Award No. 4132

Docket No. 3974

2-AT&SF-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Carman K. J. Tavener was unjustly dismissed from the service of the Carrier on October 11, 1960, at Kansas City, Missouri.

2. That accordingly the Carrier be ordered to reinstate the Claimant to service with all rights unimpaired and with compensation for all time lost retroactive to and including October 11, 1960 and to continue.

EMPLOYES' STATEMENT OF FACTS: K. J. Tavener, hereinafter referred to as the claimant, was employed by the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as the carrier, as a car inspector at Kansas City, Missouri, at the time the incident occurred, where the carrier maintains a repair track and car inspector forces.

The claimant was regularly employed, bulletined, and assigned as a carman on the repair tracks, working hours of 7:30 A. M. to 11:30 A. M., and 12:00 Noon to 4:00 P. M., work week of Monday through Friday, rest days of Saturday and Sunday. However, on date of the alleged incident, the claimant was working in the trainyards on a temporary vacancy of an employe who was off work.

The investigation was held on September 16 and 17, 1960, to determine the facts and fix the responsibility concerning the charge of the claimant's alleged indifference to duty, insubordinate, quarrelsome, and vicious attitude toward Supervisor E. J. Ruff on Friday, August 19, 1960, violating Rules 1, 2, 3, 19 (Rule 20 in previous issue), 20 (Rule 21 in previous issue), and 21 (Rule 22 in previous issue) of the "General Rules for Guidance of Employes, Form 2626 Standard."

On October 11, 1960, the claimant was removed from service as is identified in employes' Exhibit.

(3) The record justified the discipline administered. Claimant was guilty of insubordination as well as a vicious and unwarranted attitude toward his supervisor, all of which created an intolerable situation to the detriment of all employe relations in that yard.

Carrier reserves the right to submit such additional facts and evidence as it may conclude are required in reply to the ex parte submission of the employes or any subsequent oral argument or briefs of the employes in this dispute.

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 Claimant, Carman K. J. Tavener, was employed at the Carrier's Argentine Shops, Kansas City, Missouri, since November 20, 1949, and was the Local Chairman of the Organization at the time here relevant. On August 19, 1960, he was working on a temporary vacancy as a car inspector at the Departure Yard during the hours from 4:00 P. M. to 12:00 Midnight. At about 8:35 P. M. he called his immediate supervisor, Assistant Car Foreman E. J. Ruff, over the PA system and complained that he had not yet had his lunch period of 20 minutes within the limits of the fifth hour as provided in Rule 4 of the applicable labor agreement. The parties are in disagreement as to the ensuing conversation.

At about 10:20 P. M., Ruff went on the PA system and called train SF-59 good to work for the five rear gangs that included the Claimant. The latter came in on the PA system and a conversation ensued between him and Ruff the content of which is in dispute. The Carrier contends, in essence, that the Claimant stated he had already cut the train for six gangs and that he refused to carry out Ruff's instructions to cut it for five gangs. The Carrier also contends that the Claimant insulted Ruff by using vile language. The Claimant denies the Carrier's contentions.

Shortly thereafter, Ruff called Night Train Yard Foreman V. G. Nail and told him that the Claimant had refused to carry out his instructions and had cursed him. Ruff asked Nail for assistance. The two foremen went together to the Claimant's work place. When they approached that place, Nail squatted down so that the Claimant could not see him. A conversation followed between Ruff and the Claimant the content of which again is in dispute. The Carrier asserts, in essence, that Ruff asked the Claimant whether he had cut train SF-59 for five gangs as instructed and that the Claimant first did not answer but eventually said: "Well, I don't have even to talk to you." The Carrier asserts, further, that the Claimant made other disobedient remarks and finally directed a vulgar epithet towards Ruff. The Claimant's version is that he only told Ruff he did not have to argue with him and that he did not use vulgar language. The conversation ended when Nail who had overheard it from close vicinity emerged from his hiding place. Ruff went away and the Claimant followed him. The latter made an apologetic remark ("let's forget

about all this" or "no hard feelings") and offered to shake hands. However, Ruff refused to accept the Claimant's apology. The Claimant contends that Ruff then insulted him by using vile language. The latter denies this.

The record shows that train SF-59 actually was worked by five gangs in accordance with Ruff's instructions (see: Carrier's Exhibit "A", p. 12).

The Carrier charged the Claimant with indifference to duty and insubordination as well as with having been quarrelsome and having displayed a vicious attitude towards Ruff, all in violation of certain Rules of the General Rules for guidance of Employes, Form 2626 Standard. After a formal investigation hearing, the Claimant was dismissed from the Carrier's service, effective as of October 11, 1960. He filed the instant grievance in which he requested re-instatement with all rights unimpaired and with compensation for all time lost. The Carrier denied the grievance.

1. The term "insubordination" usually refers to an employee's refusal to submit to the authority of a duly authorized supervisor and to obey his instructions. However, "insubordination" may also be demonstrated by profane or vile remarks addressed to a supervisor by an employe. The right of an employer to take appropriate disciplinary action against an employe who is found guilty of either type of insubordination is beyond doubt.

Yet, the above neither means nor implies that a supervisor has any right to direct profane remarks towards an employe whereby he provokes the latter to retaliate in kind by also using profanity. In such instance, the employer cannot, in justice, single out the employe for discipline.

In applying those principles to this case, we have reached the following conclusions:

As far as the first conversation between the Claimant and Ruff is concerned, the record does not adequately reveal that the Claimant was disobedient or used invectives.

The Claimant also contends that he was neither insubordinate nor directed vile remarks towards Ruff in the course of the two subsequent conversations. The preponderance of the available evidence proves the contrary. Carman D. C. Burns, a disinterested witness, testified that the Claimant refused to follow Ruff's instructions and also addressed a vile epithet to the latter during the second conversation which took place at about 8:35 P. M. on the night in question (see: Organization's Exhibit "B", pp. 70, 71). His testimony stands uncontroverted, except by the Claimant's self-serving denial. In addition, the testimony of Night Train Yard Foreman Nail, who was not involved in any discussion or argument with the Claimant, substantially corroborates the Carrier's version of the third conversation which occurred at approximately 11:00 P. M. (see: Organization's Exhibit "B", p. 51). Again, Nail's testimony stands uncontroverted, except by the Claimant's self-denial. The testimony of the two witnesses leaves no doubt that the profane remarks used by the Claimant were not merely "shop talk" or "railroad language" but were reprehensible invectives. As a result, we find that the Claimant was insubordinate during the two conversations in question by both refusing to submit to the authority of Ruff and by addressing profane remarks to him.

We also find him guilty of having been quarrelsome. He was the Local Chairman of the Organization and entitled to present complaints to Ruff in a positive and respectful manner. If he believed that he or the employes represented by him were unjustly dealt with by Ruff's alleged failure to properly

assign the twenty-minute lunch period or by cutting train SF-59 for five instead of for six gangs, his only recourse was to present such complaints to Ruff. In case the latter did not remedy them, the Claimant's only right was to file a formal grievance as provided in Rule 33 of the labor agreement. See: Award 3999 of the Second Division and cases cited therein. He had no right to berate Ruff in a vulgar and disrespectful manner or, in other words, to quarrel with him.

2. In further support of his grievance, the Claimant asserts that Ruff, as well as other supervisors, have frequently used profane language in their conversations with employes. This assertion has no bearing on the disposition of the case at hand. We are not here called to pass upon, and do not pass upon, the use of profanity by the Carrier's supervisors in general. The narrow question which emerges in this case is whether Ruff addressed profane epithets to the Claimant during the three conversations under consideration.

The record is barren of any convincing evidence that Ruff insulted the Claimant personally by using profanity, except that the Claimant contends that Ruff directed a vile remark towards him after the third conversation when he (the Claimant) offered an apology (see: Organization's Exhibit "B", p. 172). Ruff has denied the Claimant's accusation and we cannot accept it as a true fact in the absence of any corroborating evidence.

In summary, we find that Ruff did not use vile language which could have provoked the Claimant's profanity.

3. The Caimant argues, further, that his discharge violated Rule 34 of the labor agreement which prohibits discrimination against the duly accredited representatives of the employes. In support of said argument, he has referred us to the disciplinary penalty imposed by the Carrier upon another employe (L. Small) who, the Claimant asserts, was charged with more serious offenses than those here involved but who was given only 50 demerit marks and permitted to remain in the Carrier's service.

The fact that the Carrier may have determined to be lenient in an entirely different instance cannot be construed as an obligation on its part to follow the same course in the instant case. The facts underlying discipline cases usually vary so widely that each case must be judged on the basis of the specific circumstances surrounding it. Furthermore, no claim has been made by the Claimant that the Carrier has followed a consistent practice not to discharge employes charged with offenses substantially similar to those here under consideration.

In brief, we are unable to find that the Claimant's dismissal was violative of Rule 34.

4. The Carrier has also charged the Claimant with indifference to duty as well as with having displayed a vicious attitude towards Ruff. The available evidence does not sustain these charges.

First, Ruff explicitly testified at the investigation hearing that the Claimant did not neglect his duties but performed them properly on the night in question (see: Carrier's Exhibit "A", p. 48). In the face of such testimony by the Claimant's chief accuser, the Carrier's charge of indifference to duty is untenable.

Second, the term "vicious" connotes an attitude characterized by spiteful, depraved or wicked intent or motives (see: Webster's New International Dic-

tionary, Second Ed., Unabridged, 1961, p. 2841). The Claimant undeniably was insubordinate and quarrelsome. But we fail to see that he displayed a "vicious" attitude towards Ruff.

5. We have consistently held that a disciplinary penalty imposed by a Carrier upon an employe can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Awards 3874, 4000, and 4098 of the Second Division. The evidence on the record considered as a whole has convinced us that the Claimant's dismissal was out of proportion to the nature of the offenses of which we have found him guilty and thus excessive. To be sure we do not condone his insubordination and quarrelsome attitude. However, the record shows the following extenuating circumstances which have to be taken into account in determining whether his dismissal was a reasonable punishment "to fit the crime":

First, two out of the four charges preferred against the Claimant by the Carrier were unjustified. Second, this was the first instance in which the Claimant had ever given cause for disciplinary action during his entire service of almost eleven years (see: Carrier's Exhibit "A", "Transcript of Record"). Third, General Car Foreman D. L. Vincent testified at the investigation hearing that he had "a lot of conversations" with the claimant and that no profanity was used by the latter. The witness also stated that his relations with the Claimant in regard to handling work loads and other matters had been "very fine" (see Carrier's Exhibit "A", pp. 82-83). Vincent's testimony proves that the Claimant generally was a good and obedient employe. Fourth, it speaks in the Claimant's favor that he attempted to make amends when he obviously realized that his attitude towards Ruff was out of order. Fifth, in spite of the Claimant's initial refusal to carry out Ruff's instructions, train SF-59 was worked by five and not by six gangs. Thus, the Claimant did not persist in his defiance of Ruff's authority but submitted to it eventually.

In view of the above mitigating circumstances, we are of the opinion that a substantial disciplinary suspension is a reasonable penalty which will do justice to the Carrier's indisputable right to maintain an adequate degree of discipline among its employes as well as to protect its supervisors against unprovoked, personal insults by employes.

Accordingly, we hereby set aside the Claimant's dismissal and direct the Carrier to re-instate him with accumulated seniority and with compensation for all time lost, except that no such compensation shall be due to the Claimant for the period from October 11, 1960, to April 11, 1961. From the compensation so computed there shall be deducted any renumeration which the Claimant may have earned in other gainful employment from April 11, 1961, until his reinstatement.

AWARD

Claim partly sustained and partly denied in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1963.