



Award No. 5599

Docket No. 5352

2-N&W-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 57, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier unjustly discharged Car Inspector, T. McGinnis on July 2, 1965.

2. That the Carrier be ordered to compensate Car Inspector T. McGinnis from date of discharge of July 2, 1965 to the date of reinstatement of May 12, 1966, this to include premiums for hospitalization, life insurance and vacation pay.

EMPLOYEES' STATEMENT OF FACTS: T. McGinnis, hereinafter referred to as the claimant, was employed by the former Nickel Plate Railroad, now known as the Norfolk and Western Railway Company, hereinafter referred to as the Carrier, with date of employment of March 23, 1925, carrying a seniority date as a Car Inspector of March 15, 1929 and was regularly employed as such, who was discharged from service on July 2, 1965. The claimant had approximately forty (40) years of service.

Claimant's assigned hours of service at Osborne, Indiana were from 8:00 A. M. to 4:00 P. M., Central Standard Time, with rest days of Monday and Tuesday.

The Carrier held an investigation on June 7, 1965 in the office of the General Foreman of the Norfolk and Western Railway Company at Calumet Yard, Chicago, Illinois. The Carrier's Car Foreman from Osborne, Indiana filed charges against the claimant under date of letter of May 27, 1965, copy submitted herewith and identified as Exhibit A, alleging:

"You will report for a formal hearing in the General Car Foreman's office, Calumet Yard, Chicago, at 10:00 A. M. (D. S. T.) Thursday, June 3, 1965, to answer charges in connection with taking extended lunch period off company property and returning appar-

Carrier in this respect and a finding will be set aside only when it is clearly wrong as to constitute an abuse of discretion. Awards 419, 891, 1022, 2297. Not only was there no abuse of discretion but the evidence, while conflicting, amply sustains the charge." (Emphasis ours.)

In Fourth Division Award No. 332, the Board denied claim for reinstatement of the claimant who had been discharged and said:

"In the absence of an agreement to the contrary, the Carrier's action in dismissing an employe will not be interfered with by the Board unless in so doing the Carrier acted arbitrarily or capriciously, provided always the employe has been accorded such a hearing or trial as the rules provide for."

Other Awards so holding are as follows:

Third Division: 3125, 3149, 3112, 891 and 135.

Second Division: 1121.

Fourth Division: 377, 375 and 343.

It is the position of the Carrier that it may properly consider the past record of an employe when assessing discipline, and, in fact, it should do so in fairness to the employe involved. Otherwise, an employe with a good record might be penalized more severely than would an employe with a bad record.

In Third Division Award No. 1599, the Board clearly defined the duty of the Carrier to consider the employe's record in connection with matters of discipline. There the Board denied the claim and held in Part 2 of its opinion that:

"Second: In disciplinary matters it is not only proper, but is essential, in the interest of justice, to take past record into consideration. What might be just and fair discipline to an employe whose past record is good might, and usually would, be utterly inadequate discipline for an employe with a bad record."

Also, see Second Division Award No. 1367, which stated that it was not only proper but essential, to take into consideration the employe's past record. Carrier asserts that Mr. McGinnis was afforded a fair and impartial hearing and Carrier did not act in a capricious or arbitrary manner, the discipline was not harsh and was entirely justified.

(Exhibits not reproduced.)

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.

In this discipline case, Carrier held two separate hearings in regard to three separate charges, namely, "Being on duty allegedly under the effects of intoxicants," (Hearing held May 19, 1965); "Taking extended lunch period off Company property and returning apparently under the influence of intoxicants" and "Failure to report for duty at Calumet Repair Track, Wednesday, May 19, 1965, as he was instructed to do so by Mr. E. W. Smith, Car Foreman, Osborn, and others." (Hearing on both of these later charges were held June 7, 1965.)

In regard to the charge of "Being on duty allegedly under the effects of intoxicants," the evidence presented at the hearing shows that the charge arose out of an incident when assistant Master Mechanic Keith, in checking the operation performance at Osborn, Indiana on May 12, 1965, opened a box lid on a NKP gondola car, and upon finding a dirty condition, requested that it be examined. Claimant and one other employe jacked up the car, removed the parts and Claimant dropped the part at Mr. Keith's feet and said in a belligerent tone: "Here is your brass, there is nothing wrong with it." After words were exchanged and Claimant becoming belligerent, Mr. Keith asked Car Foreman, E. W. Smith, who was present at the time, if Claimant had been drinking and Mr. Smith responded that Claimant had been known to drink.

From the evidence adduced at the hearing, it appears that Carrier failed to meet its burden of proving beyond a reasonable doubt that Claimant was under the influence of intoxicants on said date of May 12, 1965 while on duty. This is readily seen from the following question and answer propounded to Car Foreman E. W. Smith by local Chairman P. Piazza:

"Q. Mr. Smith, on what do you base your opinion that Mr. McGinnis was under the effects of intoxicants?

A. Because he was belligerent and offensive to Mr. Keith, and in face to face arguing and talking I seemed to detect an odor of alcohol." (Emphasis ours.)

Further, if Claimant was intoxicated, he would not have been able to comply with Car Foreman's instructions to "jack" up the NKP Gondola car and remove parts therefrom.

Therefore, we do not feel that there was sufficient evidence in the record from which we could reasonably find that on the date in question, Claimant, while on duty, was under the influence of intoxicants.

Concerning the charge of "Taking an extended lunch period off Company property and returning apparently under the influence of intoxicants," it is seen that Car Foreman, E. W. Smith, testified that he watched for Claimant because of the previous unpleasant experience with Claimant and Mr. Keith, and noticed that Claimant's car was not in the parking lot and saw him walk in an awkward manner across three sets of tracks; that his face was flushed and he detected an odor of alcohol on his breath; that Claimant was off of Company property from 12:00 Noon to 1:30 P. M. on March 14, 1965.

The record of the hearing shows that Claimant did not have any regularly assigned fixed lunch period, inasmuch as he was required to inspect and repair equipment at Osborn, Indiana; that he took his lunch period when the work permitted at the convenience of the Carrier. In this instance, Claimant's immediate supervisor, Car Inspector Linden L. Wells gave Claimant permission to leave his job to get his car greased and failed to instruct him as to the exact time he was to return to work. Therefore, we feel that Carrier not only did not prove that Claimant was guilty of taking an extended lunch period, but also Carrier failed to prove beyond a reasonable doubt that Claimant returned under the influence of intoxicants. The only evidence Carrier presented in regard to this latter charge of "returning under the influence of intoxicants" was that Car Foreman Smith detected the odor of alcohol on Claimant's breath. This evidence, standing alone, is not sufficient to prove this charge, and further, the fact that Foreman Smith stated that Claimant walked awkwardly over three sets of tracks is not sufficient supporting evidence to substantiate said accusation. Walking awkwardly or clumsily over railroad tracks is not unusual, due to the raised portion of the rails. If the testimony had been that he stumbled or fell or walked in an unsure and unsteady manner over the tracks, then we would have more persuasive substantive evidence to support the allegation. In addition, by watching for Claimant because of the previous altercation, Foreman Smith showed he was prejudiced against Claimant. Therefore, we are not convinced that Carrier met its burden of proving by clear and convincing evidence that Claimant in this instance took an extended lunch period and returned under the influence of intoxicants.

The third charge of "Failing to report for duty as instructed," we feel was proved by Carrier in this instance. The record shows that Claimant was not informed by Carrier that he was discharged from his position. Claimant attempts to use this as an excuse for not reporting for work as instructed by Carrier. Further, Claimant admitted that he did not advise any supervisor of Carrier that he would not or could not report for work at the Calumet Repair Track. Therefore, Claimant must accept the consequences of being disciplined for failing to comply with Carrier's specific instructions to report for work.

In view of the foregoing, the penalty imposed by Carrier herein, is in our opinion excessive. Therefore, we feel that a fair and reasonable penalty would be a 90 work day suspension from service.

AWARD

Claim partly sustained and partly denied in accordance with the aforesaid findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1968.

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