Award No. 5437
Docket No. 5304
2-IC-FO-'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. 99, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement Laborer John Carter was unjustly dismissed from service January 4, 1966.

2. That accordingly Carrier be ordered to reinstate the aforementioned Claimant with seniority unimpaired and be compensated for all time lost as well as other damages that he incurs as a result of his being dismissed from service.

EMPLOYES' STATEMENT OF FACTS: Laborer John Carter, hereinafter referred to as the Claimant was employed by the Illinois Central Railroad, hereinafter referred to as the Carrier, for approximately 15 years, and prior to dismissal was assigned on the 7:00 A. M. to 3:00 P. M. shift, Monday through Friday, with rest days of Saturday and Sunday.

Shop Superintendent L. R. Barron directed a letter to the Claimant under date of December 21, 1965 directing him to be present at a formal investigation to be held at 9:30 A. M., December 28, 1965, a copy of which is attached and identified as Exhibit A.

Investigation was held as scheduled and attached and identified as Exhibit B is a copy of the hearing transcript.

Under date of January 4, 1966 Shop Superintendent L. R. Barron directed a letter to the Claimant advising him he was dismissed effective January 4, 1966, a copy of such letter is attached and identified as Exhibit C.

The dispute was handled with Carrier officials designated to handle such affairs, who all declined to adjust the matter.

The Agreement effective April 1, 1935 as subsequently amended is controlling.

Therefore, Carter's gross negligence in this instance, considered with his past record of irresponsibility, is ample reason for his dismissal by the Illinois Central Railroad.

In Award 2–3067 Referee Whiting said:

> "The testimony adduced at the investigation clearly shows claimant failed to fulfill his responsibility as a car inspector . . . **accordingly he was properly found guilty of the charge and, in view of his prior record of discipline, dismissal was not too sever a penalty."** (Emphasis ours.)

And in Award 2–3828 Referee Doyle stated:

> ". . . the offense is most serious. It is capable of producing tremendous damage. In view of this we are constrained to hold that legel justification exists for the penalty of dismissal and that it is now shown to have been motivated by ill will. **Since there is a basis in reason for the extreme action of dismissal it is not within our power to void it as an arbitrary exercise of power."** (Emphasis ours.)

When, as in this case, the cause for discipline has been adequately shown, the Second Division has repeatedly held, that it will not substitute its judgment for that of the company.

In Award 2–2996 Referee Whiting said:

> ". . . There was substantial evidence to reasonably support the decision of the carrier. Under such circumstances we **may not** substitute our judgment for that of the carrier. (Emphasis ours.)

SUMMARY AND CONCLUSION

The company has shown that; (a) Carter was solely responsible for the damage to Illinois Central equipment as charged, (b) Carter was grossly negligent under the circumstances, (c) this negligence, considered with Carter's poor work record, gave the company ample cause to dismiss him.

All data included in this submission has been presented to the employes and made a part of the question in dispute.

The company asks that the Board deny the claim.

(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 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.

On December 9, 1965, the claimant, a laborer, was assigned to a second shift tractor operator's position at the Weldon Coach Yard. He was instructed to proceed to the passenger terminal area and exchange the garbage wagon his tractor was pulling for one of the wagons parked near the terminal. He was also given some paper cups and towels to deliver to the depot located near the passenger terminal. When he reached a desired area from which to perform his work he parked the wagon portion on the track. While engaged in delivering the cups and towels to the station his wagon was struck by an engine. However, he did attempt to flag down the engine but was unsuccessful.

An examination of the transcript of the investigation reveals that the claimant was working the position of his own choosing, was familiar with the duties of a tractor driver and considered himself a qualified competent tractor operator. The facts don't reveal any inability on the part of the claimant to operate the tractor, but only his failure to park the wagon free of the track. The claimant states in the transcript:

> "In order to carry out this duty, inasmuch as the garbage wagons, pails, compressed gas tanks, wagons, Oh, let's see, what kind of wagons would we call them. Well, anyway, all of this work stacks up in that corner. When you go to carry out this duty the only way that you can take one garbage wagon away and put another one in there is the tractor driver has to pull the tractor off the tracks and shove the garbage wagon back into the hold where they are. There is no way that you can park right in front of the garbage wagons without being on the track.
>
> Q. Then you and you alone are responsible for the accident that followed shortly after you spotted the tractor and wagon in such a manner that it fouled the track? Is that correct?
>
> A. Now you are asking the same question again. Now, Mr. Barron, in using my judgment that's right and I was the one who did it. But the other conditions were such that I could not carry out my duties in any other way than to do that. In other words I could not have carried out my duties if I hadn't done that. In other words the way you had it fixed that was the only way I could carry out my duties."

In this testimony the claimant is saying it was more convenient for him to park at this location to perform his tasks. In light of the rules, if in order to perform his tasks he must violate them — he just can't perform the tasks.

The record further reveals that it was the responsibility of the carrier to prove that on December 28, 1965 the concourse was open or other areas open and available to park the tractor. However, an examination of the rules violated are as follows:

> "SAFETY RULE 280 – Trains, engines, and cars must be expected to run at any time on any track, in either direction.
>
> SAFETY RULE 428 – Leaving trucks or tractors where they will foul tracks is prohibited."

Thus, in conclusion the rules generally state "Don't park attended or to operate mobile equipment in such a manner that the tracks are not obstructed, whether parking facilities are available or not.

Thus, in conclusion the rules generally state "Don't park attended or unattended vehicles on tracks." The claimant has violated Safety Rules 280 and 428, under circumstances that could have caused serious personal and property damages. This did not take place, but as the facts reveal, the claimant violated two of the carrier's safety rules, the Board must deny this claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of May, 1968.

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