

Award No. 10429
Docket No. MW-12386

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald A. Rock, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
JACKSONVILLE TERMINAL COMPANY

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

(1) The dismissal of Painter H. W. Kunkle was without just and sufficient cause and on the basis of unproven charges.

(2) Mr. H. W. Kunkle be restored to service with seniority, vacation and all other rights unimpaired and that he be compensated for the wage loss suffered by him.

OPINION OF BOARD: This is a discipline case. Claimant who was employed as a painter, was removed from the service for the reasons stated in the following notice, dated April 22, 1960.

"Mr. H. W. Kunkle: you are removed from the service of Jacksonville Terminal Company effective at 8:15 a. m. this date (April 22, 1960) for your alleged ungentlemanly conduct in the presence of a lady (Mrs. R. A. Youngblood) in the Union News Soda Fountain, Friday, April 15, 1960. It is alleged that you used swear words in addressing Mrs. Youngblood, and that furthermore you made remarks which would tend to intimate that she is not a woman of good character."

The Organization, acting in Claimant's behalf, requested formal investigation pursuant to Rule 5, Paragraph (A) of the Agreement. In response thereto the matter was set for hearing May 3, 1960, and written notice thereof was sent to Claimant and his representatives on April 28, 1960. Said notice, with respect to the charges, contained the following language:

"You are hereby advised that a formal investigation will be held to develop the facts and place your responsibility in connection with your alleged ungentlemanly conduct in the presence of a lady (Mrs. R. A. Youngblood) in the Union News Soda Fountain, Friday, April 15, 1960. It is alleged that you used swear words in a reply you made to Mrs. Youngblood, and that furthermore, in her presence, you inquired of Mr. J. H. Edwards whether or not he wanted to kick the crate from under one of the midgets. Which remark, I am told, is part of an obscene joke known to Mrs. Youngblood, Mr.

Edwards and yourself among others, and that in making such inquiry of Mr. Edwards in the presence of Mrs. Youngblood, you intimated that she is not a woman of good character."

The hearing was held on June 1, 1960. It was conducted by Mr. Warrenfells, Carrier's chief engineer, who at the commencement thereof, made the following statement:

"This investigation is open at 9:53 a. m. June 1, 1960. This investigation is being held to develop facts and place responsibility in connection with Mr. H. W. Kunkle's alleged ungentlemanly conduct in the presence of a lady in the Union News Soda Fountain on Friday, April 15, 1960, at which time it is alleged that he used swear words in a reply to Mrs. R. E. Youngblood, and that furthermore in her presence he inquired of Mr. J. H. Edwards, whether or not he wanted to kick the crate from under one of the midgets. Which remark, I am told, is part of an obscene joke known to Mrs. Youngblood, Mr. Edwards and himself among others, and that in making such inquiry of Mr. Edwards, in the presence of Mrs. Youngblood, he intimated that she is not a woman of good character."

Mr. Winstead, General Chairman of the Organization, objected to the statement and moved that it be stricken from the record, apparently on the theory that it contained new charges, broader in scope than the charges contained in the original notice of removal. His motion was denied. We have carefully examined the language contained in both notices and have concluded that the charges set forth in the second did not enlarge upon those contained in the first. If anything, it made the first charges more specific and understandable, which rendered it more beneficial than prejudicial to Claimant. The motion to strike was properly overruled.

Following the hearing, at which seven witnesses testified, Claimant was notified on June 14, 1960, that the charges had been sustained and that he had been dismissed from the service as of June 13, 1960.

The transcript of the testimony taken fills some 37 pages. It is replete with charges, admissions, denials and contradictions of fact, and conflicting inferences drawn therefrom. It appears that there were several suggestive stories or jokes of varying degrees of offensiveness, which were known to several employes, including Mr. Kunkle, Mr. Edwards and Mr. Youngblood and his wife. The stories at one stage of the telling involve the expression of desire or choice of kicking the crate out from under a midget. The evidence shows that while Claimant was standing by the soda fountain at the Station, Mrs. Youngblood and Mr. Edwards stopped at the fountain to have a Coca Cola. Claimant, who was acquainted with Mrs. Youngblood, asked her what she was doing there. She explained that her husband was in the hospital and that she had come down to pick up his pay check. To this Claimant replied, "That's a Hell of a note, he did the wrong damn thing by sending you down for that." Mrs. Youngblood became embarrassed but made no reply. While she was finishing her Coca Cola, Claimant was having conversation with one of the two young ladies working at the fountain. He then turned to Mr. Edwards, who was standing with Mrs. Youngblood, and asked him which girl he wanted to kick the crate out from under.

When Mrs. Youngblood was asked if she knew Claimant's remarks were part of a dirty remark, she replied,

"Some time ago, that joke was started to be repeated in my presence, and I did not allow it to be repeated, I realized at the time that it was not a proper remark to be made at any time."

Claimant testified that he had meant no harm; that one of the other employees told him to ask Edwards the question. Later on, however, he testified that he though his remark had gone over Mrs. Youngblood's head. She resented his profanity, and she considered his other remarks as ungentlemanly and insulting to her. Mr. Edwards, to whom Claimant made the remarks, also considered them insulting to Mrs. Youngblood.

We have carefully examined the entire record including the transcript of the testimony and have concluded that it contains sufficient competent evidence to support carrier's finding that the charges against Claimant were sustained.

The remaining question concerns the discipline imposed. The record shows that carrier took Claimant's past record into consideration in arriving at its decision to dismiss him from the service. His record was quite properly not put in evidence at the hearing, but it was examined and discussed in conference on the property by the General Chairman, and the President and General Manager of the carrier. The details of his record need not be here repeated. Suffice it to say that Claimant's conduct in the presence of lay employees had been admittedly ungentlemanly and rude on three previous occasions.

It is not the function of the Board to determine the quantum of discipline to be imposed in any given case. That is the responsibility of the carrier, and unless the record shows that its action was arbitrary or capricious or that it acted in bad faith, its judgment should not be set aside. 9422 (Bernstein), 9935 (Weston), 9511 (Elkouri). The record before us does not support such a finding.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March 1962.