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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6358
Docket No. 6146
2-UP-MA-'72

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 105, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Machinists)
(
(Union Pacific Railroad Company

Dispute: Claim of Employees:

- (a) That the Carrier arbitrarily and in violation of the controlling agreements, on May 22, 1970, suspended Machinist M. D. Hemenway, North Platte, Nebraska from service after conducting a formal investigation held at 2:00 PM, May 14, 1970, at which time it was alleged that he left his work site early without proper authority or permission.
- (b) That accordingly, the Carrier be ordered to reinstate and compensate Machinist M. D. Hemenway, North Platte, Nebraska for all time lost from May 22, 1970, until this dispute has been settled in its entirety at the established hourly rate of pay based upon forty hours per week together with all other benefits, such as, seniority, insurance, hospitalization and all other benefits normally enjoyed by all members of craft or class.

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 claimant was charged with leaving the property 25 minutes before the end of his work shift without permission in violation of Rule 702, Rules and Instructions of the Motive Power and Machinery Department, and also with signing his time card to show completion of his full working time. There was no objection to the hearing which was duly held after notice to claimant. At the hearing, claimant stated that he had not received permission from his supervisor to leave his point of duty, and that he had left to get a tool which he had asked for several days earlier, Tr. p.4.

The result to be reached in this situation rests upon the limitation upon this Board to change the Carrier's decision made after the hearing, or the discipline which was imposed; and the extent to which Rule 702 is controlling. Consideration must also be given to Rule 3006, Rules and Instructions of the Motive Power and Machinery Department, raised by the Organization as a defense, which states: "Employees must not leave their place of work to go to other parts of the shop or plant, without permission from supervisor, except on company business."

Although the policy of this Board set forth in many Awards recognizes that the Carrier's decision will not be disturbed if there is substantial evidence to support it, this does not mean that we may not examine the facts. The Carrier asserted that the claimant had signed a time record which did not disclose that he left early. It appears that there is a practice of filling out the time record when the employee reports for duty, expecting that he will complete his full work shift. The record of the hearing and the discipline imposed does not appear to stress this. The Carrier also states that claimant left in his street clothes, in his own car and proceeded to a point off the property in the direction of and close to his home. Claimant answered that he was in the clothes he wore while working that day and that he left the property and was near his home because the usual route on the property to the old roundhouse was blocked by a train. The Carrier's officers who had followed claimant believe that he turned to the roundhouse instead of going home because he saw at that point that he was being followed. This is an assumption which is denied and has no basis in fact.

We believe that the violation, if any, depends upon the interpretation of the Rules. Rule 3006, which requires permission from a supervisor to leave a place of work, except on company business, suggests that the business be related to work then being performed or business of the company which cannot otherwise be completed. Claimant's action does not fall into this exception. He had asked for the tool several days earlier. Leaving his point of work on this day was not a continuation of work or of company business which required action at that moment. There is no evidence that a supervisor was not available. Latitude to leave his work any time he pleases on so called, "company business" is not available to claimant under this exception.

Rule 702 requires proper authority to be absent from duty. We believe that the General Regulations of which Rule 702 is a part, controls this situation and that the exception of Rule 3006 is not applicable to this case. Accordingly, there is substantial evidence that claimant had committed a violation and we are without authority to upset that decision.

Claimant was given an opportunity to return to work on a leniency basis by Carrier's letter dated August 10, 1970. This would have resulted, in effect, in a loss of approximately 90 days from May 13, 1970 when he was removed from service prior to the hearing. Carrier continued its offer by letter dated September 9, 1970, after claimant failed to answer. Claimant rejected the offer of reinstatement by letter dated October 1, 1970. On October 2, 1970, Carrier repeated its offer of reinstatement to the claimant, and in addition stated that it would be without prejudice to the claimant's right to pursue his remedies (to vindicate himself or to reduce the penalty). Carrier repeated the offer by letter dated November 9, 1970. After an exchange of correspondence and further conference, claimant rejected the offer by letter dated February 25, 1971.

Claimant had the right to adhere to his position and to seek complete exoneration from the charge. By his rejection of the offer of August 10, 1970, however, the Carrier was relieved of any further possible liability. The Carrier's offer of October 2, 1970 gave claimant the right to return to work and at the same time continue his fight to clear his record and to recover back pay. The return to work on a leniency basis would not be considered as an admission against his interest (without prejudice). This was an ideal position for the employee to be in; he could have his cake and eat it too. The rejection of this chance to earn his bread and still redeem himself, is difficult to understand and provides a strong temptation to allow the Carrier's decision to stand.

In our discussion, it was conceded that the dismissal with a later return to work on a leniency basis is not actual dismissal but the device used as a substitute for a disciplinary suspension which is not provided for by the Agreement. Treating the dismissal as a suspension, there is room to reflect upon the extent of the appropriate penalty. Confining ourselves strictly to the facts produced at the hearing and the employee's good record as it appears in the exhibits, an appropriate period of suspension from work without pay would be 60 days.

To sum up. We have not permitted the claimant's refusal to return to work to influence our Award. These are acts after the hearing and dismissal. Claimant was entitled to refuse although we question the wisdom of his decision. Any monetary (seniority claims terminated as of August 10, 1970 when he was offered reinstatement. He delayed unduly in responding to this offer. The Carrier was not obligated to send reminders or to improve the offer as "without prejudice". Claimant shall receive pro rata pay and no loss of seniority for the period starting with the 61st day from May 13, 1970 until August 10, 1970. No other benefits shall accrue from August 11, 1970 until such date as he may return to service. Reference is made to prior Awards: First Division, 13142, 14447, 15764, 16483, 16534, 19033; Second Division, 6215.

A W A R D

Claim disposed of in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Wilkins
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1972.