



Award No. 5931

Docket No. 5716

2-PC-MA-70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 152,
RAILWAY EMPLOYEES' DEPARTMENT, A.F.L.-C.I.O.
(MACHINISTS)**

PENN CENTRAL TRANSPORT COMPANY (PRR)

DISPUTE: CLAIM OF EMPLOYEES:

1. That the carrier unjustly disciplined Machinist H. J. Behringer, Jr., on a charge of insubordination.
2. That the Carrier be required to remove the charge from his record and compensate him for all time he was suspended as a result of the discipline.

EMPLOYEES' STATEMENT OF FACTS: At the time the instant case arose, claimant was employed by the former Pennsylvania Railroad Company (now Penn Central Company), in the air brake shop of the carrier's Wilmington shops, located at Wilmington, Delaware.

In a notice dated December 14, 1965, claimant was notified that he was to attend trial at 1:00 P.M., December 17, 1965, in the Machine Shop office at Wilmington Shops, in connection with the following charge: "Insubordination—Failure to do work assigned by Gang Foreman on November 24, 1965".

Trial was held on December 17, 1965, and claimant was present and represented by the local chairman of the machinists.

In a notice dated December 22, 1965, claimant was notified that he would receive ten (10) bulletined working days' suspension in connection with the specified charge.

In a letter dated December 27, 1965, claimant appealed the discipline to the superintendent of personnel. The appeal was heard on January 14, 1966, and, in spite of the fact that there is no evidence whatsoever that leniency was ever requested, the superintendent of personnel, in a letter dated February 7, 1966, reduced the suspension to five (5) days on that basis.

On claimant's behalf, the local chairman, in a letter, dated February 16, 1966, rejected the superintendent of personnel's decision and requested that a joint submission be prepared.

discipline, Carrier is privileged to take into consideration the employee's prior service record. This evaluation does not have to take place or be introduced into the hearing proceedings but is used as a yardstick, after Claimant is found guilty of the charge, to assess discipline. Then and only then does the past service record influence the punishment appropriate to the violation of Carrier's operating rules."

Award No. 636, Special Board of Adjustment No. 235

"... This Board is of the opinion that it is unnecessary to include an employee's personal record into the transcript of an investigation in order for the investigation officer to use it in arriving at the measure of discipline after the employee has been determined to be guilty of the charge."

As a matter of information, claimant's prior record consisted of a one day's suspension for the offense of "Walking off job and off premises of the Pennsylvania Railroad at 9:20 A.M., December 16, 1963."

In regard to point no. 3, the employees have referred to the testimony where claimant asked Gang Foreman Wisniewski, "Did I refuse to do the job?", and Mr. Wisniewski replied, "You did not refuse to do the job," as evidence that claimant was not guilty of insubordination. The carrier rejects this conclusion because obviously what Mr. Wisniewski meant was that claimant did not verbally advise him in "so many words" that he refused to do the job; however, actions and not words may be the basis of insubordination, as here where claimant's attitude and actions as shown by the trial record, constituted persuasive, substantial evidence of his insubordination. This shallow defense of the employees is at best a futile attempt by using language out of context to lead your Board, into believing that claimant is not guilty of insubordination, when the fact is the whole record indicates otherwise. It is interesting to note that point no. 3 constitutes the employees' sole defense on the merits of the case. They have ignored the rest of the record.

In summary, the carrier has shown that its action in disciplining claimant was taken only after a fair and impartial trial proved conclusively that he was guilty as charged; that the measure of discipline assessed (5 days' suspension) was more than reasonable in view of the nature of the offense; that the record here is devoid of any facts to support a charge that carrier's action, either in its determination of guilt or in the degree of discipline imposed, was in any way arbitrary or unreasonable.

Therefore, in view of all of the foregoing, the board is respectfully requested to dismiss or deny the employees' claim in this matter.

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 were given due notice of hearing thereon.

Claimant was assigned as a Machinist, Air Brake Shop, Wilmington Heavy Repair Shops, Wilmington, Delaware. His assigned duties were "operate test rack U. C. valves (means Universal Control)." Valves of this type

have two portions: (one) known as the quick action (or emergency) portion; and the other known as the equalizing (or service) portion). Claimant's assignment included work on both of these portions.

In a notice dated December 14, 1965, Claimant was served with the following charge:

"CHARGE(S) LODGED Insubordination—Failure to do work assigned
by Gang Foreman on November 24, 1965. 11-24-65
(Date of Alleged Offense)"

Hearing was held on December 17, 1965. Claimant was represented by J. R. Bock, Local Chairman, International Association of Machinists. The hearing officer was C. E. Wambaugh, Assistant Foreman.

On December 22, 1965, Claimant was found guilty as charged and a ten day suspension penalty assessed.

Organization perfected appeal to the highest officer who sustained the finding of guilt and discipline assessed. (NOTE: During the course of the appeals procedure, one of Carrier's officers, without a plea for leniency from the Organization, unilaterally reduced the discipline to 5 days. This was rejected by Organization and therefore is not probative material evidence in this case.)

Organization states its position:

- "1 - That the charge against Claimant was specious, ambiguous and contradictory.
- 2 - That the trial was not properly conducted and that the trial record is procedurally defective.
- 3 - That the trial testimony of the Gang Foreman referred to in the charge proper, proves conclusively that Claimant was not guilty of insubordination."

We find no support for (1)—Claimant knew with what he was specifically charged; as to (2) Claimant and his Representative each stated in the record, at the end of the hearing, that neither of them "have any comments or criticisms of the way this trial was conducted;" and (3) we find the trial testimony of the Gang Foreman does not prove conclusively that Claimant was not guilty of insubordination.

During the trial the hearing officer made certain comments in phrasing his questions which may have been objectionable in a court of law. Under the prevailing procedures for framing interrogations in discipline cases, generally presided over by persons not skilled in the law of evidence, the questions as framed by the hearing officer do not support a finding of prejudicial error.

The work involved herein came within the assignment of Claimant's position. He holding the position, it must be presumed that Claimant possessed the ability and qualifications to perform the work of that position unless there was evidence of waiver as to him. The record contains no such evidence.

Claimant finished the testing of the **quick service portion** of the valve on which he was working after received orders from the Gang Foreman to immediately thereafter test equalizing portions. Claimant did not do so. His testimony speaks for itself:

- "Q. At about 11 A.M. the Gang Foreman in charge approached you and assigned you to test equalizing portions. Is this correct?
- A. Yes.
- Q. When he told you to begin testing equalizing portions, what was your reaction?
- A. He did not tell me to test them, that when I got done the valves I was doing I was to go on service.
- Q. When did you finish the testing of the quick service portion that you were working on?
- A. Approximately 11:25 A.M.
- Q. Then what did you do?
- A. I came over to see Mr. Bock, and couldn't find him so I came back.
- Q. Why was it necessary for you to see Mr. Bock at this time?
- A. I wanted to see if it was right for me to go on this job after I had been working on U.C. valves.
- Q. Your regular assignment is testing U.C. Valves. This includes both equalizing and quick action portions, therefore this assignment was part of your regular tour of duty. How then do you account for it being necessary for you to see Mr. Bock?
- A. I had the impression that my job was testing U.C. Emergency valves.
- Q. Do you understand that it is your duty to do the work assigned you by the Gang Foreman?
- A. I do every morning." (Emphasis supplied.)

We find nothing in the record supported by the Agreement, or otherwise, that permitted Claimant to fail to perform the work on the equalizing portions of valve or to absent himself to seek out Mr. Bock as to Claimant's contractual duty to perform the duties of his assignment as ordered by the Gang Foreman. His obligations and remedies, under such circumstances, are spelled out in First Division Awards 9217 and 9224; and Second Division Awards 3568 and 5167.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 7th day of May, 1970.