

Award No. 5989

Docket No. 5812

2-N&W-EW-'70

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, the Carrier improperly and unjustly suspended Radio Maintainer Richard Gosmer for ten (10) calendar days commencing July 2, 1967.

2. That accordingly, Carrier be ordered to clear the aforesaid employe's service record and compensate him for all time lost account the aforesaid unjust suspension.

EMPLOYEES' STATEMENT OF FACTS: Radio Maintainer, Richard Gosmer, hereinafter referred to as the Claimant, is regularly employed and assigned as a Radio Maintainer by the Norfolk and Western Railway Company, hereinafter referred to as the Carrier, at Bellevue, Ohio.

Under date of July 3, 1967, Carrier's Assistant Engineer, Signals and Communications, addressed a letter to the claimant confirming telephone conversation of Sunday, July 2, 1967, advising claimant that he was being withheld from service effective 7 A. M., July 2, 1967, pending a hearing on a charge that he allegedly refused to perform service when requested on July 2, 1967, at approximately 1:50 A. M.

Under date of July 5, 1967, Carrier's Assistant Engineer, Signals and Communications, addressed another letter to the Claimant charging him with " * * * insubordination in that you refused to perform service when requested on the morning of July 2, 1967, at approximately 1:50 A. M. at Bellevue, Ohio," and scheduled hearing on the charge for Tuesday, July 11, 1967, at 9 A. M.

Hearing was held at 9 A. M., on July 11, 1967, as scheduled, and a copy of the Hearing Transcript is attached hereto as Exhibit B, Pages 1 through 7.

Under date of July 12, 1967, Carrier's Regional Engineer, Signals and Communications, W. W. Bell, addressed a letter to claimant, advising him that

Moreover, employes' system representative continued these unsupported allegations in his belated appeal to Manager-Signals and Communications W. B. VanLear dated May 22, 1968, by stating:

"It is quite evident that Mr. Gosmer's case and assessment was based on something other than evidence and testimony given at this hearing."

Carrier's position is simply that Claimant Gosmer was given an investigation which was fairly conducted and he was proven guilty of being insubordinate in that he refused to perform services when requested on the morning of July 2, 1967, at approximately 1:30 A. M. The transcript shows that claimant was available, had been properly instructed concerning the call rule, was not sick and he was, in essence, receiving compensation based on the understanding that he would respond to call at any time. His defense was based on the premise that he did not refuse to report simply because he said the magic words, "Will it hold until morning."

In the absence of some showing of arbitrary or capricious judgment on the part of the carrier, or a showing of bad faith, none of which is here present, the Board has found in numerous awards that the claim must be denied and the disciplinary action of the carrier upheld. The Board has refused in such situations to substitute its judgment for that of the carrier or otherwise interfere with carrier's prerogative in the matter of application of discipline.

This is evidenced by the following awards:

Referee Rudolph in Second Division Award 1041 states:

"It is well established that the action of the carrier in discipline cases will not be disturbed unless the carrier has acted arbitrarily without just cause or in bad faith."

Also, Referee Donaldson in Second Division Award 1323 states, in part:

"* * * it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion."

CONCLUSION

The claim in this docket is entirely lacking in either merit or agreement as the responsibility of Mr. Gosmer in connection with the charges preferred against him was fully developed and although the discipline assessable on this charge is more severe, it was, in this case, in view of all circumstances, mitigated to ten (10) calendar days actual suspension.

We respectfully request that Carrier's decision not be disturbed and the claim be denied.

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.

The question to be determined in this dispute is whether, under the circumstances, Carrier was arbitrary and capricious in assessing a ten-day suspension.

An analysis of the record before the Board reveals that the claim is without merit. It was communicated clearly to Claimant that his services were needed by Carrier. He had an obligation to do so. Failure to respond warrants the discipline imposed.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 24th day of September, 1970.