Award No. 17242
Docket No. DC-18091

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 495, on the property of the Norfolk and Western Railroad Company, for and on behalf of Cook ARCHER MAYO, that he be compensated for net wage loss, returned to service with seniority and vacation rights unimpaired account of carrier dismissing claimant from service on the 13th day of November 1967 in violation of the Agreement and in abuse of its discretion.

OPINION OF BOARD: Claimant, Archer Mayo, initially hired June 6, 1942, was dismissed by Carrier on the charges that on October 10, 1967, he used profane language in the presence of and was insubordinate to the Supervisor Dining Cars, the highest officer of Carrier's Dining Car Department.

Pursuant to Article No. 6 of the Agreement, the Claimant was removed and suspended from service on October 10, 1967, immediately after the incident in question, pending formal investigation.

By letter under the date of the next day—October 11, 1967, the Supervisor Dining Cars notified the Claimant to appear at an investigation on October 17, 1967, on the charge of

> "Use of boisterous and profane language in violation of Rule No. 5, 'Book of Rules for the Government of Employees in Dining and Tavern Car Service' and for insubordination to Superior Officer."

The investigation was thereafter postponed at the request of Claimant's representatives and finally took place on November 7, 1967.

Under date of November 13, 1967, Carrier notified Claimant that the charges were substantiated by the hearing and that he was dismissed from service with the Carrier.

The Board does not find that the Claimant's substantive rights under the Agreement were violated.

The record shows that the Claimant was given clear and adequate advance notice of the investigation and afforded full opportunity to have representatives and witnesses present. The transcript of the investigation shows no denial of usual and expected rights for full presentation of testimony, cross-questioning of witnesses and the other indicia of fair and due

process. The transcript further discloses the following exchange before the conclusion of the investigation:

Q. "Mr. Mayo, do you feel that you have had a fair and impartial hearing?"

A. "I do, sir."

Thereafter, appears the following statement over the witnessed signature of the Claimant, referring to the entire transcript of his testimony:

"I have read the above statement and it is correct."

Turning now to the merits of the charges against the Claimant, and the appropriateness of the penalty of dismissal, the record reveals the following:

1. The Claimant, initially employed by the Carrier as a dining car cook, held the status of extra dining car cook at the time of the incidents in question because of a decline in business. He was called in in that capacity for duty at 8:00 A.M. on the morning of October 10, 1967, on an extra work assignment to assist in the transfer of supplies from one dining car to another. The Claimant called back and asked to be excused, giving as his reason that he was "just in a wreck". He was told that he was the only one available in the classification needed, and was not excused. He thereupon reported at 8:00 A.M. on October 10, 1967 and carried on the assigned duties.

2. The testimony at the investigation was revealed by the transcript thereof, establishes that at about 9:00 or 9:15 A.M. the Supervisor Dining Cars entered the car in which the Claimant was working and heard the latter say, in the presence of other employees, substantially as follows:

"Man, get the hell out of my way. I am loaded down."

The Supervisor cautioned the Claimant to stop "the loud talking and cursing", and walked off, but continued to hear the Claimant talking in the same vein. At this point, the Supervisor approached the Claimant again and told him if he didn't cut out the boisterous and profane language", he would have to get off the car.

3. According to the testimony of a fellow employee, the Claimant then replied, "I am doing my work", and when warned again by the Supervisor, replied:

"I am a man. You talk to me like a man. I don't care anything about your a-- because I am a man just like you.",

and thereafter, after an additional warning, continued to berate the Supervisor in similar language, uttering a final profane curse when he was ordered off the car by the Supervisor.

4. At the investigation on the property, the Claimant testified as follows:

a. His reference to being "in a wreck" when he was called to come in to work was intended to describe his state of mind after being informed by his wife of a grave personal family problem involving his thirteen year old daughter and that there was immediately due a doctor's bill of $205.00 which the family was unable to meet.

b. The Claimant further testified that he "began to get shaky and went all to pieces" at the time the subject incident occurred and "just blanked out". His statement is that he could recall nothing from the time of carrying two cases of beer in the dining car until he woke up home about 10:00 P.M. that night.

We conclude from the evidence in the record that the Claimant was guilty of the use of "boisterous and profane language" in violation of Rule No. 5, Book of Rules for the Government of Employees in Dining and Tavern Car Service and of insubordination to a superior.

However, this Board finds itself in a difficult predicament, on the subject of the penalty administered. This is caused by the clear indications in the record that the Claimant was under extraordinary emotional stress at the time of these events, brought about by traumatic family circumstances.

It is quite true, us the Carrier claims, that the Organization's ex parte brief does not specifically raise the question of mitigating circumstances or the general charge of Employer "abuse of discretion". But there can be little doubt that these contentions were advanced by the Claimant and his Organization during the exchanges on the property. Mr. F. C. Lindsey, the Organization's General Chairman, is quoted in the transcript of the investigation hearing as arguing, in part, that, "the employee was upset and reported for work in that condition as a result of being a dedicated employee . . . he was unaware of the use of profanity against anyone and due to his serious problems he was a complete wreck . . . this was responsible for him blanking out to the extent that he does not recall the profanity used as alleged . . . Therefore, we will request that the Carrier take all of the facts surrounding this case . . .".

The more difficult aspect of this problem (of penalty) arises from this Board's well-settled reluctance to intrude on the Employer's discretion for penalties, once the charges on which it has acted have been probatively supported. The boundary line which separates us from entry into this area of management prerogative has been repeatedly described as the point up to which the disciplinary imposition has not been shown to be "so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion". (Awards 5032, 16189 and many others).

But it must be noted also that the concept of "reasonable" does permit an evaluation of whether the degree of penalty imposed may under unusual circumstances of mitigation (such as we believe may be present here) be so harsh as to be inappropriately responsive to the total facts, and as such, amendable. It is for that reason that the Board in previous decisions has sometimes put the criterion for the right to intrude on penalties in terms of whether the action was "unjust" (Award 15184) or "excessive" (Award 16168).

It is our conclusion that the indications of the exceptional disabling emotional effects of personal family tragedy on this Claimant justify and

permit our amending of the penalty imposed, to one of reinstatement without back-wages, the interim loss of pay standing as a disciplinary suspension.

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 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 violated to the extent that the penalty of dismissal was excessive.

AWARD

Claimant shall be restored to service with seniority and other rights unimpaired but without pay for time lost while out of service.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1969.

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