



Award No. 5813

Docket No. 5733

2-C&O-FO- '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Arthur Stark when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, AFL — CIO
(Firemen & Oilers)**

CHESAPEAKE & OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Laborer George Sorrells was unjustly dismissed from the service of the Carrier, effective August 21, 1967.
2. That accordingly the Carrier be ordered to reinstate this employee with all seniority and all employee rights unimpaired and pay for all time lost retroactive to August 21, 1967.

EMPLOYEES' STATEMENT OF FACTS: On September 22, 1951, the Chesapeake & Ohio Railway Company, hereinafter referred to as the carrier, employed George Sorrells, hereinafter referred to as the claimant, as a laborer in its locomotive department at Clifton Forge, Virginia.

Shortly after the carrier's introduction of diesel power in the year of 1952, claimant was furloughed and remained in this status until requesting a laborer's position in the carrier's locomotive department at Huntington, West Virginia, at which time claimant was hired and placed on the Huntington roster with a seniority date of 10-14-65. Claimant became a furloughed employee at the Huntington locomotive department February 4, 1967, thereafter working relief work on laborers' vacancies that became available through regular assigned employees being absent from work due to illness, etc.

Under date of August 4, 1967, General Foreman Keller charged the claimant as set forth in letter of that date and requested him to attend investigation at 3:00 P.M. August 7, 1967.

Formal investigation was held on August 7, 1967, as scheduled.

Due to a typographical error in the heading of the investigation transcript, the date of the hearing was listed as August 2 instead of August 7. This resulted in improper reference to August 2 as the date of the investigation in subsequent correspondence. Any reference to investigation of August 2 is understood to mean August 7, 1967.

of the claimant and give appropriate consideration of all the facts in making a determination of guilt or innocence.

CONCLUSION:..The carrier has shown:

- (1) The claim appealed by the general chairman and presented to the Board is not the same as the claim presented by the local chairman on the property.
- (2) That the claimant was proven to be at fault for failure to carry out instructions of his supervisor on July 30, 1967.
- (3) That the investigation and imposition of dismissal fully met all procedural requirements of the agreement and awards of the Board.
- (4) There was no showing of arbitrariness, capriciousness or bad faith on the part of the carrier.
- (5) That in view of the testimony adduced at the investigation and the past record of the claimant, the discipline imposed was fully warranted.
- (6) That the claim is without merit and should be denied in its entirety.

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 August 4, 1967 Carrier notified Laborer George Sorrells, seniority date October 14, 1965, that he was charged with "responsibility in connection with insubordination by refusing to perform work assigned to you by Power House Engineer on July 30, 1967 at about 4:00 P.M." Mr. Sorrells was requested to attend an investigation on August 7 and invited to arrange for his "representative and/or witnesses if desired".

The investigation hearing was conducted on the appointed day by General Foreman L. L. Keller. Witnesses included Mr. Sorrells, Chief Stationary Engineer C. T. Leach and Extra Chief Stationary Engineer R. L. Hanshaw. Although in attendance, Local Chairman Harry Martin did not participate in the proceedings.

On August 21, 1967 Acting Shop Superintendent A. M. Schuh notified Mr. Sorrells that he had been found guilty of insubordination and was being dismissed. Thereafter a claim on his behalf was filed.

Petitioner contends that Mr. Sorrell's discharge was unjust for the following principal reasons:

1. Claimant was not accorded a fair hearing as required by Rule 44 (This Rule declares that an employee "will not be disciplined by suspensions or dismissal without a fair hearing by a designated officer of the company.") Specifically, Petitioner alleges that Hearing Officer Keller acted

in a discriminatory manner in asking questions. For example, Sorrells was not asked how long he had worked the position or whether he had ever before been requested to perform the task in question.

2. Mr. Sorrells was tried without benefit of explanation of the Agreement rules, his rights in securing witnesses or representatives on his defense, or of the seriousness of the charge against him.

3. Claimant was a victim of prejudgment. His dismissal had been decided upon before the investigation.

4. The discipline was excessive, particularly since Claimant was a furloughed employee filling in for an absent worker.

The record reveals the following information with respect to Claimant's employment with this Carrier: He had previously been employed by Carrier during 1951-52. Rehired in October 1965, he had been performing relief work since February 1967. In that month he was suspended five days for insubordination and placed on probation for three months. On July 30 he was assigned to a Laborer position on the second shift (3 to 11 P.M.). At about 4 P.M. he was asked by the Engineer to pull weeds around the perimeter of the Power House. He did not comply. The Engineer repeated his request at about 6 P.M., but to no avail. Later, when the Engineer asked him to clean up the oil around the air compressor, Mr. Sorrells replied that that was not his job. Thereafter he was charged with insubordination.

* * *

After careful consideration of the entire record we must find that Petitioner's allegations concerning Mr. Sorrells' hearing are unsubstantiated. Note the following:

1. Contrary to Petitioner's assertion, Mr. Sorrells was informed of his right to be represented and have witnesses testify on his behalf. This was first done in the August 4 notice of hearing, as noted above. At the outset of the hearing Sorrells was asked, "Do you desire representation?" His response: "Is one necessary?" At this juncture Local Chairman Martin cited the section of the Rule Book which gives an individual the right to present his own case. Mr. Martin then said "I am here Mr. Keller as a witness only, not a representative". Clearly, Claimant could have requested Mr. Martin to represent him, had he so desired.

Claimant was not denied the opportunity to present evidence on his own behalf. Shortly after the hearing began he was asked, "... do you desire witnesses?" His reply, "... there was no one in the vicinity, just Mr. Hanshaw and I, so how could there be any witnesses?" At the end of the hearing he was asked, "... is there any additional evidence which you desire to present in this case?" He replied in the negative.

Additionally it may be noted that Mr. Sorrells had been present at a February 1967 disciplinary hearing at which he was represented by the Local Chairman. Obviously he was well aware of his rights.

2. Whether Claimant was aware of the seriousness of the charges is known only to him. But he did know that he had been previously disciplined on similar charges. True, the Hearing Officer did not specifically state that dismissal might follow an adverse verdict, but Mr. Sorrells could certainly have ascertained that just by a simple question to either the Hearing Officer or the Local Chairman. Moreover, it is common knowledge that insubordina-

tion is considered a serious offense. Rule 44, under which the Hearing was being held, specifically refers to discipline by "suspension or dismissal", (When asked if he understood the rules Claimant did not respond, but merely indicated his hostility by noting that "These rules are outdated and outmoded and were made in the 1800's and against the negro. Also, I think all rules around here need to be revised.")

3. The Hearing Officer was not remiss in his duty, as Petitioner alleges. It cannot be expected that such a person will think of every question which might be asked. That is one reason why employes have been accorded the significant right to be represented at these investigations. These representatives, experienced in presenting evidence, can fill in whatever gaps may exist. When an individual chooses to forego the right to be represented, of course, he must be willing to suffer the consequences. If, indeed, the questions suggested by Petitioner should have been asked, there was nothing to stop Claimant from asking them.

4. There is no evidence to support Petitioner's assertion that this case was pre-judged.

5. In light of Claimant's prior disciplinary record and relatively short length of service, there is no basis for finding that his dismissal constituted an excessive penalty. His refusal to accept his superior's orders is clear. There were no extenuating circumstances. In the case of the weed-pulling he merely asserted (at the hearing) that this was not his job. "The chart tells me . . . what I am supposed to do, and I follow these orders", he testified, "and when a foreman comes to me and tells me about doing something else, I don't think I should do it." This attitude constitutes the epitome of insubordination and, clearly, reflected itself in Claimant's general conduct. As for cleaning the oil from the compressor, on the day in question, Claimant merely stated it was not his job. At the hearing, however, he said he declined the task because "it was about 10:30 P.M. and . . . time to get ready to leave there . . ." "It was too late to do the job then." This, of course, is quite a different explanation. Whichever the real reason, however, it is apparent that Claimant was a recalcitrant employe, unwilling to accept direction and, apparently, unable to mend his ways.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1969.