



Award No. 5430
Docket No. 5292
2-C&NW-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 12, RAILWAY EMPLOYES'
DEPARTMENT, A. F. L. - C. I. O. (Machinists)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That under the current agreement, Machinist L. J. Laboyeske was unjustly dealt with when he was dismissed from the service of the carrier on July 30, 1965.

2—That accordingly the carrier be ordered to reinstate Machinist, L. J. Laboyeske with seniority rights unimpaired; compensate him for all time lost, plus 6% interest thereon; make whole for all vacation rights; pay premiums for all hospital, surgical and medical benefits; pay premiums for Group Life Insurance, which would have accrued had he not been so unjustly dealt with and subsequently discharged.

EMPLOYES' STATEMENT OF FACTS: Machinist L. J. Laboyeske, herein referred to as the claimant, was employed in the North Fond du Lac motor car shop of the Chicago, North Western Railway Company, hereinafter referred to as the carrier, until dismissed from service on July 30, 1965.

Claimant has a seniority date with the carrier of October 1, 1945.

Under date of June 28, 1965 carrier directed letter to claimant, notifying him to appear for investigation at 10 A. M., July 16, 1965 in office of Supervisor of work Equipment, and charged in pertinent part as follows:

"Your responsibility for your failure to properly repair Tractair 17-1012 on May 11, 1965, in that you deliberately damaged new material to the extent that it had to be scrapped, necessitating that Tractair 17-1012 again to be dismantled and new parts ordered, which resulted in unnecessary expense to the Railway Company and also prevented Tractair 17-1012 from promptly being released for service."

Letter dated June 28, 1965 above submitted as employee Exhibit A.

Investigation was held as scheduled on July 6, 1965 and a copy of the investigation transcript is attached hereto as Exhibit B, pages 1 through 4.

charge of failure to perform duties properly. See Second Division Awards Nos. 3607, 3092, 3626 and 4122, on other carriers, and in particular, Award No. 4352, Machinists vs C&NW, an award involving the same parties as the present dispute.

There is no support for the claim for reinstatement. In view of the employees' admission at the investigation that the claimant was responsible for the charge, it is difficult to understand how the employees feel justified in demanding that the claimant be exonerated by reinstatement with pay for time lost and "fringe benefits," as if he had done nothing for which he should be censured.

The claim is without merit and should be denied. In any event, there is no support for the claim for six percent interest or the fringe benefits referred to in the Statement of Claim. Rule 35 of the applicable agreement provides in pertinent part:

"If it is found that charges are not sustained, such employee shall be returned to service and paid for all regular time lost."

The rule does not provide for payment of anything other than "regular time lost," so there is no support for the claim for six percent interest or "fringe benefits." Furthermore, as held in Award No. 1638 on this property, and involving this rule, the payment of regular time lost under Rule 35 is subject to deduction of outside earnings.

All information contained herein previously has been submitted to the employees during the course of the handling of this case on the property and is hereby made a part of the particular question here in dispute.

Oral hearing before the Second Division is waived, provided the employees also waive hearing, and with the understanding that the carrier will have the opportunity to file a written reply to the employees' submission, and if a referee is appointed, the carrier will be given a hearing before the Division sitting with a referee.

(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 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 waived right of appearance at hearing thereon.

The claimant was charged with "your failure to properly repair Tractair 17-1012 on May 11, 1965, in that you deliberately damaged new material to the extent that it had to be scrapped, necessitating that Tractair 17-1012 again had to be dismantled and new parts ordered, which resulted in unnecessary expense to the Railway Company and also prevented Tractair 17-1012 from promptly being released for service."

The tractair is a combination tractor and air compressor, which had been brought into the shop for repairs the first week in May, 1965. The claimant while assembling the engine discovered two of the precision manufactured cylinders did not fit so he proceeded to file them down. Later when the engine was assembled and tested water was discovered leaking into the crank case. An investigation was held and it was discovered that the filing of the cylinders caused the damage and the claimant was responsible. The claimant stated at the investigation that he had no idea why the cylinders did not go into position as they should, and he did not ask anyone's advice in connection with the problem. He just went ahead and filed down these new parts.

The investigation revealed the following:

"Question: Have you ever overhauled any Tractairs before to the extent of installing engine sleeves and, if so, what were the results?

Answer: Good.

Question: How many cylinders does the engine have?

Answer: Four.

Question: Did you have any trouble installing #3 and #4?

Answer: No, none at all.

Question: Normally, in your line of work, when you reach a problem you cannot solve or do not want to take responsibility for what is your usual procedure?

Answer: I never had that problem before.

Question: Did you ask anyone in authority for advice in this matter?

Answer: I didn't see anyone around and I was told to use my own judgment.

* * * * *

Question: What were your intentions when you were grinding them off? Did you think you were doing the right thing at the time?

Answer: At that time when I found the sleeves would not go down I thought I was doing the right thing.

Question: Were you ever found guilty of deliberate destruction of North Western property or parts?

Answer: No."

Thus, statements in the record and the transcript indicates that the claimant was attempting to get the machine out on time. There is no question that he deliberately filed the cylinders. However, there is a question of fact as to whether his intention was to deliberately damage new material. His purpose was to improvise the part in order for it to fit and complete the job. His efforts were a failure although a reasonable doubt exists as to whether he deliberately damaged new material.

An examination of the claimant's service record: Exhibit "B," statement from a foreman, who had not exercised supervision over the claimant in ten years, Exhibit "C", statement from a foreman who hadn't exercised supervision over the claimant in approximately four years. Exhibit "D" is supplemented by statements in the record that on March 15, 1963, that he absented himself from his job from 10 to 40 minutes for a period of 14 days, coupled with the contention that he had 15 accidents, all of which were due to carelessness. Exhibit "E", a statement from his current supervisor stating: "His mechanical ability was limited and after twenty years he could not adjust timing or follow a timing sequence."

The claimant has 20 years of service with a limited amount of infractions of discipline. His work on the equipment herein was without supervision which leads to the contention that he was possessed of considerable skill. His actions, although well intended, resulted in considerable monetary loss in both money and time to the Carrier. However, his conduct was a lack of judgment rather than a willful, or premeditated act which he should have been able to estimate the consequences.

Thus, the Division concludes that, under all the facts of the record, the disciplinary sanction of discharge from service is not warranted. The discharge is therefore, converted into a suspension without pay until reinstated with seniority and vacation rights unimpaired. Other demands requested are denied.

AWARD

Claim sustained as modified.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of May 1962