

Award No. 5835
Docket No. CLX-5732

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee.

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that

"(a) The agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes, effective September 1, 1949, was violated at St. Louis, Missouri in the treatment accorded O. C. McNeill, in dismissing him from service January 29, 1951 as the result of an investigation conducted January 24, 1951; and

(b) O. C. McNeill shall be restored to service with seniority rights unimpaired and compensated for wage loss sustained beginning January 20, 1951 and continuing up to the date of his return at the rate of \$260.90 basic per month."

OPINION OF BOARD. There is very little dispute about the visual facts in the matter involved here. There is, however, room for dispute as to the implications and inferences to be drawn from the visual facts.

O. C. McNeill was on January 29, 1951 dismissed from the service by the Carrier after investigation held in conformity with the Rules of the Agreement between the Organization and the Carrier. The basis of dismissal was a charge that he had accepted five gallons of gasoline which had been removed from a tank of the Carrier on January 20, 1951. The truth of the charge was established.

This being true it cannot be well said that the Carrier did not have the right to take disciplinary action. It had the right to do so.

The degree of the exercise of that right in this case, as has been true in numerous other cases coming before this and other Divisions of the Adjustment Board, is the one which presents the difficulty.

It appears to be the general position of the Carriers that where the right to discipline has been established, and there being no measure or standard for discipline in the Agreements, it is the unquestionable right of the Carrier to discipline in any measure it may choose within the limit of its power as an employer.

The effect of this is to say that when it is shown to the satisfaction of the Division that under proper procedure an employe has been guilty of an infraction sufficient to subject him to disciplinary action at the hands of the Carrier the function of the Division has come to an end, and that it may not proceed further and inquire into the propriety of the discipline imposed. There are Awards the effect of which are to uphold this viewpoint.

The Organizations on the other hand have always contended that each and all of the procedures as to discipline by the Carrier on the property are subject to examination by the Divisions without discrimination. This position finds support in Awards.

It can no longer be doubted that the Adjustment Board has jurisdiction over matters of discipline under the Railway Labor Act. In this connection it is to be observed that the subject of discipline is not committed to the Adjustment Board under procedural restrictions.

Also beyond the provisions relating to investigation the Agreements contain no provisions the effect of which amount to procedural restrictions upon hearings before the Adjustment Board.

The restrictions upon the procedural functioning of the Adjustment Board, if any there are, flow to the greatest extent, if not altogether, from the opinions and decisions coming out of the various Divisions. The authority of these opinions and decisions, and this is not a criticism but the statement of a truism, does not and cannot rise above the source. The only authority they carry is that which is implicit in the particular decision. Beyond that they become only precedent which may be accepted or rejected in the determination of later disputes.

Unless and until therefore the parties by their Agreements or by some other positive means establish measures or standards for the imposition of discipline it does not appear proper to deny the Adjustment Board power to examine into the character and extent of discipline imposed on the property, and if it be deemed improper to adjust it. To deny the Board the right of examination in this respect would afford the opportunity for the abuses which so often flow from uncontrolled and unchecked power.

In a case where the right of the Carrier to impose discipline has been demonstrated, as here, the discipline imposed should not be brushed aside or modified without good and sufficient reason. All of the facts and circumstances should be weighed carefully before any such step is taken. Length of service, seniority, the kind of work engaged in, the responsibilities involved, the enormity of the violation, the probability of recurrence, past conduct, whether or not the act was wilful or was in the field of thoughtlessness or carelessness, the effect on discipline and service generally on the property, and all other pertinent considerations to the extent that they are shown by the record should be weighed and carefully considered, and if on such consideration it becomes clear that there has been an abuse of discretion corrective action should be regarded as authorized and proper and accordingly taken.

McNeill had seniority of fifteen years. The occurrence involved a voluntary act on his part known to be contrary to regulations. The act was, insofar as the record is concerned, single and unrepeated. There is an inferential suggestion that it may have been a repetition of other like incidents but this finds no support in the record. His record as to service is clear. There is nothing to indicate that he had not, other than in this instance, been faithful in his service to the Carrier. If, as he says, he intended to pay, no moral turpitude was involved but only an infraction of duty. In any event, the amount involved was slight and he did not actually obtain and use the gasoline.

Taking these facts and the other elements to be considered in cases of this character, to the extent that they appear, into consideration it is the conclusion that the discipline imposed was of unreasonable severity.

It is the further conclusion that McNeill should be returned to service with his seniority unimpaired but that his record should not be cleared of the charges nor should he be compensated for any loss of wages.

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 Employes involved in this dispute are respectively Carrier and Employes 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 act of the Carrier in dismissing McNeill from the service was discipline of unreasonable severity.

AWARD

The claim for restoration to service with seniority rights unimpaired sustained. In all other respects claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of June, 1952.