Award No. 4282
Docket No. 4070
2-SOU-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph M. McDonald when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement Carman A. J. Pitts was improperly removed from service July 10, 1960, and discharged from service July 18, 1960.

2. That accordingly the Carrier be ordered to compensate the aforenamed employe for all time lost July 10, 1960 until reinstated July 28, 1960. Time lost 15 days, 5 hours and 40 minutes.

EMPLOYES STATEMENT OF FACTS: Carman A. J. Pitts, hereinafter referred to as the claimant, employed by the carrier at Birmingham, Alabama, was taken out of service July 10, 1960, charged with failure to carry out instructions issued by the foreman on duty.

Formal investigation was held July 13, 1960. On July 18, 1960, the claimant was notified he was being discharged and services were terminated with the Southern Railway. Claimant was verbally notified he was being restored to service July 28, 1960, after a monetary loss of 15 days, 5 hours and 40 minutes pay.

This dispute has been handled with the carrier's officers designated to handle such matters, in compliance with the current agreement, all of whom have refused or declined to make satisfactory settlement.

POSITION OF EMPLOYES: Article 5 of the National Agreement dated August 21, 1954, reads in pertinent part:

"(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurance on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the

not arrived at arbitrarily, capriciously or from motives of prejudice. Therefore, the Carrier having exercised its discretionary power to discharge the Claimant, this Board has no power or right to substitute its judgment for that of the Carrier, nor to determine what we might or might not have done had the matter come to us initially."

Award No. 1275, Referee Sembower:

"* * * we cannot interfere where no material error appears in the transcript of the proceedings and there is such basis for the discipline that it cannot be said to have been arbitrary, unreasonable, or in bad faith. * * *"

Attention is directed to the following additional awards of the Fourth Division:

257	671	901	1124
264	677	912	1152
337	755	978	1201
375	796	1008	1218
401	804	1048	1241
574	844	1081	1268
622	899	1102	1270

The Board should be guided by the principles of its prior awards, holding that it will not interfere with disciplinary action taken where, as here, it was imposed in good faith without bias or prejudice for just and sufficient cause.

CONCLUSION

Carrier has conclusively shown that:

(a) The case is closed, claim is barred and the Board has no jurisdiction over it and should therefore dismiss it for want of jurisdiction. (Section 1(b) of Article V of Agreement of August 21, 1954.)

(b) Claimant was not improperly suspended and dismissed and the claim is without basis. Claimant was dismissed for just and sufficient cause. In fact, he was proven guilty and he acknowledged his guilt at the investigation afforded him.

(c) The discipline administered was **not** imposed as a result of arbitrary or capricious judgment or in bad faith. To the contrary, the action was taken based on the evidence of record adduced at the investigation afforded the claimant in which he was proven guilty and in fact admitted his guilt. The discipline was administered in good faith without bias or prejudice, and the Carrier's action is fully supported by awards of all four Divisions of the Board.

Claim, being barred the case closed and the Board having no jurisdiction over it, should be dismissed by the Board for want of jurisdiction. If, however, despite this fact, the Board assumes jurisdiction it cannot do other than make a denial award because the claimant does not have any contract right to be paid the compensation here demanded on his behalf by the brotherhood.

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 were given due notice of hearing thereon.

Claimant, a Carman at Norris Yard, Birmingham, Alabama, was taken out of service after a preliminary investigation on July 10, 1960 on account of his alleged failure to carry out instructions of the Car Foreman on duty.

On July 13, 1960 an investigation was conducted, the transcript of which has been examined in this Division, and on July 18, 1960, the claimant was discharged by the Carrier.

On July 28, 1960, Claimant was restored to employment by the Carrier with all rights unimpaired.

Meanwhile, on July 23, 1960, the Local Chairman wrote to the Master Mechanic at Norris Yard protesting the dismissal, and seeking restoration of Claimant to service.

The file shows that a reply was dispatched to the Local Chairman on July 27, 1960, declining restoration. This letter the Local Chairman denies ever receiving, and on October 10, 1960 he wrote to the Master Mechanic, request allowance of the claim as presented in compliance with the 60 day clause of the National Agreement of August 21, 1954, Article V(a).

The Master Mechanic replied to this letter on October 13, 1960, and also citing the National Agreement advised the Local Chairman that since he had not processed the claim within the 60 day time limit, the case was closed.

Each party is initially relying on the non-compliance of the other with Article V. Under the facts presented in this record, we decline to dispose of this conflict on procedural grounds, and proceed to the merits of the matter.

Briefly, the facts show that Claimant, together with Carman Gilley was working on the wash track; that the foreman, Buffat, told Claimant to come to the car repair track and work. Claimant told Gilley that a man was needed at the repair track, and Gilley went there. When the General Foreman discovered that Gilley was working on the repair track instead of Claimant, he ordered Claimant to his office for a preliminary investigation, resulting in the matters set out in this dispute.

A part of Claimant's contention is that there was a local verbal agreement that when a man was needed, as here, the junior man on the track would be taken, and that was why he thought Gilley should have gone to the repair track, and not he. This, however, did not excuse Claimant from taking it upon himself to follow what he believed to be the custom after he was ordered to the repair track, and this he admitted at the investigation hearing.

We are well aware of the many awards cited by the Carrier of this and other Divisions of this Board to the effect that the Division should not substitute its judgment for that of the Carrier unless it feels that judgment is arbitrary, unreasonable or not supported by the record. Here, there never was

a substantial difference as to what were or were not the facts as they occurred at the Yard on July 10.

But we do feel that there was an unwarranted penalty assessed under the facts. There was no resulting actual or possible harm from Claimant's action either to the Carrier, its property, or to the public. Regardless of the fact that Claimant was reinstated on July 28, the penalty assessed on July 18 was harsh and unreasonable, and out of proportion to the Claimant's minor infraction. It would have served adequately to order Claimant restored at the conclusion of the hearing on July 13, 1960 following a proper reprimand and the loss of the days from July 10 through the 13th.

Accordingly, the Carrier is ordered to compensate the Claimant for the time lost from July 14, 1960 until reinstated on July 28, 1960.

AWARD

Claim sustained in accordance with our Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4282

We are not persuaded that the Referee who sat with the Division when this award was rendered properly evaluated Carrier's evidence presented to the Division to show that the Employes had not complied with the provisions of Article V of the August 21, 1954 Agreement in the handling of this dispute on the property, otherwise he could not have written —

> "Under the facts presented in this record, we decline to dispose of this conflict on procedural grounds * * *."

The evidence in the record is substantial in support of Carrier's contention that this claim is barred under Article V of the August 21, 1954 Agreement. Furthermore, this award is wrong when it modifies Carrier's action and grants additional leniency to that which Carrier granted after finding that the evidence sustained the charges against the claimant. We do not agree with the reasons given for extending leniency to the claimant — that he was only guilty of a "minor infraction" and "There was no resulting actual or possible harm from Claimant's action * * *."

It is very clear that Section 3 of the Railway Labor Act, establishing the National Railroad Adjustment Board, was never intended to transfer any of the rights of management to the Divisions of the Board. The railroads retained the right to make all decisions affecting operation, finances, equipment, selection of employes and other details of management. Section 3 empowered the N.R.A.B. Divisions only to rule on the question of whether the Carrier, in exercising its rights of management, had failed to abide by the terms of its contracts with the employes. The N.R.A.B. Divisions have no authority to

overrule a management decision merely because the action of the Carrier may be greater than that which the Board might choose.

It is well established in numerous awards of the various Adjustment Boards that discipline will remain undisturbed unless it can be established by clear and competent evidence that the investigation materially prejudiced the substantial rights of the claimant, or that there was no evidence whatever to support the finding and that it was based on mere whim or caprice.

In the instant claim the Organization has not satisfied any of these requirements, and the Division should not have interfered with the penalty imposed by the Carrier.

The charge against the claimant was not one to be considered a "minor infraction," but was for insubordination, because the claimant refused to submit to the authority of his duly authorized supervisor and to obey his instructions. Obedience to instructions is a condition of employment existing in every industry, and when an employe fails to be obedient to the orders of his superior, he then exposes himself to disciplinary action by his employer.

The findings of the majority in the instant dispute should have followed the many precedents which have held that leniency is a function of the Carrier and not of the Division. See Awards 1389, 1323, 1692, 3430, 3462, 3580, 3613, 3772, 3828, 3839, 3874, 3884, 3894, 4000, and others of this Division; Third Division Awards 892 and 9422; and Fourth Division Awards 935 and 1050, which are representative of the numerous awards which have found that the Board does not have the power to disturb the action of the Carrier in discipline disputes merely because it thinks the discipline meted out is not what it would have meted out had it been in the position of the Carrier.

There has been agreement in numerous awards that the Board's function does not include probationary action within its limitations, and we are not at liberty to substitute our judgment when the evidence supports the Carrier's charges.

For the reasons herein offered, we dissent.

P. R. Humphreys

H. K. Hagerman

F. P. Butler

W. B. Jones

C. H. Manoogian