

Award No. 5157
Docket No. 4889
2-GM&O-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harry Abrahams when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 29, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

GULF, MOBILE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, upgraded Carman Apprentice J. A. Miller was unjustly suspended May 25, 1964 and his service record closed June 17, 1964.

2. That accordingly, the Carrier be ordered to reinstate J. A. Miller with all service rights unimpaired, including vacation qualifying time, and paid for all time lost, including hospital dues, Health & Welfare and life insurance premiums that are a condition of employment.

EMPLOYEES' STATEMENT OF FACTS: Upgraded Carman Apprentice J. A. Miller, hereinafter referred to as the claimant, was employed by the Gulf, Mobile and Ohio Railroad, hereinafter referred to as the carrier, at its Ridgely Shops in Springfield, Illinois.

On date of May 25, 1964, while performing his duties, claimant was instructed to report to the office of the general foreman and was dismissed from service for allegedly being insubordinate to the general foreman.

Under date of May 27, 1964 carrier addressed the following letter to claimant:

"Ridgely, Illinois
May 27, 1964

File PR 123

Mr. J. A. Miller
Upgraded Carman
419 South Cheyene
Taylorville, Illinois

"In disciplinary actions it is not only proper, but essential in the interests of justice, to take into consideration the employee's past record when, after the employee has been found guilty of the charges made against him, discipline is being imposed. This for the reason that what might be just and fair to impose upon an employee whose past record has been good might, and probably would be, entirely inadequate for an employee whose past record has been bad. It should be understood that such past record should in no way be considered in determining the guilt or innocence of the party as to the charges for which he is being tried.

In view of the claimant's past record, considering the nature of the charge of which she has been found guilty, we do not find the discipline imposed to be either unreasonable, excessive or arbitrary."

Carrier submits claimant was given a fair and proper hearing, that the evidence proves his guilt of the charges made against him and that he was properly dismissed, carrier's actions were not unreasonable, excessive or arbitrary, and that claimant should not be restored to carrier's service under any conditions.

(Exhibits not reproduced.)

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 waived right of appearance at hearing thereon.

The Claimant did not follow his superiors' instruction. He was insubordinate and was discharged.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April, 1967.

DISSENT OF LABOR MEMBERS TO AWARD NO. 5157

The majority states in their findings "The Claimant did not follow his superior's instructions. He was insubordinate and was discharged."

In reading such statement it immediately becomes obvious that the majority in arriving at their findings in this dispute failed to give any consideration to the record, including the excerpts from the transcript as quoted in the record. Had they done so, they would have been hard put to justify their conclusion that the claimant failed to follow instructions or was insubordinate.

There exists no such proof anywhere in the record, including the transcript of the hearing, or else it would only be reasonable to expect of the majority, that in support of their findings, they would reveal for public perusal the basis on which their findings were predicated.

This Board has previously held in Award 4338 of this Division as presented to this Board in the record before them:

"3. The law of labor relations is firmly settled that the burden of proof squarely rests upon the employer convincingly to demonstrate that an employe committed the offense upon which his disciplinary penalty is based. In meeting such burden, the employer is free to rely on circumstantial evidence which may often be more certain, satisfying, and persuasive than direct evidence. However, irrespective of whether the employer relies on circumstantial or direct evidence or both types of evidence, he is not relieved from proving beyond a reasonable doubt that the employe is guilty of the offense with which he is charged. . . ."

The majority failed to develop, define, or otherwise reveal, where in the record was found proof of the charge that would sustain the claimant's discharge. In the absence of such proof the claim should have been sustained, and the majority was in error when they found otherwise.

D. S. Anderson
C. E. Bagwell
E. J. McDermott
R. E. Stenzinger
O. L. Wertz