

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated the Agreement between the parties when it discharged Mrs. Lucy G. Tippen from its service effective Monday, June 9, 1958, without due process, in an arbitrary and capricious manner, and on charges unproved, and

(b) Claimant, Mrs. Lucy G. Tippen shall now be restored to Carrier's service with seniority, vacation, and all other rights unimpaired and compensated for all loss sustained in accordance with Rule 40 (a).

OPINION OF BOARD: Claimant is Mrs. George A. (Lucy G.) Tippen, a Rate Clerk in Carrier's office of Passenger Accounts, Atlanta, Georgia. She and her husband were jointly charged and their investigation was conducted at the same time and upon the same evidence. We have heretofore considered and acted upon the claim of George A. Tippen, in Docket CL-11067, and there recited the facts developed at considerable length, many of which we will not repeat but reference is made to the opinion in CL-11067.

There are, however, differences and distinctions in the effect of the evidence in Mrs. Tippen's case to which we direct our attention.

The charge was that on Friday, June 6th, Mr. George A. Tippen and Mrs. Lucy G. Tippen were passengers on Train No. 34 en route to New York riding on company passes, that they had been drinking, were involved in a fight, causing a general disturbance and interfering with the orderly conduction of the company's passenger business. As a result of the investigation, the charges were found to have been proven and both Mr. and Mrs. Tippen were discharged from their employment with the company.

The investigator was well within the evidence in holding that both of the Tippens were drinking, as charged, and further that both were intoxicated.

There is some support for Mrs. Tippen's denial that she was intoxicated in the refusal of the Pullman Dining Room Steward to sell her husband beer and the serving of beer to Mrs. Tippen. This occurred a very short time before the disturbance in the Pullman Bedroom but several policemen and officers of the company who observed Mrs. Tippen after she had gotten off the train at Greensboro, North Carolina, expressed the opinion that she was still definitely intoxicated.

But the officer who conducted the investigation did not rest his finding against Mrs. Tippen upon her intoxication but upon proof of the other and more serious elements of the charge. In his opinion, which is well done, he said:

"The abundance of evidence in this case shows that both Mr. and Mrs. Tippen indulged in the use of alcoholic beverages, both whiskey and beer, to the extent of becoming intoxicated but not helpless; **that they indulged in a fight on the train**, screaming and hollering; that because of the disturbance they were causing, the train conductor requested them to leave the train * * *. This behavior on the part of both Mr. and Mrs. Tippen is inexcusable and I do not **see any difference in the guilt of either of them.** * * *." (Emphasis ours.)

With due respect to the investigator, we are required to say that his interpretation of the evidence in the particulars underscored is not supported by the record. No informality in procedure or liberality in the admission of evidence will obviate the necessity of competent proof of a charge which, if established, may ruin the reputation and cause the discharge of a worthy employe. We have the right to indulge the presumption that Mrs. Tippen was that type of employe because nothing appears to the contrary.

A careful and complete examination and analysis of the record will not permit the conclusion that Mrs. Tippen engaged in a fight or that she was responsible for the disturbance which resulted from the assault of her husband upon her.

A fight is a physical encounter between two or more persons. It cannot occur in an argument only, no matter how heated, nor can the one who is first assaulted and uses no force to repel that assault be said to have engaged in a fight.

The use of the word "fight" and "fighting" is of frequent occurrence in the statements of the various witnesses and it reasonably appears that it all emanated from the notification of the Conductor of the train, D. L. Norford, to the officer of the company at Greensboro of the disturbance in the Bedroom of the Tippens. But Conductor Norford had no first hand knowledge of what occurred in the Bedroom nor does this statement do more than to say that: "He (the Pullman Car Conductor) told me there was a lot of commotion in the bedroom and there appeared to be fighting, hollering and screaming." It was then but natural for Conductor Norford to characterize the disturbance as a fight or to report what occurred as fighting. Thereafter, many times the language of this report was incorporated in the record, all because of the loose and improper use of the term based purely on hearsay.

There were but two witnesses who could have possibly known anything respecting the charge that there was a fight in the Bedroom of the Tippens. These witnesses were Conductor of the Pullman, Harry Kent, and the Porter,

W. J. Johnson, neither of whom say anything which will permit of the conclusion that there was a fight. The Conductor in relating his version of the occurrence says: "Leaving Thomasville, N. C. as I walked into car Poplar Trail L-42 I heard a woman scream he's killing me, get him out of here. Porter Johnson was standing at soiled linen locker and pointed to Bedroom D. I rang the bell on Bedroom D. Mrs. Tippen opened the door and said 'He choked and hit me.' She had a bad cut under her left eye that was bleeding all over her dress and she had some Pullman towels and they were covered with blood. I went to head end of train and got train Conductor Norford, on his way back, he had Dining Car Steward W. K. Barlet to come back with him. Mr. Tippen tried to get Mrs. Tippen to say she fell, but she would not. She kept saying before Mr. Norford, Mr. Barlet and myself, 'You hit me get him out of here he tried to kill me'. Mr. Norford told Mrs. Tippen she should go to Hospital and have the cut sewed up."

Porter W. J. Johnson in his statement says, on the subject of a fight, only: "Leaving Thomasville about 6:15 the Conductor and I heard a lady scream we found out the sound came from Bedroom D. The Conductor rang the buzzer the man opened the door and the lady had a cut under her eye and was all bloody."

The only possible evidence tending to show that a fight ensued between the Tippens is in the failure of Mrs. Tippen to deny a part of the written statements of H. W. Rose, Division Special Agent, Special Service of the company, and R. I. Barr, Claim Agent of the company, both of Greensboro, wherein each says: "I asked this woman what caused her injury, and she stated to me that her husband had struck her while fighting on train." Mrs. Tippen was not interrogated as to this statement attributed to her, whether she made it, what she meant by the word, if she used it. It is common knowledge that the words "fight" and "fighting" are frequently loosely and improperly used in defining an altercation between parties. That is was so used by Mrs. Tippen and the other witnesses in the case seems probable. That she admitted that she engaged in a fight is at complete variance with her statement to Conductor Kent, Porter Johnson and her written statement at the Passenger Station at Greensboro, after she had left the train.

Mrs. Tippen's statement was given under distressing circumstances, in a strange city, while still under some influence of liquor, bleeding and suffering from a serious injury and in the presence of a number of police officers and officers of the company. All of these men conducted the inquiry, though in good faith, with the knowledge of the reports they had received and with the firm impression that Mrs. Tippen, as well as her husband, had been engaged in a fight. Notwithstanding this difficult situation, Mrs. Tippen related her version of the occurrence in the Bedroom and did not at any time thereafter vary from it in the least. Mrs. Tippen's conduct lends credence to the conclusion that she at no time was engaged in a fight with her husband. A very short time before the assault upon Mrs. Tippen, her husband had turned a perfectly proper and innocent conversation between her and a Dining Room Steward into an accusation, which he admitted: "Are you trying to make my wife?" Even after the Tippens had been caused to leave the train during a statement made of Mr. Masten, in the Special Service of the Carrier, he says Mr. Tippen cursed and used profane language and while Mrs. Tippen was looking in her pocketbook for her pass, continued his ridiculous charge with a vulgar expression. Mr. Masten continues: "She said her husband came into the Diner and accused her of having relations with the Dining Car Steward. Mrs. Tippen stated that after she had finished drinking her beer, she went back to their space in Car L-42, Bedroom D, and her husband started beating

her up." This is, in our judgment, the true version of the occurrence in the Bedroom in the Pullman car.

There is no showing whatever, with the exception of her intoxication, which may have contributed in some degree to the disturbance, and for which it was proper to discipline her, that she acted in any manner other than a lady although her provocation to retaliate in kind when her husband assaulted her was great. Her screaming was but the natural result of the attack on her and of her instinct for self-preservation and protection. It should not be held against her.

The decision of the Conductor to have the Tippens leave the train and to call the police at Greensboro to accomplish his purpose was caused not only by the intoxication of the Tippens, the disturbance, but also because of his judgment that the injury to Mrs. Tippen was such as that it required medical attention. No doubt Mrs. Tippen demurred to leaving the train because of her desire to get to New York to meet her mother whom she was to bring back to Atlanta to live with her. There is no showing that Mrs. Tippen, or Mr. Tippen for that matter, offered any physical resistance to leaving the train.

The burden was on the Carrier to establish the charges which it made against Mrs. Tippen. It failed to meet this obligation except in the one particular heretofore stated. The finding and discharge was based upon full proof of all of the elements of the charge.

The facts properly analyzed and evaluated did not justify the dismissal of Mrs. Tippen. Suspension for a reasonable time was the most the proof permitted. Mrs. Tippen has suffered enough for the one dereliction with which she is chargeable. The penalty was excessive because of the unwarranted interpretation of the evidence. This we can and should correct. Award 6085, this Division.

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 Agreement was violated.

AWARD

Claim (b) granted, with the exception that no allowance will be made to Mrs. Tippen for payment for time lost by reason of her suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 29th day of September, 1959.