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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6350
SECOND DIVISION Docket No. 6196
2-UP-MA-'72

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

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

Union Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Union Pacific Railroad Company improperly withheld Machinist O'Donald Carroll from service on September 2, 1970, pending investigation and dismissed him from service on September 14, 1970.

2. That the Carrier be ordered to:

(a) Compensate Machinist O'Donald Carroll for all time lost from September 2, 1970 until restored to service.

(b) Restore to Claimant all seniority and vacation rights, unimpaired.

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, employed by the Carrier as a Machinist in its Locomotive Department at Las Vegas, Nevada, was withheld from service (suspended) pending investigation and hearing commencing September 2, 1970 and removed from service (terminated) on September 14, 1970. He was charged with having been "Flagrantly insubordinate" in that he failed to comply with instructions given to him by the Enginehouse Foreman on September 1, 1970 in violation of Rule 702 of the Controlling Agreement which reads in part:

"Employes must attend to their duties during the hours prescribed,... and comply with instructions from proper authority..."

The Petitioner contested the disciplinary action taken against the Claimant by the Carrier and the claim was duly processed in accordance with contractual procedures. The matter not being adjusted, appeal was taken to this Board for review and determination.

The Carrier moved to have the claim dismissed on the ground that "the claim which the Organization progressed to this Division is not the same as the claim handled on the property". The alleged inconsistency is in the relief sought by the Petitioner in its submission to this Board, to wit:

"2. That the Carrier be ordered to:
(a) compensate Machinist O'Donald Carroll for all time lost from September 2, 1970 until restored to service."

as compared with the letter of the Local Chairman of the Organization initiating the claim in which it is stated:

"Request Machinist, O'Donald Carroll of Las Vegas, removed from service, September 14, 1970, be promptly reinstated to service and be compensated for all time lost..."

We are unable to find the variance which the Carrier seeks to impress upon us. The Claimant was withheld from service commencing September 2, 1970 pending hearing per letter of that date from the General Foreman to the Claimant. (Carrier Exhibit No. 1) He was discharged from the Company's service per letter of the Carrier's Master Mechanic dated September 14, 1970. The initial claim, while referring to the date of discharge, requests reinstatement with compensation for all time lost, including lost earnings due to suspension pending investigation and hearing. This is clearly consistent with Rule 37 which reads in part:

"...Suspension in proper cases pending a hearing...shall not be decreed a violation of this rule...If it is found that the employee has been unjustly suspended or dismissed from service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from such suspension or dismissal."

Claimant lost earnings commencing with his removal from service effective September 2, 1970 and the Petitioner properly, in accordance with Rule 27, demanded, from the outset, restitution, should the suspension and dismissal be found to be unjust. Our rulings, and that of the other Divisions of this Board cited by the Carrier, are to prevent a materially different matter from being considered by us than that which was being processed on the property. The Respondent should not be required to deal before us with issues it was not afforded an opportunity to review, discuss and possibly settle in the agreed upon procedure. It should not be faced with surprise in responding to appeals to us. This was certainly not the case herein. From the outset, Petitioner revealed that it contested the validity of the charge agai Claimant and that his being withheld from service pending hearing with resulting lost

earnings, was, in its view, no more appropriate than the subsequent decision of the Carrier to discharge him. The correpondence consistently demanded pay for "all time lost" and this was part of all of the discussions as the claim was progressed. The fact that the dismissal date was recorded did not convert the original remedy sought. (See Article V-3 of National Agreement of August 21, 1954) The Carrier could not have been misled as to the relief applied for and the basis therefor. We must reject this contention.

It is well established by Awards of every Division of this Board that our jurisdiction in discipline cases is limited. We should not substitute our judgement for that of the Carrier as to appropriate disciplinary measures to be taken nor are we in a position to weigh the credibility or veracity of witnesses who testify at the hearings on the property. (See First Division Awards 21777 (Wyckoff) and 21779 (O'Brien). However, the transcript of the hearing must support a finding that the offense for which the punishment was imposed was in fact committed and that its nature was such that the penalty assessed was not arbitrary, capricious or unreasonable (ibid). We do not require proof of the charge beyond a reasonable doubt, nor even by the preponderance of evidence, but it is requisite that the record before us be such as to contain substantial evidence to support the Carrier's charge and its action. (See First Division Awards 13142 (Boyd) and 16785 (Loring) The Supreme Court of the United States outlined the nature of proof necessary to satisfy the Substantial Evidence Rule as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Consol. Ed. Co. vs Labor Board, 305 U.S. 197, 229.

The total testimony of the Carrier's witness consisted of identifying himself as Enginehouse Foreman, who supervised Claimant and the following statement:

> "I instructed him to connect, hook up and load test the consist of units, and he stated he would not do the load testing or connecting of the control cables, at which time I told him to either do the work or go home. He elected to go home."

and that the Claimant had previously performed these duties. No effort was made to controvert the extensive and detailed recounting of the events of the afternoon of September 1, 1970 by the Claimant, corroborated by an eye-witness, which was at great variance with that of the Foreman. We do not consider that the Carrier's evidence fulfilled the requirements of the above quoted rule of evidence. It was clearly insufficient to support the findings of the hearing officer as set forth in his letter to Claimant dated September 14, 1971, which reads:

> "Please refer to notice of investigation and hearing dated September 2, 1970.
>
> Having carefully considered evidence adduced at the hearing held September 5, 1970, I find that the following charge stated in the above-mentioned notice has been sustained:

'You were insubordinate and failed to comply with instructions given you at approximately 3:45 p.m., September 1, 1970, by Enginehouse Foreman S. J. Curtis in regard to load checking consist of units.'

Therefore, you are discharged from the Company's service.

Very truly yours,

W. F. Cocking
Master Mechanic"

It would serve no useful purpose to delve more deeply into the inadequacy of this record before us to sustain a discharge for insubordination.

As to the relief requested in item 2(a) of the claim of the Petitioner, several special factors have to be weighed. On November 10, 1970, the Carrier, while reaffirming its position that Claimant was properly disciplined for insubordination, proposed settlement of the dispute by reinstatement of Claimant to service, without back pay, on a leniency basis with seniority unimpaired. This was rejected by the Claimant and the Petitioner on the ground that they were not willing to admit that Claimant had been insuborinate and that they reasserted their claim for complete vindication of Claimant and payment for all time lost. There then ensued further correspondence and a face to face conference between the General Chairman of the Organization and General Superintendent, Motive Power and Machinery, of the Carrier. There is nothing in the record to indicate that Petitioner offered any alternative propositions other than full satisfaction of the claim in an effort to resolve the dispute, mitigate the damages, and bring to a halt the loss of earnings by the Claimant.

We are not unmindful of the fact that acceptance of the Carrier's proposal, as offered, would have constituted a full settlement of the claim and would have foreclosed any further action on the part of the Claimant and the Petitioner to recover all or part of the more then ten weeks' lost earnings suffered by the Claimant. However, this Board has in its Awards admonished and cautioned parties to exert their best efforts to adjust disputes at the property whenever opportunity to do so presents itself. Although we did not find that the evidence adduced at the hearing warranted a holding for dismissal, we did find that Claimant's testimony revealed an attitude and conduct which Petitioner should have considered in weighing whether to persist in its original position and await further processing of the claim rather than find a mutually satisfactory compromise which would have brought the matter to a close.

We are not suggesting that an employee is prohibited from raising questions concerning a job assignment or even protesting same, so long as he performs as instructed and grieves later. The record indicates that Claimant went beyond this acceptable area. He asked a question and received an answer. He indicated his displeasure with the reply. This should have sufficed to establish his point. But he continued to repeat his question and reiterate his discontent without meaningful purpose. In shop parlance this is known as "needling the foreman" or "plaguing him a bit". Certainly the General Chairman and the Local Chairman recognized this as a factor in the reaction of the foreman, and the Management's need to in some way assuage the Supervisor's resentment by not agreeing that he was entirely in the wrong

on September 1, 1970. The Organization frequently calls upon us to consider human frailties in dealing with those it represents. We believe that had such an approach been taken in considering a settlement, this matter would have been satisfactorily closed shortly after the offer of reinstatement was made. It would therefore be improper for this Board to penalize the Carrier beyond the point when it opened the door for discussion of a compromise. Any subsequent wage loss was of Claimant's own choice and not reimbursible by the Carrier.

A W A R D

1. Claim sustained.

2. The Carrier is ordered to:

(a) Pay to the Claimant a sum equal to what he would have earned had he been employed in his position with it during the period September 2, 1970 through and including November 10, 1970, less any earnings he may have had from employment elsewhere during that ten week period.

(b) Claimant shall be recalled to work by the Carrier and upon his return shall have all of his seniority restored unimpaired. His vacation rights shall be such as he would have been entitled to under the Rules for active employment up to and including November 10, 1970. The period November 10, 1970 to the date of his return to work shall be treated, for vacation purposes, as though the claimant had been on furlough without pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July, 1972.