

**Award No. 4917**  
**Docket No. DC-4789**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**THIRD DIVISION**

**Robert O. Boyd, Referee**

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**PARTIES TO DISPUTE:**

**JOINT COUNCIL DINING ROOM CAR EMPLOYES**  
**CHICAGO AND NORTH WESTERN RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of Joint Council Dining Car Employees, Local 351, on behalf of John J. Wiggins, second cook, that he be returned to service with seniority accumulated and unbroken and with compensation for net wage loss suffered after a date not to exceed thirty days following February 16, 1949, Carrier's disciplinary decision of dismissal being in abuse of discretion.

**OPINION OF BOARD:** The undisputed facts are that the claimant, second cook on a dining car of Carrier, while stationed in the Oakland Yards and while he was preparing some frozen fish and without provocation on his part, was assaulted by the pantryman, another member of the crew, with vile and abusive language. The pantryman, Green, continued his abusive language even after the claimant had requested him to stop. Thus provoked, the claimant threw hot grease on Green, burning him severely. After a hearing, the claimant was dismissed. No question is raised that the hearing was not conducted in accordance with the rules.

The representative of the claimant admits some discipline was proper, but asserts that dismissal from the service was harsh and excessive. (His assailant was also dismissed.)

The applicable rule has been stated by this Board, with Referee Garrison assisting, in Award 391 as follows:

"Our function in this case is not to substitute our judgment for that of the Carrier or to determine what we might or might not have done had the matter been ours to handle. We are entitled to set aside the Carrier's action only upon a finding that it was so clearly wrong as to constitute an abuse of discretion vested in the Carrier."

The issue is: Did the Carrier abuse its discretion by dismissing the claimant?

Clearly, the claimant was in the wrong when he resorted to force for the purpose of silencing a verbal assault. By throwing hot grease upon the pantryman he used more force than was justified under the circumstances. On the other hand, hot words create hot blood. The overt acts of the claimant must be admitted as wholly and unjustifiably provoked. The disturbance took place out of the presence of the public, and no passenger was involved. These facts tend to mitigate the offense; and the mitigating factors apparently were not considered by the Carrier. Dismissal from service is the severest penalty the

Carrier can invoke. Here such penalty was given to both the aggressor and his victim. To such extent we believe the Carrier abused its discretion.

The claimant is admittedly at fault, and, while we have found the Carrier was also at fault in not recognizing the mitigating circumstances, we believe that justice will be served if the claimant is restored to service with seniority right unimpaired, without pay for time lost.

**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 Carrier violated the Agreement as per Opinion.

#### AWARD

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 20th day of July, 1950.