Award No. 3925
Docket No. 3438
2-MP-CM-'62

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 EMPLOYES:

1. That Mrs. Inez Maxwell, Coach Cleaner, was improperly discharged from the service of the Missouri Pacific Railroad Company on May 28, 1958 (See Employes' Exhibit A).

2. That accordingly, the Missouri Pacific Railroad Company be ordered to reinstate Mrs. Maxwell to service with seniority rights unimpaired, including any vacation rights, and paid for all time lost.

EMPLOYES' STATEMENT OF FACTS: Mrs. Inez Maxwell, Coach Cleaner, hereinafter referred to as the claimant, is employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at Rankin Yards, St. Louis, Missouri. On May 5, 1958, in letter addressed to the claimant by Master Mechanic, Mr. L. Bechel, she was advised to appear at 9:00 A. M., Tuesday, May 8th, 1958, in the office of the master mechanic for investigation to determine cause and responsibility for failure to carry out her work assignment between 9:40 P. M. and 10:05 P. M., April 21, 1958. The employes asked that this investigation be postponed until May 12, but the carrier advised that they would not be able to hold the investigation until May 14th, 1958, at which time the investigation was held.

Following the investigation on May 14th, Superintendent, Mr. H. Jones, in his notice of May 28th, 1958 advised the claimant that she was dismissed from the service of the carrier "account being absent from and your failure to carry out your work assignment as Car Cleaner, April 21st, 1958".

Upon receipt of the investigation transcript, General Chairman Bond discovered that the carrier had omitted much of the testimony pertinent to the defense of Mrs. Maxwell and under date of May 29th, 1958 General Chairman Bond wrote Master Mechanic Bechel in complaint of these omis-

On May 5, 1958, an investigation was held pursuant to a notice to claimant

> "to answer charge of failing to properly perform your duties and leaving your job and staying away from same 1'05" before quitting time on April 16, 1958, without permission from your supervisor."

An investigation was held after considerable delay due to postponements requested by the employes. Since claimant was cited for absenting herself from duty on April 21 for which she was discharged as stated in this record prior to action being taken in the earlier offense, it was not necessary to assess separate discipline on the earlier charge.

We see then that claimant was cited for absenting herself from duty only 5 days earlier yet again brazenly showed the same disregard for her job. We need wonder no longer why the foremen made a thorough search for claimant. The carrier cited awards in its submission leading to Award 2491 showing that sleeping on duty fully justified discipline as severe as dismissal from service. Although your Board in Award 2491 took it upon itself to modify the discipline assessed by the carrier, certainly there is no basis for disturbing the discipline assessed by the carrier after the third offense of a similar nature. In 1955, claimant was found sleeping on duty for which she was discharged. Within a year after being returned to service in compliance with the order from your Board, claimant was twice formally charged for being absent from her job without permission. The second time claimant brazenly left her assignment after being charged with the same offense only five days prior thereto. Certainly the carrier cannot be compelled to tolerate such unsatisfactory conduct.

The carrier respectfully submits that this 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 was discharged after an investigation on a charge of absence from work for 25 minutes, between 9:40, when the relief foreman started looking for her, until 10:05, when he and another foreman found her in the locker room. She testified that she worked until 9:45, when the lead car cleaner borrowed her wash hose to clean the dome glass, and that she then went to change her wet clothes. But the evidence shows without dispute that when the hose was borrowed it was still raining, that the lead car cleaner proceeding with his work in spite of the rain, and that the rain stopped about 9:30, so that her absence was at least 35 minutes, and longer than was charged.

Claimant testified that she was wearing safety shoes and rubber rain clothes, consisting of trousers, coat and hood, but that her underwear was wet

up the leg from the ankle; that she hung up the rain clothes to drip, placed her other wet clothing on the radiator to dry, removed her wet shoes and was putting on dry socks when the foreman entered the room. But both foreman testified that she was lying on a bench reading a magazine.

Extraneous matters are urged, including the charge that the foremen invaded Claimant's privacy by entering the locker room without proper warning and finding her insufficiently dressed. But the evidence shows that one of them knocked at least twice and obtaining no response said "I'm coming in," before entering. It shows also that she was sufficiently dressed to go immediately to the office as directed, although a wet undergarment was on the radiator.

It seems clear that the time taken by Claimant, whether 20 minutes as claimed by her, 25 minutes as charged, or at least 35 minutes as shown by the circumstances, was more than sufficient to change wet clothes and return to work. It probably would not have been sufficient time to dry wet clothing. But Claimant went to the locker room to change clothing, and not to dry them. She did not claim to be entitled to sufficient time off the job to dry them. Since they were still wet at 10:05, she would have lost considerably more time than the 35 minutes or more which had already expired.

However, the 25 minutes absence charged hardly seems a sufficient offense to warrant absolute dismissal. While apparently she had been previously discharged and reinstated, that fact was not mentioned in connection with the charge or the investigation.

We conclude that the discipline imposed was excessive, and that Claimant should be restored to service without pay for time lost.

AWARD

That Claimant be restored to service without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1962.

CARRIER MEMBERS' DISSENT TO AWARD NO. 3925

The claimant, Mrs. Inez Maxwell, was discharged from the service of the Carrier on May 28, 1958, upon having been found guilty of failure to carry out her work assignment, following a formal investigation as required by the rules of the Agreement applicable to coach cleaners, the class of service in which she had theretofore been employed.

After reviewing the pertinent evidence contained in the transcript made at the investigation, the majority, in the Findings, stated as follows:

> "But the evidence shows without dispute that when the hose was borrowed it was still raining, that the lead car cleaner proceeded with his work in spite of the rain, and that the rain stopped about

9:30, so that her absence was at least 35 minutes, and longer than was charged."

After further discussion of the evidence upon which a finding of guilt was made, the majority then reached the following conclusion:

"However, the 25 minutes absence charged hardly seems a sufficient offense to warrant absolute dismissal. While apparently she had been previously discharged and reinstated, that fact was not mentioned in connection with the charge or the investigation.

"We conclude that the discipline imposed was excessive, and that Claimant should be restored to service without pay for time lost."

The award then provided

"That Claimant be restored to service without pay for time lost."

The majority committted grave error in its award after having found that the claimant was guilty of the charge preferred against her which resulted in her discharge from service by the Carrier for the reasons:

1. They substituted their judgment for that of the Carrier; and

2. They failed to take into consideration claimant's past record.

All divisions of the National Railroad Adjustment Board, in awards so numerous as to become legion, have held that the Board will not substitute its judgment for that of the Carrier, except (a) where the claimant was not accorded a fair and impartial investigation where required by rule, (b) there was not substantial evidence to support the charge preferred against the claimant, or (c) the discipline assessed was so harsh when viewed in the light of the facts as to establish bias, prejudice or capriciousness by the officer who assessed the discipline.

In Award No. 1323, Second Division, (Donaldson), this Board stated its policy in discipline cases as follows:

"Be that as it may, it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion."

Again, in Award No. 3092, Second Division, (Burke), this Board adhered to its policy for the following reasons:

"This and other Divisions of the Board have often said that they would not substitute their judgment for that of the carrier unless its action in that respect can be said to be arbitrary, unreasonable, or unjust."

Once again, in Award No. 3430, Second Division, (Murphy), this Board held that:

"We do not feel that this Board should substitute its judgment for that of the carrier unless the evidence proves that the carrier assessed an unjust or discriminatory penalty. The evidence here does not support such a contention.

"The carrier has a right to expect its employes to observe the Rules and perform their work. Likewise when the carrier is assessing penalties they should take into consideration the entire service record of the employe, which could be their reason for the reinstatement of Mr. Clement. This discretion is vested in them and we may not set aside their judgment unless the evidence proves that they have abused this right. The record in this case does not so indicate."

In connection with the second point mentioned earlier, the majority stated:

"While apparently she had been previously discharged and reinstated, that fact was not mentioned in connection with the charge or the investigation."

The above statement constitutes grave error because there is no requirement in the rules applicable to Claimant Maxwell to the effect that her past record could only be considered in the event it was introduced into the investigation and this Board has never held that the introduction of the past record of the accused at the investigation is a condition precedent to giving consideration to such past record at the time discipline was assessed, following a finding of guilt of the charge preferred against the accused.

This proposition is not new to this Board as all divisions have held, in numerous awards, that it is not only proper but essential for the Carrier to take into consideration the past record of the accused, after the accused has been found guilty of the charges preferred against him, before making the decision as to the quantum of discipline to be assessed.

In Award No. 1367, Second Division, (Wenke), this Board announced its policy in the following language:

"In disciplinary actions it is not only proper, but essential in the interests of justice, to take into consideration the employes' past record when, after the employe has been found guilty, of the charges made against him, discipline is being imposed. This for the reason that what might be just and fair to impose upon an employe whose past record has been good might, and probably would be, entirely inadequate for an employe whose past record has been bad. It should be understood that such past record should in no way be considered in determining the guilt or innocence of the party as to the charges for which he is being tried."

Again, in Award No. 1402, Second Division, (Chappell), this Board stated:

"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 No. 1389.

"In the discipline to be imposed after determining his guilt, it was not only proper but essential in the interest of justice for the carrier to take into consideration the employe's past record. See Award No. 1367. In view of such past record and the nature of the charge, we do not find the discipline imposed to be either arbitrary, unreasonable or excessive."

Again, in Award No. 2066, Second Division, (David R. Douglass), this Board stated:

"Once it has been established that an employe has been guilty of an offense, which requires disciplinary action, all of the facts and circumstances should be very carefully considered before arriving at a decision as to the amount of discipline warranted. In such deliberation it is our opinion that the following should be carefully considered:

"* * * * *

"2. The past record of the violator.

(a) The length of time spent in the service of the carrier.

(b) The service record of the violator throughout his entire service with the carrier.

"3. The attitude of the employe in respect to the liklihood of a violation in the future.

"4. The effect of the amount of discipline, upon the other employes, in pointing out the necessity of compliance with the rules."

In Carrier's submission, and again in oral presentation by Carrier representative before this Board with the referee present, Claimant Maxwell's past record was placed squarely in evidence. This evidence included a reference to, and discussion of, a prior claim for reinstatement of Mrs. Maxwell in Docket No. 2327 Second Division, and this Division's Award No. 2491, in which the same Claimant Maxwell was reinstated, but without back pay, after the majority concluded in the Findings that she was guilty of the charge which resulted in her dismissal from the service of the Carrier.

In its oral presentation before this Board, it was stated as follows:

"Although leniency was extended to her by your Board in Award No. 2491, the claimant did not improve her work habits, and on May 5, 1958, was accorded an investigation to answer a charge of failing to properly perform her duties and leaving her job and staying away from same 1 hr. 5 mins. before quitting time on April 16, 1958, without permission from her supervisor. Due to reasons beyond control of the Carrier, investigation was delayed, and in

the meantime, on April 21, the occurrence here involved (in Docket No. 3438) resulted in her dismissal from the service."

It was further stated in that hearing that "the Carrier has an obligation to operate its property with safety and efficiency, which it is able to accomplish only through the services of loyal, faithful and efficient employes who will perform the duties to which assigned, and that there is no place in a well-run organization for an employe such as the claimant who will not perform the duties to which assigned unless some supervisor stands over her at all times to enforce the proper performance thereof."

It was further stated in the referee hearing that "this Carrier complied with the Order of your Board in Award No. 2491 and restored Mrs. Maxwell to service. This was done in order to effectuate this Carrier's policy of complying with Board awards wherever it is possible to do so in the interest of bringing these matters to a conclusion. The leniency extended this claimant in Award No. 2491 was misguided, and subsequent conduct of the claimant has proved that this Carrier's Judgment in the first instance was correct. We have been lenient and long suffering in this matter and we must urge this Board not to exceed the authority vested in it under the Railway Labor Act and refrain from interfering in the action taken by the Carrier in the instant case."

Not withstanding all these things, the majority substituted its judgment for that of the Carrier as to the quantum of discipline warranted and apparently ignored the past record of the claimant with the observation to the effect that

> "* * * that fact was not mentioned in connection with the charge or the investigation."

This observation was made in the face of the fact that there are few, if any, awards of this Board which have held that the past record of the accused should be made a part of the investigation record; but, on the contrary, there are numerous awards of all divisions which have consistently held, as did this Board in Award 1367, previously discussed, that:

> "In disciplinary actions it is not only proper, but essential in the interest of justice, to take into consideration the employe's past record when, * * * discipline is being imposed."

followed by the reasons therefor.

For these reasons, we feel compelled to file this dissent.

W. B. Jones

F. P. Butler

H. K. Hagerman

D. H. Hicks

P. R. Humphreys