

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

FLORIDA EAST COAST RAILWAY COMPANY

Scott M. Loftin and John W. Martin, Trustees

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that: Clerk H. E. Murray, Miami Freight Agency, shall now be reinstated with senior rights unimpaired and reimbursed for wage losses suffered retroactive to July 10, 1948, on which date he was suspended from the service, having subsequently been dismissed from the service on July 19, 1948 "for using vulgar and obscene language and being insubordinate to your superior at Miami Freight Agency on the morning of July 10, 1948."

OPINION OF BOARD: This is a discipline case. Claimant, H. E. Murray, was charged with insubordination and using vulgar and obscene language toward his superior on the morning of July 10, 1948. After hearing, Claimant was notified of his dismissal for using vulgar and obscene language and being insubordinate to his superior. It appears that on the morning of July 10, 1948, a complaint was received from Acme Fast Freight with respect to the slow unloading of freight at the Miami Freight Warehouse. Warehouse Foreman A. L. Browne went to the car which Mr. Murray was unloading with the help of a crew of four men to investigate the reason for the slowness of the operation. Mr. Browne and Mr. Murray had a conversation with respect to the unloading operation at Mr. Murray's car. Apparently when Mr. Murray explained that a long piece of freight across the door was impeding the operation, Mr. Browne remarked to him that even at that he should do better. What happened thereafter is a matter of conflict. Mr. Browne says that then Mr. Murray turned around to him and uttered a vulgar expletive. Mr. Murray, while admitting the use of the expletive, says that he was walking away from Mr. Browne and that the remark was not addressed to him (Browne) but was uttered, in effect, to give vent to a feeling of exasperation with the trouble which they were encountering with so much overfreight for this Cincinnati car. In any event, Mr. Browne immediately relieved Mr. Murray and had him come up to the Freight Agent's Office. The latter official suspended him, stating that Mr. Murray's remark reflected an insubordinate attitude.

We have said many times in our awards 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, its conclusions will not be disturbed by this Board. Although reasonable minds might differ with respect to conclusions to be drawn from the testimony at the hearing in this case, there is sufficient therein to warrant the conclusion that the expletive

was addressed to Mr. Browne. Reasonable minds may differ as to whether or not that fact standing alone constitutes insubordination. However, in accordance with the rule above enunciated, we shall not disturb the Carrier's conclusion in that respect.

What of the severity of the punishment? While we have the power to order reinstatement of an employe, we recognize that we should be cautious in its exercise. However, in this instance we believe that the discipline was extremely harsh and arbitrarily imposed. Misdemeanors have never carried life sentences. The Carrier has here imposed the sternest punishment within its power for a relatively minor offense. The epithet used, while a technical violation of the Carrier's rule against vulgar and obscene language, is far from the most vile. While we have sustained the Carrier's finding of insubordination, nevertheless the expletive was not accompanied by defiance of orders or any overt act which indicated an unwillingness to submit to a reasonable authority. Rather does it appear that it was merely a momentary expression of gripe or resentment. The dividing line between mere griping and insubordination can at times be very thin. Sometimes the distinction is based upon whether the supervising officer hears the gripe or doesn't. Some superiors choose to preserve the fiction that they do not hear it and consider it a sign of good morale. It was the Claimant's misfortune that his superior was not of the latter class. We do not condone either the use of offensive language nor insubordination. We do believe that the latter is a far more grievous dereliction than the former. However, there are degrees of insubordination. Here, we believe it was of a minor degree. There have been no previous disciplinary infractions in this employe's record. For all that appears from the file, he has had about three years of satisfactory service. Considering the Claimant's record of satisfactory service, we are of the opinion that a five-day suspension for an offense such as this would be the maximum which could be imposed and still be within the outermost limits of discretion. Anything in excess would be arbitrary or capricious. Accordingly, the claim will be sustained, but only to the extent that the reinstatement be effective July 15, 1948, and that the wage loss suffered be less amounts earned in other employment.

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 Employe involved in this dispute are respectively carrier and employe 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 discipline assessed was too harsh and capriciously imposed.

AWARD

Claim sustained to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of February, 1950.