

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: { Sheet Metal Workers' International
 { Association
 {
 { Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

1. That the Louisville and Nashville Railroad Company violated the controlling agreement, particularly Rules 32, 33, 34 and 46 when they unjustly dismissed Sheet Metal Worker H. B. Ferrell from service effective June 23, 1976.
2. That accordingly the Louisville and Nashville Railroad Company who returned Sheet Metal Worker H. B. Ferrell to service on September 21, 1976 with all seniority rights unimpaired, now be ordered to compensate him as follows:
 1. Compensate Claimant for all time lost with 6% interest per annum.
 2. Make Claimant whole for all vacation rights.
 3. Pay Hospital Association dues for all time out of service.
 4. Pay the premiums for Group Life Insurance for all time out of service.
 5. Pay Claimant for all holidays.
 6. Pay Claimant all sick pay.
 7. Pay Claimant for all insurance premiums.
 8. Pay Claimant for all jury duty lost.

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.

Following a hearing and investigation, Claimant was suspended for 90 days without pay for allegedly being insubordinate to Asst. Department Foreman R. B. Postlewait. Review of the entire record shows that Claimant knowingly failed to obey an order from Postlewait to come down off a locomotive and talk with him. This established a prima facie case of insubordination but the case is not that simple. We would be remiss in our duties as an appellate tribunal and blind to the realities of the situation if we did not also consider the context in which that insubordination took place. Illegality and imminent danger are the two recognized grounds to justify conduct which would otherwise be insubordinate. But other factors which may not justify or excuse altogether an insubordinate act can and should be taken into consideration when warranted to mitigate the impact of such an act. While we cannot completely condone Claimant's outright refusal to speak with his authorized superior we do find that he was provoked into such behavior by the Assistant Department Foreman. Specifically, Postlewait diverted racial slurs at Claimant during a roll call on the night of March 2, 1977. Shortly thereafter, Postlewait issued a new flashlight to another employee in Claimant's presence but refused to give one to Claimant, instead offering Claimant the defective flashlight which the other employee had just turned in. It was in the context of the racial slurs and the discriminatory treatment that Claimant walked away from Postlewait, climbed onto the locomotive to perform his job and refused to respond to Postlewait's repeated orders to stand down from the locomotive. Given the circumstances of the case we find the discipline of 90 days excessive. We shall reduce the penalty to one (1) day without pay and order Carrier to compensate Claimant in accordance with Rule 34 for wage loss from June 24 to September 21, 1976. The balance of damages claimed in items 1 through 8 of Part 2 of the claim are not awarded by us because we have been apprised of no contractual basis for such payments. See Awards 2-4795, 2-4860, 2-7085.

A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of September, 1979.