Award No. 3894
Docket No. 3876
2-GM&O-SM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 29, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O.
(Sheet Metal Workers)

GULF, MOBILE & OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement sheet metal worker Medford Denton Hillis was unjustly dismissed from service of the Gulf, Mobile & Ohio Railroad August 14, 1959.

2. That accordingly the Carrier be ordered to restore Sheet Metal Worker Medford Denton Hillis back to service with all earned rights and seniority rights intact since being discharged as of August 14, 1959.

EMPLOYES' STATEMENT OF FACTS: Sheet Metal Worker Medford Denton Hillis, hereinafter referred to as the claimant, was employed by the carrier from September 30, 1947, to the date of dismissal on August 14, 1959. The claimant was ordered to appear for investigation on July 17, 1959. The grievance of this claimant has been handled with each carrier official including the highest designated officer, without securing satisfactory settlement. The agreement of July 1, 1946 is controlling in this dispute.

POSITION OF EMPLOYES: It is submitted that the dismissal of the claimant was unjustified in the circumstances as this happened on one of the hottest days of the year and the claimant had to work inside of the diesel unit and lay across the top of the diesel engine inside of the car body where the temperature sometimes runs to 110 degrees. The claimant claims in his statement that he was cooling off after changing one of the new type hose connections. The record will show when Foreman Berres came on the job from the Union Station he expected the claimant to have finished his work on changing out these parts with no let-up, regardless of the temperature or working condition.

The claimant claims that he did not refuse to perform the work, but claims the foreman, Mr. Berres, began cursing him and they began

telling an employe not to follow the instructions of his superior officer as to what work he should do and also by abusive language."

This same principle was upheld in Third Division Award No. 8675, Signalmen vs. Baltimore & Ohio, Referee Vokoun. The Board stated in part:

"The Awards of this Board have established the principle that unless there has been a gross miscarriage of justice and the Carrier has acted in an arbitrary and capricious manner, the Board should not substitute its judgment for that of the one regularly charged with the responsibilities of maintaining order and enforcing reasonable regulation."

The record in this case clearly shows that the carrier did not act in an arbitrary and capricious manner. The facts show that the claimant was guilty of insubordination and admitted his guilt. The facts further show that this was the second offense of insubordination of which the claimant was guilty. Under these circumstances a dismissal from the service was amply justified.

CONCLUSION

Claimant should not be restored to the carrier's service because:

(1) The claim presented to this Board is not the same, but is an enlargement of the claim discussed and handled on the property;

(2) This Board does not have the authority to order the reinstatement of employes on a leniency basis; and,

(3) The carrier did not act in an arbitrary and capricious manner and this Board should not substitute its judgment for that of the employing officers charged with the responsibilities of maintaining order and enforcing reasonable regulations.

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.

Parties to said dispute were given due notice of hearing thereon.

The issue posed by the instant claim is whether carrier dismissed claimant from service for just cause or, to state the question in reverse, whether carrier's disciplinary decision was arbitrary, capricious, unreasonable, or discriminatory, amounting to an abuse of managerial discretion.

The principles or criteria to be applied in determining an issue of this kind have been developed over the years in a great many awards, with and without referees, on all the Divisions of this Board. Said criteria are summarized in Awards 8431 and 8503 of the Third Division and are by this reference thereto incorporated herein. Those criteria relevant to the facts of record in the instant case will be used here.

Accordingly, this Division now finds as follows: (1) Carrier's rule against insubordination by an employe, and foreman Berres' order to claimant to proceed with the work on the Diesel engine here involved, were reasonably related to the orderly, efficient, and safe operation of carrier's business. The record contains no probative evidence that claimant was justified in substituting his judgment for that of his foreman. (2) There is no evidence that said rule and said order were not known to claimant or that he was unaware of the possible penalties for disregard of said rule and order. (3) There is no evidence of record that carrier failed to apply its rule and order evenhandedly. That is, carrier did not discriminate against claimant in favor of other employes. (4) There were no procedural defects of moment in the investigation conducted by carrier. True, at one point, carrier's hearing officer said, "He (the foreman) told you to perform a certain job and you refused to do it. That is quite obvious." And this suggests that said officer had prejudged the case before most of the testimony was in. But in the content of the whole record this un-judge-like statement may not be said to have prejudiced claimant's rights. Carrier's investigation and decision may not on this account be held to have been unfair. (5) The testimony presented at said investigation provided more than substantial evidence that claimant had been guilty of insubordination. While foreman Berres' words and behavior may in terms of good employe relations, have left something to be desired, same may not be held to have justified claimant's refusal to do the work, his use of offensive, profane language, or his threatening gestures. (6) Carrier's decision to discharge claimant may not be held to have been unreasonably related to (a) the nature of claimant's proven offense or (b) claimant's past behavioral record. Orderly, efficient, and safe operations among all employes are seriously threatened when insubordination goes unpunished; that is, proven insubordination is a serious offense, and it may not be ruled that discharge is too heavy a penalty therefor. As to claimant's record, the uncontradicted statement of carrier is that he had previously been suspended for similar behavior.

The claim, which asks for reinstatement with rights unimpaired but without pay for lost time, is essentially one for leniency. The Division now holds, as it has many times in the past, that leniency is a function of the carrier and not of this Board.

In the light of all the above, the Division can find no proper basis for substituting its judgment for that of carrier. The latter's decision must be left in full force and effect.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1961.