

Award No. 12368
Docket No. DC-13641

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

**JOINT COUNCIL DINING CAR EMPLOYEES
LOCAL 385**

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 385 on the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for and on behalf of P. L. Prebble, that Carrier compensate claimant for the difference between what he would have earned as an Attendant and what claimant earned in other classifications account of Carrier refusing to allow claimant to exercise seniority as an Attendant since July 24, 1961, in violation of the existing Agreement.

EMPLOYEES' STATEMENT OF FACTS: Pursuant to charges filed against claimant in letter dated July 8, 1961 (Employees' Exhibit A), Carrier advised claimant under date of July 24, 1961, that as a result of hearing held on July 17, 1961, he would "no longer be permitted to work as Attendant." (Employees' Exhibit B.)

Employees appealed this decision in letter dated July 27, 1961, to Carrier's Assistant to Vice President, the highest officer on the property designated by Carrier to consider appeals. (Employees' Exhibit C.) Conference on appeal took place between the parties on August 29, 1961, and under date of September 5, 1961, Carrier's Assistant to Vice President denied the appeal. (Employees' Exhibit D.)

A transcript was taken of the July 17, 1961, hearing. Employees assume that in line with usual handling Carrier will attach as an exhibit to its initial submission a copy of the transcript in question.

POSITION OF EMPLOYEES: There is in existence and on file with your Board an Agreement between the parties to this dispute, which Agreement is by this reference incorporated herein as though fully set out.

Carrier has, so to speak, "thrown the book at Claimant." Carrier's letter of July 8, 1961 (Employees' Exhibit A), contained eight (8) specific charges based on incidents alleged to have taken place during one tour of duty, June 19 to 24, 1961, and on June 30, 1961.

"We have often said that it is not the function of this Board to substitute its judgment for that of the Carrier or to determine what we might have done if it had been our duty to make the decision in the first instance. We interfere only when an examination of the record reveals that the action taken was unjust, arbitrary or unreasonable. Where the evidence produced in support of the charge, if believed, is sufficient to sustain it, then though there may be evidence directly in conflict, the imposition of discipline cannot be said to be unjust, arbitrary or unreasonable. It is not for this Board to determine the creditability of witnesses. If there is substantial evidence in the record to support the charge, even though contradicted, the Carrier's action in assessing discipline will not be disturbed. See Awards 2621, 4068, 5946."

In Third Division Award No. 6231, your Honorable Board held:

"Nothing in the record indicates the Carrier has acted in an arbitrary or capricious manner, nor is there any evidence of bad faith on the part of Carrier toward this employe. It is not the function of this Board to substitute its judgment for that of the Carrier, in discipline cases where the evidence reasonably tends to support the contention of Carrier.

For that reason we must exercise a high degree of caution in reviewing cases of this nature. In the case before us, the Organization contends the charges as alleged are unproven, which brings us to the proposition that we are being called upon to determine a question of fact. This Board has held in numerous awards that we cannot substitute our judgment for that of the Carrier in discipline cases, where there is no evidence the Carrier acted in an arbitrary, capricious manner or showed evidence of bad faith toward the employe. See Awards 1497, 2621, 2767, 3172, 3185.

Based on the record and a long line of awards supporting the contention of the Carrier, we hold this Board is not justified in substituting its judgment for that of the Carrier."

The Carrier submits that there can be no doubt but what the responsibility of Mr. Prebble in connection with the charges preferred against him was fully developed, and in view thereof and in view of Mr. Prebble's repeated shortcomings, the discipline assessed, which, incidentally, the Carrier feels was very lenient under the circumstances, was warranted and we respectfully request that the Carrier's action not be disturbed and the claim denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The charges, eight in number, stemmed from a complaint registered with the Carrier which involved certain alleged delinquencies which are said to have occurred on Claimant's regular run from Chicago to Los Angeles and return on train 103-104.

The Carrier's representative made an extended argument before the Board that the instant case is not a "discipline" case, but is one concerning "disqualification."

The short answer to this contention is to be found in the Carrier's own statement of its position on the record:

1. The Carrier's submission discusses discipline and its citations are to Awards which deal with discipline.
2. In the Carrier's own words, found in its submission, the Carrier states: " * * * in view of Mr. Prebble's repeated shortcomings the discipline assessed * * * "
3. The Carrier presented its case in the form of eight charges some of which, if sustained, might well have led to Claimant's dismissal.
4. The Carrier set up a hearing, took voluminous testimony and treated the matter in accordance with Rule 8, Discipline and Grievances.
5. There is no provision anywhere in the current Agreement between the parties setting up a procedure leading to disqualification. Nor does the word "disqualification" appear anywhere in the Agreement.

It is therefore clear from the instant record that the Carrier could not have intended to proceed in any other manner except that of a discipline case since the Agreement makes no provision to proceed as a disqualification case. On the property and in its own language the Carrier treated the instant matter as a discipline case.

Discipline may include a wide variety of penalties short of dismissal. Indeed, the penalty imposed here was to remove Claimant from the position he occupied as an Attendant, thus causing him to suffer a loss of pay of the difference between what he has been paid and what he would have received if he had not been removed from service as a Buffet Attendant.

The Claimant's past record is replete with indications of poor performance and reprimands. It is difficult to understand under these circumstances how Carrier could have tolerated such poor performance from June 27, 1947 until the instant case arose in 1961. However, in order to sustain the claim, the record must show that the Carrier's action was unjust, arbitrary, or based on bias or prejudice. No such showing has been made nor has any provision of the Agreement been violated. It is also interesting to note that the penalty invoked was reduction in status and earnings, but the Claimant **was** not discharged. Full weight has been accorded by the Carrier to the fact that the conditions complained of for fourteen years were tolerated and now that the day of reckoning has come, the Carrier reacted reasonably and removed the Claimant from the job he was performing poorly. For a case strikingly similar on its facts, where the Agreement also did not provide a procedure for disqualification, see Award No. 7283 (Cluster), which established a precedent which we cite with approval.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1964.