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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6489
Docket No. 6279
2-PCT-MA-'73

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

Parties to Dispute: (System Federation No. 1, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Machinists)
(
(Penn Central Transportation Company

Dispute: Claim of Employees:

1. That the Management at Collinwood Diesel Locomotive Shop, Cleveland, Ohio, on January 15, 1971, unjustly and arbitrarily dismissed Mr. Robert L. Smith, Temporary Machinist.
2. That Mr. Smith be returned to service with full seniority rights and be compensated for loss of wages, vacation pay, hospitalization benefits and any other benefits due to him until restored to service.
3. That in addition, a 10% interest will be paid to Mr. Smith on all compensation received.

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, with approximately ten months service when the incident occurred, was charged with insubordination and conduct unbecoming an employe. Approximately three months prior to this incident, claimant was suspended for ten days for insubordination. Immediately following this alleged insubordination and unbecoming conduct, claimant was held out of service pending the hearing and disposition.

No objection has been made to the suspension pending the investigation or of the notice and timeliness of the proceedings. Although claimant stated at the hearing that it had been fairly conducted, his representatives stated that it was not a fair hearing. The Organization's defense involves alleged harassment of the claimant by his foreman prior to the incident on the day in question; that profanity if used by claimant was normal shop talk; that claimant was discriminated against because he was charged but not the employe who was assisting him at the time; and finally that whatever he did, it was neither insubordination nor unbecoming conduct.

The Carrier asserts that in the first place this Board has no authority to act because this is a leniency case. It argued that in any event, the claimant was insubordinate and did act improperly. Also that on the basis of his past record of suspension for insubordination three months earlier, dismissal was proper in the case of this short term employe.

The testimony of the hearing shows that claimant was a machinist on the second trick from 3:30 P.M. - 11:30 P.M. On the day in question he was assigned to complete wheeling of a unit and then to start cutting for removal of an oil engine from a unit. He was assigned an assistant. Several minor tasks were also required of claimant before he got to the oil engine removal. When the foreman came to the work site he found both claimant and his assistant were standing by. During the remarks which followed, claimant used profanity and told the foreman to get away, accompanied by the remark that the foreman didn't pay him so shouldn't complain about his not working. Claimant denied the testimony of the foreman but his assistant corroborated it.

Carrier's letter of March 3, Exhibit B, and Organization's letter of March 20, Exhibit H, indicate possible discussion of leniency but there is nothing in the record to bear this out. Accordingly, we will consider the merits.

The material and relevant facts are those which have to do with what took place regarding the removal of the oil engine. The remarks attributed to claimant made no reference to his being harassed that day. The assistant corroborated the fact that claimant used profanity as testified by the foreman. The profanity was not used as casual shop talk but were epithets directed to the foreman. For the claimant to order the foreman to get away from him, accompanied by profanity, and to quarrel with the foreman about getting the work done amounted to both insubordination and improper conduct. It was not discrimination to single out the claimant. The testimony is that the assistant did as he was told; there is no evidence that he quarreled with the foreman about the work to be done or when to do it. The hearing officer conducted the hearing fairly and gave everyone a chance to speak. The Carrier may choose any of its supervisory staff to make the charge, to hear the case and to fix the penalty. In this case, a meeting was held with the Organization's committee before claimant was taken out of service so that the facts were known to claimant's representatives before the hearing. There is no charge that the foreman changed his story at the hearing.

Although the evidence has been discussed, it does not mean that we could substitute our judgment for that of the Carrier. The precedent for this policy is overwhelming in prior Awards. Neither do we sit to do equity. We are an appellate body, in effect, to review the record and consider the contentions of the parties. We look for evidence of prejudgment, abuse of discretion, arbitrary or capricious action which could lead to a reversal on those grounds. We do not resolve conflicts in testimony unless the judgment made may fall into the categories listed above. As indicated, we find substantial evidence to support the conclusion reached.

We do have authority to review the extent of the penalty, not as a matter of leniency which is a management prerogative, but as a matter of correction to protect employes from discriminatory, arbitrary or capricious acts. This is not the same as remitting an appropriate penalty. Third Division Award No. 6085.

In this case, the employes' prior suspension for insubordination has provided the Carrier with grounds for the penalty imposed.

A W A R D

Claim Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Killean

Executive Secretary

Dated at Chicago, Illinois, this 2nd day of May, 1973.