Award No. 3828
Docket No. 3640
2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William E. Doyle when the 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 (Gulf District)

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Car Helper Oiler C. H. Stewart was unjustly suspended from service on May 25, 1959 and unjustly dismissed from the service of the Missouri Pacific Railroad Company (IGN) on June 9, 1959.

2. That accordingly, the Missouri Pacific Railroad Company (IGN) be ordered to reinstate Car Helper Oiler C. H. Stewart to service with full seniority and vacation rights and pay for all time lost from May 25, 1959, the date he was held out of service pending investigation.

EMPLOYES' STATEMENT OF FACTS: At Palestine, Texas, the Missouri Pacific Railroad Company (IGN) hereinafter referred to as the carrier, maintains a large freight car repair shop as well as two train yards which are referred to as the North Yard and South Yard. These two yards are in what might be termed a "Y" location inasmuch as one is near the main line and the other is located south on the opposite side of the repair shops.

On the night of May 24, 1959, the train from Little Rock, Arkansas, arrived in Palestine North Yard carrying the cars in question, i.e., Sou. 31600, Penn. 24630, NP 17674, CB&Q 18828 and NYC 118643. These cars were service treated and symboled by Car Helper Oiler C. H. Stewart, hereinafter referred to as the claimant. The claimant's symbol number was N-13-24.

Following the service treatment of these cars, and after they had been switched into Train No. 167, southbound located in the South Yard, they were inspected by Mechanical Superintendent P. E. Latsha; General Manager Smith and Assistant General Manager Walker about 8:15 P. M., May 24, 1959, on Track No. 5. Exception was taken to five cars: Sou. 31600, Penn. 24630, NP 176674, CB&Q 18828 and NYC 118643, which were placed in Train No. 167, and this exception constitutes the basis of the investigation of the claimant.

Under date of May 25, 1959, General Car Foreman H. H. Echols notified the claimant that he was being held out of service pending investigation set

clear and definite intention that the adjustment is on some other basis. See Award 15765, First Division.

The foregoing is in conformity with the common law rule. It is in accord with the rulings of the state courts of the country. And, lastly, the Supreme Court of the United States recognizes the rule. See Republic Steel Corp. v. Labor Board, 311 U.S. 7; National Labor Relations Board v. Seven-Up Bottling Co.; 73 S. ct. 287. Making the employe whole simply means he shall suffer no loss. Consequently, the measure of damages for the breach of a collective employment contract is the amount an employe would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach. This conforms to the rule that the employe should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

For reasons fully set forth herein there is no rule support or basis for the request that Claimant Stewart be reinstated to service, and such request must therefore 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.

There are three basic contentions asserted on behalf of the dismissed employe.

1. That the case was not one in which temporary suspension was an appropriate remedy.

2. That the evidence was legally insufficient, the judgment of guilt is unsupported and the hearing was unfair.

3. That the penalty imposed was excessive.

First, Propriety of the temporary suspension. Rule 32(b) authorizes suspension in "proper cases." What constitutes a proper case must be determined in each instance. It must however be a serious offense and not a trifling violation. See Awards 1261 and 1265 wherein it was ruled that failure to report because of oversleeping did not justify suspension. However, a **prima facie** showing of failure to service journal boxes and the placing of a symbol on them indicating that they had been serviced is not an inconsequential matter, and we must therefore hold that the case was a proper one for suspension.

Second, The sufficiency of the evidence. Whether the condition of the journal boxes resulted from their being moved to track five or was a result of failure to service them was a question of fact to be resolved by the trier of the facts. There was considerable evidence in support of the proposition that the boxes had not been serviced. Part of this was opinion evidence but the circumstances corroborated this hypothesis. For example, only five cars of a much larger cut showed this condition. The packing in the other cars showed that the boxes had been serviced and were undisturbed by the move. Moreover Stewart was silent when confronted with the accusation and testified that the boxes were "not too bad" when he finally serviced them after the discovery of the condition. We can not in view of this and other evidence hold that legal insufficiency is present.

There is not substance to the contention that the hearing was unfairly conducted. Stewart was not prevented from introducing any evidence and the only possible complaint which could be made was that personalities were engaged in at the hearing. This was largely attributable to the then general chairman. His conduct of the defense was, to say the least, vigorous, zealous and excessively personal. There was retaliation, but from a consideration of the entire record we are unable to hold that the hearing was not fair.

Third, The question of excessive punishment. In reviewing the sanction imposed we note that the offense is most serious. It is capable of producing tremendous damage. In view of this we are constrained to hold that legal justification exists for the penalty of dismissal and that it is not shown to have been motivated by ill will. Since there is a basis in reason for the extreme sanction of dismissal it is not within our province to void it as an arbitrary exercise of power. The fact that we might have imposed less punishment in the light of Stewart's good record of 15 years does not furnish a basis for reversal.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September 1961.