Award No. 1693
Docket No. 1610
2-VA-MA-'53

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 40, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

THE VIRGINIAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement Machinist Helper A. M. Andrews was unjustly deprived of his service rights at 12:30 P. M. on May 10, 1951, through 7:00 A. M., July 9, 1951 and that, accordingly, the Carrier be ordered to compensate this employe for all time lost during the aforesaid period.

EMPLOYES' STATEMENT OF FACTS: A. M. Andrews, hereinafter referred to as the claimant, was employed as a laborer by the carrier at Sewalls Point, Virginia, on September 3, 1918, and who, in due course, was then promoted to the position of a machinist helper packing boxes on July 1, 1922. The claimant continued in such position for approximately twenty-nine years or until he was suspended from the service at 12:30 P. M. on May 10, 1951, because he sought to have extended for a few days his summons to attend investigation at 10:00 A. M., May 11, 1951, on the charges set forth in letter dated May 10, 1951 to the claimant by General Foreman Lawson, copy submitted herewith and identified as Exhibit A.

This investigation was not held because the carrier filed new charges against the claimant on May 11, 1951, and summoned him to stand trial on said charges at 10:00 A. M. on May 18, 1951, which is affirmed by copy of letter to the claimant from General Foreman Lawson, submitted herewith and identified as Exhibit B. This investigation was held as scheduled and submitted herewith is a copy of the hearing transcript identified as Exhibit C.

The carrier made the election as late as June 7, 1951, to assess the claimant's personal record with thirty demerit marks without granting him a hearing on the first charge set forth in Exhibit A and this is affirmed by copy of Form 1701 submitted herewith and identified as Exhibit A-1.

The carrier also made the election on June 8, 1951, twenty-one days after the investigation on the second charge established in Exhibit B, to assess the claimant sixty days of actual suspension from the service, which is affirmed

suspension was proper in lieu of dismissal. In view of the serious nature of the offense such determination does not appear out of line.

The carrier desires that any necessary application of discipline be fair and equally applied. Obviously there must be some range in judgment between one officer and another as to what is proper discipline but where, as in this case, the evidence clearly supports a charge of insubordination an assessment of sixty days' actual suspension is equitable and should not be upset by your Board.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The machinists of System Federation No. 40 bring this dispute here on the grounds that Machinist Helper A. M. Andrews was unjustly deprived of his service rights by being suspended from work for a period of sixty days from May 10, to July 9, 1951. They ask that because thereof he be paid for all time lost during this period in accordance with the provisions of Rule No. 34 (d) of their effective agreement with the carrier.

On May 11, 1951, J. E. Lawson, general foreman, charged Andrews with:

> "Insubordination for failing to report for investigation in my office at 10:00 A. M., on May 11, 1951, and disrespectful way you talked to an officer of the railroad when approached on this subject."

Hearing was had on these charges on May 18, 1951 in the General Foreman's office and, on the evidence adduced at that hearing, carrier found Andrews guilty of insubordination and suspended him from service for a period of sixty days. It is from this finding and discipline that appeal was taken.

However, indirectly involved is another charge made by carrier against Andrews on May 10, 1951. It therein charged him with:

> "Failing to properly do your work as outlined and instructed on May 9th, 1951, by not filling Air Pump Lubricators on Engines 447, 462, 240 and 242, called for 3:00 P. M. yard May 9th, 1951."

A hearing was had on this charge on May 11, 1951 in the office of the General Foreman and, on the basis of the evidence adduced thereat, carrier found Andrews guilty of the charge made against him and assessed his record with thirty demerits. No appeal was taken therefrom.

Attention is called to the fact that claimant contends carrier failed to grant him a continuance of the hearing on the charge of May 10th. He claims he requested it for the purpose of obtaining representation thereat. Rule 34 (a) of the parties' agreement contemplates that a reasonable length of time will be provided between the time an employe charged with an offense is notified thereof and the time set for hearing thereon so that he may secure the presence of necessary witnesses and, if he so desires, obtain an accredited representative. Just what is a reasonable length of time for such purpose must necessarily depend upon the facts of each individual case. What might be sufficient time in one case may not be in another. Ordinarily from about noon of one day to 10:00 A. M. of the next would not be a

reasonable length of time for such purpose. But claimant did not appear at the hearing on May 11th, although his representative, Local Chairman H. P. Slagle, did. No motion for a continuance was made thereat nor was any showing made for that purpose. Neither was an appeal taken therefrom. In the absence thereof this question is not properly here for our consideration.

A point is made of the fact that claimant, in both instances, refused to sign a receipt acknowledging he had received a copy of the charges made against him. Carrier says it has always been the custom for employes to do so. Rule 34 (a) of the parties' agreement provides carrier must serve upon the employe a written copy of the charge or charges being made against him. In complying with this requirement it is only a reasonable construction thereof that carrier should be entitled to have the employe acknowledge that it has done so. If the notice is served in person it is proper for carrier to require the employe to acknowledge receipt thereof in writing when such notice is served. On the other hand no further acknowledgment by the employe is necessary when it is served by registered mail and a return receipt requested, and, for the carrier to require it, would be beyond any reasonable construction of the rule. However, this requirement has no bearing on the issues here involved as the notice of the charges made on May 11, 1951 was sent by registered mail and a return receipt requested.

The question of claimant's failure to appear at the hearing held on May 11, 1951 is also discussed. The record shows he failed to appear at the hearing although he was represented thereat. Ordinarily, in the absence of some good and sufficient reason, the rule contemplates the employe charged should appear at the hearing held thereon. However, an employe cannot prevent such a hearing by absenting himself therefrom. If an employe has been properly served with notice of the charge or charges made against him and therein advised of when and where the hearing thereon will be held, but fails to appear thereat, he does so at his own peril for the carrier can properly proceed and adduce its proof, making a finding based thereon and render a decision accordingly. Actually that issue is not here for claimant took no appeal from the hearing held on May 11th. But even if he had this contention would be without merit because he made no showing thereat evidencing any good and sufficient reason why he was absent therefrom.

Coming then to the issue of whether or not the claimant was guilty of an insubordinate attitude in connection with his discussion with General Foreman J. E. Lawson of the charges made against him by the latter on May 10, 1951. When Roundhouse Clerk and Timekeeper H. R. Staub served the notice of the charge on claimant, about noon of May 10th, claimant entered into a discussion with Lawson in regard thereto. Just what brought about this argument is not too clearly shown by the record. Claimant says that after he was served with the notice he went into the Machine Shop to ask the General Foreman for a continuance of the hearing thereon so he could get someone of his own choosing to represent him thereat. On the other hand Lawson says the first discussion took place in the Machine Shop when claimant absolutely refused to attend any hearing in his office. He also stated that later, when he, Lawson, found out from Staub that claimant had refused to sign a receipt acknowledging having received the notice, he went into the engine house to talk to him about it and that the main argument took place there. In any event an argument did take place. While claimant and Lawson accuse each other of being the one to use abusive language toward the other we think that the evidence, especially that of Boilermaker W. H. Ellis and Machinist J. J. McFadden, is sufficient to support carrier's finding that claimant's conduct in this regard constituted insubordination. In this respect Lawson is not entirely blameless but his conduct in that regard neither excuses nor exonerates claimant.

As to the penalty we do not find sixty days' suspension to be either excessive or unreasonable, considering claimant's past record. The latter it was proper for carrier to consider in determining the extent of the discipline it was reasonable to impose.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August, 1953.