

Award No. 3342

Docket No. TD-3303

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee.

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY - PACIFIC LINES

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(1) The dismissal of Train Dispatcher Clinton Bowman, on August 9, 1945, by the Southern Pacific Company (Pacific Lines) was not justified by the circumstances involved, and that;

(2) The Carrier shall now restore Mr. Bowman to service as train dispatcher, with seniority unimpaired, clear his record of the charge or charges used as a basis by the Carrier for dismissing him from the service, and compensate him for all monetary loss sustained by him as a result of his dismissal from the service.

OPINION OF BOARD: This is a discipline case, controlled by Article 6, "Investigations—Appeals," as provided for in an Agreement between the parties effective October 1, 1937. This case is properly lodged on appeal to this Board for determination.

The Claimant is charged with violation of Rules 801 and 804 of the General Rules and Regulations of the Carrier. Specifically, the charge is predicated on that part of Rule 801 as follows:

"Indifference in the performance of duties will not be condoned. Employees who are * * * insubordinate * * * quarrelsome, or otherwise vicious, will not be retained in the service."

Rule 804 provides:

"Misconduct or negligence affecting the interests of the Company must be reported. Withholding such information will be considered proof of negligence or indifference, and treated accordingly."

Investigation was held August 7, 1945; at the termination thereof the Claimant was found guilty of the charge. On August 9, 1945 he was dismissed from the service.

The record discloses: That the Claimant entered the service of the Carrier as a train dispatcher on March 25, 1942, and at the time of his dismissal was working as a train dispatcher at Tucson, Arizona, assigned hours 4:00 p.m. to 12:00 midnight, Tucson-Lordsburg District. He was on duty in such capacity August 6, 1945; his superior officer, Assistant Chief Dispatcher Kitchens, was on duty the same day and hours; he was charged with the duty of seeing that various dispatching systems were properly manned during his tour of duty.

During the late afternoon there was an altercation between the Claimant and Kitchens as appears in the transcript of the evidence taken at the investigation, as heretofore set out in the respective ex parte submissions, and will not be repeated here in detail as to do so would unnecessarily lengthen this Opinion.

The evidence is in direct conflict as to whether the Claimant in an abusive manner, brandished a paper punch machine, which he held in his hand, continuing to berate his superior officer in charge. Also, as to whether or not the Claimant threatened to cut such officer's guts out, and whether or not he held in his hand a knife with the blade unexposed. There is corroboration of the fact that the Claimant made a statement to the effect, that he'd like to cut his guts out. The witness so testifying did not see either one of the parties threaten each other as her back was turned to them. One witness summed up the affair as a quarrel and stated the Claimant was doing the talking while Kitchens remained silent. Another witness testified he heard mumbled voices, and a couple of vulgar words, he could not distinguish the voices.

This altercation arose when the Claimant left his dispatcher's desk, going to the telegraph room to order his lunch by telephone from the Commissary, as he was accustomed to do and a witness confirmed the fact that he generally ordered his lunch by telephone. During the process of obtaining a telephone connection with the commissary he was sitting at the manager's desk and while there picked up a newspaper and was reading the headlines when Kitchens took up the matter of his leaving his desk unprotected, informing him in substance it was a busy railroad and to return to his desk.

The Claimant testified in substance, that Kitchens approached him in an arrogant and officious voice, demanding what he was doing there, and before he could reply told him he didn't have any business in there and to get back into the Train Dispatcher's Office where he was needed. The Claimant resented Kitchens' manner and his request as stated and proceeded to tell him so—to the effect he didn't like a man to talk to him in such a way, whether he was an officer or not. When Claimant arose from his seat, he testified he placed his hand on a paper punch and did not raise it from the counter. After a few more words he left, took out his pocket book, held it in his closed fist and returning to his desk opened it, took out a half dollar to pay for his lunch. He denied having a knife in his possession that day or time.

The Claimant also testified he had made all proper arrangements to leave his desk at that time, and had requested the operator at Rasco to listed out for him for a few minutes, that he knew the location of the trains, that there would be no delay in a space of ten or fifteen minutes. Kitchens stated that during the Claimant's absence from his desk certain parties were endeavoring to contact him in his Dispatcher's capacity. The Claimant shows six orders, issued and completed upon his return to his desk—5:32 p.m., 5:36 p.m., 5:40 p.m., and 6:25 p.m.—this for the purpose of disclosing the altercation did not occur at the time Kitchens said it did. The time element is not material as both Claimant and Kitchens testify to their version of the affair so it obviously took place.

The finding of guilt or innocence of the charge must be based upon the facts developed at the investigation and the evidence there disclosed controls. See Award 3322. To hold otherwise would prolong the determination of the case and would amount to an open invitation to meet the failure of the record either to make a case or not to make one, and fill the record with self-serving declarations and collateral facts and documents not pertinent to the specific charge, or the complaint's defense thereto. An investigation must be held, evidence taken therein, the investigation concluded, and any other procedure connected with it progressed as the rules provide.

In approaching a determination of this case the duty of this Board is to review the record of the investigation subject to the established rule that "it is not the function of this Board to weigh conflicting evidence in a discipline case and if the evidence is such that, if believed, it will support the findings of the carrier, the judgment of the carrier will not be disturbed." See Award 3321.

The record discloses incidents of the complainant's past conduct to show that he was not temperamentally fitted to fulfill the duties of a train dispatcher and the fact that he was admonished on occasions and his promise to correct his conduct in such respect.

It is true that this subject matter constitutes no part of the specific charge and of course should not be considered relevant on the question of Claimant's guilt of the particular charge for which he was being tried. It is, however, proper to review Claimant's record to determine what disciplinary action should be taken if the charge is sustained. Awards 4:30, 562, 1587, 2440, 2498.

In disciplinary matters it is not only proper but it is essential, in the interest of justice, to take past records 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. Award 1599.

"Although this Board has the power to order the reinstatement of an employe, it should be very cautious in the exercise of the power. It should not exercise it unless the evidence clearly indicates that the employer has acted arbitrarily, without just cause, or in bad faith."

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There is some intimation on the part of the Claimant in this case that the Assistant Chief Dispatcher violated Rule 802 of the General Rules and Regulations of the Carrier. The fact that the Assistant Chief Dispatcher may not be fulfilling his position in accord with the Carrier or the liking of the Claimant is not a defense, or excuse for Claimant's misconduct. Award 3321.

The Carrier did not act arbitrarily, or in an unreasonable or unjust manner, in imposing the disciplinary measure in this case.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the record sustains the findings made by the Carrier at the conclusion of the investigation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of November, 1946.