date in 1961, he would be denied his service rights contrary to the intent of Award No. 3703. To the extent that there may be

any difference between the parties with respect to the time of claimant's completion of 1,040 days of service as an upgraded carman in 1961, a joint check of the carrier's records will reveal the comparable month and day in 1957 to which his seniority date as a carman shall be retroactively made, provided he exercised his contractual option in 1961 in the manner provided in Section 3(b) of the Agreement effective August 1, 1953.

Referee James P. Carey, Jr., who sat with the Division as a member when Award No. 3703 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June, 1962.