

Award No. 3805

Docket No. 3456

2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson 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 EMPLOYEES:

1. That under the current agreement Truckman R. E. Cook, Carman Helper-Oiler H. A. Chadwick and Carman Helper-Oiler R. D. Cassida were unjustly dismissed from the service of the Missouri Pacific Railroad Company on October 27, 1958.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to reinstate Truckman Cook and Carmen Helper-Oilers Chadwick and Cassida to service with compensation for all time lost, and with all service rights unimpaired, including vacation rights.

EMPLOYEES' STATEMENT OF FACTS: Mr. R. E. Cook, truckman-oiler, employed November 28, 1922; Carman Helper-Oiler H. A. Chadwick, employed June 12, 1950; and Carman Helper-Oiler R. D. Cassida, employed February 15, 1951, hereinafter referred to as the claimants, were all employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, in the Osawatomie Train Yards at Osawatomie, Kansas. The claimants assigned hours are 3:00 P. M. to 11:00 P. M., and they were cited for investigation in letter dated October 14, 1958, signed by Road Master Mechanic, Mr. A. J. Daniel, to appear for formal investigation to develop the facts and place responsibility in connection with their alleged failure to perform service in connection with oiling and servicing journal boxes in the Osawatomie Train Yard on October 12, 1958, 9:01 P. M. to 10:07 P. M.

Formal investigation was held in the office of the general foreman on October 20, 1958. Following this hearing, the claimants were advised by letter dated October 27, 1958, signed by Superintendent, Mr. J. A. Shaver that they were dismissed from the service of the carrier. Following dismissal of the claimants from the service of the carrier, this case was appealed to

"R. D. CASSIDA

Date entered service as Laborer —	February 15, 1951
Promoted to Carman Helper —	December 17, 1951
Failed examination for apprentice training —	July 10, 1956
Reprimanded for being absent from work without permission —	October 24, 1956
Laid off —	December 1, 1956
Called back —	June 2, 1958."

Only Cook has a record of long service with the carrier but his record has not been satisfactory. Cook is a truckman and, as such, is entitled to perform more skilled work on the repair track but, apparently, he preferred to loaf in the west end shanty rather than work under supervision on the repair track. Chadwick was hired during the Second World War and Cassida during the Korean War and was laid off a part of the intervening time. There is nothing in their records which entitled them to special consideration.

Members of train and engine crews have a duty to keep a look out for hot boxes and a failure to keep a proper look out has resulted in dismissal from service. See for example First Division Award 16304. But hot boxes cannot always be detected while the train is in motion. It is even more important that all journal boxes be properly service treated before the train leaves the terminal. Claimants were employed to perform this single task but, as we have seen, failed to perform their assigned duties. Discipline as severe as dismissal from service is not unduly harsh, excessive or arbitrary under the circumstances existing in this dispute. Claimants were afforded a fair hearing as required by the agreement which showed clearly that claimants were guilty as charged. The superintendent responsible for operations in Osawatomie Yard discharged claimants and no reason exists for this Board interfering with that exercise of judgment. 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.

The record is clear that all three claimants were in the shack for substantial periods of time without valid reason, one of them for at least fifteen minutes, and the other two for a continuous period of over an hour, or for two or more periods of shorter duration, according to the conflicting testimony of claimants and other witnesses. While as a result some cars which could have had servicing at Osawatomie left without it, the Carrier's submission shows that the force maintained there is insufficient to service all trains. This does not excuse loitering, but it does indicate that the failure to service cars there is not considered of such grave importance as necessarily to warrant discharge on first offense.

For that reason, and because of the relatively short period involved by one claimant and the disputed question of time involved by the others, we conclude that the discipline assessed was unduly harsh, that the discipline already suffered is adequate, and that the claimants should be restored to service with seniority unimpaired but without compensation for time lost.

AWARD

Claim sustained to the extent indicated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1961.

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when the interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 3805

DOCKET NO. 3456

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

NAME OF CARRIER: Missouri Pacific Railroad Company

QUESTION FOR INTERPRETATION: "Does the language in Award No. 3805, reading:

'For that reason, and because of the relatively short period involved by one claimant and the disputed question of time involved by the others, we conclude that the discipline assessed was unduly harsh, that the discipline already suffered is adequate, and that the claimants should be restored to service with seniority unimpaired but without compensation for time lost.

'Claim sustained to the extent indicated in the findings.'
"when considered in conjunction with part 2 of the Claim of Employees reading:

'2. That accordingly, the Missouri Pacific Railroad Company be ordered to reinstate Truckman Cook and Carmen Helper-Oilers Chadwick and Cassida to service with compensation for all time lost, and with all service rights unimpaired, including vacation rights.'

mean that the Claimants are entitled to compensation in lieu of vacation earned in the year 1958 and due in the year 1959 but not taken account vacation rights could not be exercised during the period of improper and unjust discharge."

The carrier and employees are unable to agree about the application of Award 3805. The claimants have been restored to their respective places on seniority lists, but due to the level of employment have not yet been recalled to service. The carrier contends that the award has been given the fullest possible effect. The employees contend that the claimants are entitled to pay in lieu of vacations during their suspension from service.

At no time in the record of this claim was the question presented or argued by the parties whether the carrier should be ordered to pay claim-

ants in lieu of vacations; no rule, established practice nor precedent was advanced as authority for such payment and the award was not intended to require it.

Furthermore, the clear effect of the award is that claimants' suspension throughout 1959 was justified, that claimants neither had nor were entitled to any employment by carrier in 1959 from which vacations could have been taken, that there were no vacations in lieu of which payments can be made, and that this case is not within either Article 5 or Article 8, the only provisions of the Vacation Agreement authorizing payment in lieu of vacations.

The question must be answered in the negative.

Referee Howard A. Johnson, who sat with the Division as a Member when Award No. 3805 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 28th day of February, 1963.

DISSENT TO INTERPRETATION NO. 1 TO AWARD NO. 3805

The majority's statement that "At no time in the record of this claim was the question presented or argued by the parties whether the carrier should be ordered to pay claimants in lieu of vacations; no rule, established practice nor precedent was advanced as authority for such payment and the award was not intended to require it" is in error. Claim 2 asks that the carrier be ordered to reinstate the claimants "to service . . . with all service rights unimpaired, including vacation rights." The majority in Award 3805 held that what the claimants did "is not considered . . . to warrant discharge . . ." and that "the claimants should be restored to service with seniority unimpaired . . ." thus their employment relation was never terminated within the meaning of Article 8. Further evidence of this is the majority's statement that ". . . the clear effect of the award is that claimants' **suspension** (emphasis ours) throughout 1959 was justified . . ." as in answer to Question Raised Under Article 8 of the Vacation Agreement Referee Morse concluded ". . . when a suspension is given . . . the employe relation shall not be deemed to have terminated within the terms of Article 8 of the Vacation Agreement."

In view of the foregoing the question whether carrier should be ordered to pay claimants in lieu of vacations should have been answered in the affirmative.

C. E. Bagwell
T. E. Losey
E. J. McDermott
Robert E. Stenzinger
James B. Zink