

Award No. 4354

Docket No. 4228

2-RDG-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

READING COMPANY

DISPUTE: CLAIM OF EMPLOYEES: (1) That under the current agreement Car Inspector Harry R. Wiley was unjustly dismissed from the service on October 16, 1961.

(2) That accordingly the Carrier be ordered to reinstate the aforesaid Car Inspector Harry R. Wiley, with seniority rights unimpaired and paid for all time lost retroactive to October 16, 1961.

EMPLOYEES' STATEMENT OF FACTS: H. R. Wiley, hereinafter referred to as the claimant, entered the service of the carrier at Shamokin, Pennsylvania, June 12, 1960, as a coach cleaner. Since that time he has worked at various points as packer, helper and lastly as car inspector at Coatesville, Pennsylvania, at which point he worked until dismissed October 16, 1961.

On September 11, 1961, General Division Supervisor H. O. Ludwig, directed a letter to the claimant citing him for investigation at 11:00 A.M., D.S.T., Friday, September 15, 1961, on a charge of "lying under car in a stretched out position for an extended period of time with eyes closed and not producing any work on Coatesville shop track and threatening your immediate supervisor, Foreman L. C. Ashenfelter with bodily harm and striking his nose with your finger, and failure to follow through in properly repairing car NYC 716347, at approximately 2:15 P.M., D.S.T., during your regular tour of duty on September 8, 1961 . . ."

The hearing was held on Friday, September 15, 1961.

Under date of October 13, 1961, General Division Supervisor H. O. Ludwig wrote the claimant advising him he was dismissed from the service of the carrier effective October 16, 1961.

The agreement effective January 16, 1940, as subsequently amended is controlling.

carrier's officers responsible for the safe and efficient operation of the railroad that, in view of the serious and grave nature of claimant's offences on September 8, 1961 and the equally serious rule violation of which he had been guilty in the past, his dismissal was warranted and justified.

Carrier submits that Mr. Wiley's service record shows that on July 14, 1960 he was given 15 days actual suspension and required to make restitution in connection with the theft of 40 gallons of gasoline from the carrier over a period of three months prior to May 20, 1960. Having extended leniency to claimant in connection with that offence (carrier's rules, known to claimant provide that employes who are dishonest will not be continued in the service), Carrier does not believe it should now extend further leniency to the claimant.

Carrier maintains that the Carmen's Brotherhood here requests the Second Division to set aside the considered judgment of the officers of the carrier who are responsible for the proper and efficient operation of the railroad and who passed on the evidence and approved the discipline in this case, and substitute therefor the judgment of the Carmen's Organization.

The Board has, on many occasions, properly held that the assessment of discipline is a matter within the discretion of the carrier. Carrier maintains that in the instant case there was no abuse of discretion in the dismissal of Car Inspector Wiley and that his dismissal was warranted and justified. The discipline was not assessed arbitrarily, capriciously or without just cause and your Board has previously held that where the carrier has not acted arbitrarily, unreasonably, and without just cause, the judgment of the carrier would not be disturbed.

The Board should note that in the handling of this grievance on the property there was no question raised as to the procedural aspects of the hearing. Claimant was given a proper notice, and a fair and impartial hearing at which he was afforded proper representation and the opportunity to present any witnesses as he desired. Carrier maintains, therefore, that the propriety of the discipline itself should not be questioned by the Board, as it was not assessed arbitrarily or without just cause. Under all the facts and circumstances, carrier submits that the claim of the organization that Mr. Wiley be reinstated to service with full seniority rights and compensated for time lost be denied in its entirety.

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 waived right of appearance at hearing thereon.

This is a discipline case in which the Claimant was dismissed from service. He asserts that the penalty imposed was unjust and asks that he be reinstated with retroactive pay for time lost. The charge was that he was found laying idle under a car; that he made gestures and verbal threats toward his immediate superior and that he failed to follow through in the performance of his duties, all on September 8, 1961.

We find no merit in the Claimant's contention that the Carrier's General Division Supervisor functioned in inconsistent capacities, inasmuch as he preferred the charge, acted as the prosecutor and was the judge and jury, to use the terminology employed in the Organization's submission. On the other hand, we find the evidence in the case to be highly conflicting and inconclusive. The Organization's Local Chairman was present at the hearing and at its conclusion was asked by the Carrier's Division Supervisor if he wished to say anything. We quote the Chairman's statement from the record, since we regard it as a very fair summarization of the evidence:

"After thoroughly reviewing the testimony and discussions involving this incident, there seems to be conflicting stories from both factions. As for Mr. Wiley lying in a prone position, that has been admitted. All other evidence introduced so far as Mr. Wiley's making improper repairs to a car on this date, nothing leads to directly involve improper actions taken by him in improper repairs to cars. Also, as for Mr. Wiley threatening Foreman Ashenfelter with bodily harm and assault, evidence was introduced by both parties involved, words were exchanged and, in all probability, during this heated argument, curse words could have ensued. We feel that in dealing with this particular case, the only charge against Mr. Wiley would be his lying in a prone position for approximately 15 minutes."

The Claimant's explanation for lying down during his tour of duty was that he had just removed a piece of scrap iron from the brake rigging under a car and that he was merely taking a short rest, due to the heat and having a headache; and of course, his statement was not susceptible of disproof.

From a careful consideration of the record, we think the Carrier has failed to present a factual situation that would reasonably justify the penalty imposed. On the other hand, we cannot say that the Claimant should be completely exonerated.

AWARD

The Claimant is ordered to be reinstated, but without compensation for time held out of service.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December, 1963.