Award No. 5636
Docket No. 5581
2-SP(T&L)-EW-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee A. Langley Coffey when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)

SOUTHERN PACIFIC COMPANY (T&L)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the provisions of the current agreement, the Southern Pacific Company, Texas and Louisiana Lines, unjustly discharged Equipment Installer, P. J. Antill, from service on February 22, 1967.

2. That accordingly, the Southern Pacific Company, Texas and Louisiana Lines, be ordered to restore Equipment Installer, P. J. Antill, to service with his seniority rights unimpaired and pay for all time lost subsequent to and including February 23, 1967, and that he be allowed all other contractual rights that he would have had if he had remained in service.

EMPLOYES' STATEMENT OF FACTS: Equipment Installer P. J. Antill, who was also Local Chairman of his craft, hereinafter referred to as the Claimant, was regularly employed as such by the Southern Pacific Company, Texas and Louisiana Lines, hereinafter referred to as the Carrier, with headquarters at Houston, Texas, and had been in the Carrier's service approximately twenty-three (23) years at the time he was dismissed from service.

Under date of January 20, 1967, the Carrier served a formal notice on the Claimant, charging him with insubordination for allegedly refusing to climb a tower at Baldwin, Louisiana. Investigation was held in the Superintendent of Transportation's office on February 13, 1967, and subsequent thereto, the Claimant was dismissed from service of the Carrier effective February 22, 1967. A copy of the transcript of investigation and its exhibits, identified as A through H, are attached and made a part of this dispute.

This dispute has been handled with all officers of the Carrier, up to and including the highest officer designated to handle such matters, with the result that all have declined to make satisfactory adjustment.

say that the carrier acted arbitrarily, capriciously or in bad faith in dismissing these claimants, and being without authority to direct that the carrier exercise leniency toward them, we are constrained to find that the claims made to this Board by the employes must be denied."

Attention is directed to the following additional Awards of the Second Division:

993	2207	3081
1041	2925	3151
1089	2963	3267
1692		3313

The Carrier respectfully requests a denial award in all respects.

The discipline in the instant case was imposed in accordance with Rule 26 of the effective collective bargaining agreement, which reads as follows:

"No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses, and the right to be represented by a person of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, **if any**, resulting from said suspension or dismissal." (Emphasis ours.)

Without waiving in any way the Carrier's position as set forth in this submission, if your Board should be persuaded that claimant should be reinstated to service with pay for any time lost, the Board should be governed by the last sentence of Rule 26, which limits compensation to "wages lost, if any." Essentially identical language has been interpreted by this Board in Awards 1638, 2068, 3449, 3703, 3747, 3883, 3999, 4046, and 4102, to require the deduction of all outside earnings in computing the amount of wages lost.

(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 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 waived right of appearance at hearing thereon.

This is a discipline case. Equipment Installer, P. J. Antill elsewhere identified in these findings as the accused, was charged, duly notified, formally

investigated, then dismissed from service on the grounds that he had been found guilty of conduct on or about January 27, 1967, that, in the purview of Carrier's officers, proved him to be guilty of insubordination.

Therefore, and as provided in Rule 1023 of the General Regulations of the Rules and Regulations for the Maintenance of Way and Structures, Carrier decided that the accused "will not be retained in the service." The Employes appeal.

What is insubordinate conduct is a question of fact in each case, but, as a general proposition, willful disobedience of an order or instructions, or the refusal to accept an assignment, without a valid excuse, in a situation where the authority is judiciously exercised by the one in command over the performance or expected performance by another in railroad service amounts to insubordination. When that offense has been established by clear and convincing proof, without going outside the record made at the formal investigation, the one who stands accused "will not be retained in the service." Therefore, the penalty for the offense need not be inquired into by investigating the past "discipline" (service) record of the employe before imposing discipline as was done in this case, according to the notice of dismissal which is in evidence.

The transcript of the investigation has been reviewed. Based thereon, and after considering the argument and positions of the parties in their written submissions, we are of the opinion that the decision to dismiss the accused from Carrier's service for insubordinate conduct, on the day in question, is against the clear weight of the evidence in this case and might have been colored or influenced by Carrier's erroneous consideration of the accused's past "discipline" record, whether or not intended, involving an earlier dismissal from service for insubordination.

Accordingly, the Employes' appeal will be sustained, and the decision that the accused "will not be retained in the service" is hereby reversed.

AWARD

Claim (1) Sustained.

Claim (2) Sustained, subject to deduction of all outside earnings in computing the amount of wages lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January, 1969.

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