

Award No. 12126
Docket No. TE-14039

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Pennsylvania Railroad Company, that:

On August 23, 1961, C. N. Muller, regular assigned Block Operator at Waldo Tower, Jersey City, New Jersey, tour 2 P. M. to 10 P. M., relief days Monday and Tuesday, was removed for an alleged act of insubordination and failure to cover an assignment at "Q" Tower, same date.

Following a trial, and a denial of his appeal to you, said employe was dismissed, and we, therefore, make claim for all time lost, as well as time spent at trial and appeal, commencing August 23, 1961, and until such time as claim is brought to amicable settlement.

Further claim is hereby made of fault in trial, inasmuch as the above mentioned Employe and his witness at the trial were forbidden to quote the profane and vulgar language used by Mr. M. L. Stewart, Supervising Operator on date involved.

Violation of Regulations 6-A-1 (a) and 6-C-1 (b).

OPINION OF BOARD: Claimant was dismissed from service on September 23, 1961 on the following charge:

"Insubordination in your refusal to cover an assignment as Block Operator 'Q' Interlocking as instructed by the Supervising Operator, August 23, 1961, resulting in additional expense to the company."

The dismissal followed an investigation and hearing held on August 30, 1961 in accordance with the Rules of the Agreement.

Petitioner contends that (1) Claimant did not receive a fair and impartial trial and (2) that the penalty was too severe.

Claimant entered Carrier's service as leverman on December 28, 1956 and he became a block operator on April 25, 1957.

On August 23, 1961, Claimant held the regular assigned position of block operator at Waldo Tower, Jersey City. His tour of duty was 2:00 P. M.

to 10:00 P.M. Carrier stated that the Claimant's residence was called on August 22, 1961, and a message was left for him to report the following day to "Q" Interlocking, Sunnyside, New York, to fill a temporary block operator vacancy. At 2:00 P.M. on August 23, Claimant reported instead to his regular assignment at Waldo Tower. When he arrived there he found another employee who had been assigned as block operator to temporarily replace Claimant while he was to work at "Q" Interlocking. In a telephone conversation with Carrier's Head Clerk, Claimant advised him that he had not received a message to report to "Q" Interlocking. In the course of that telephone conversation, the Head Clerk and later Claimant's Supervising Operator ordered Claimant to immediately proceed to "Q" Interlocking, which Claimant refused to do. He was then and there held out of service and the hearing and dismissal followed.

Claimant testified that his Supervising Operator used profane and colorful language when they conversed on the telephone. The trial record shows that:

"Attempt made to enter in the record quotation of some of Mr. Stewart's remarks which was objected to by Mr. Paulin and agreement made by the parties involved that a handwritten statement be provided, in deference to the lady, and that Mr. Muller be permitted to make a copy of the statement, these remarks being objectionable or offensive."

Although the alleged profane and colorful language does not appear in the transcript of the hearing, a written statement by Claimant and another by the extra operator, who said he heard the conversation, contain the language allegedly used by Mr. Stewart, the Supervising Operator. These are a part of the record in this docket.

There is no denial that the Head Clerk and the Supervising Operator ordered Claimant to proceed to "Q" Interlocking. Claimant said only that: "Because you are threatening me, I am not going to 'Q.'"

It is probable that in the course of the telephone conversation the Supervising Operator and, perhaps, Claimant used ungentlemanly language. But that is not unusual in everyday work relations when emergencies occur and when work directions are ignored. The fact is that the colorful language attributed to the Supervising Operator are not so extreme to which a block operator should take such offense as to ignore and refuse to obey a work order. Under the Rules of the Agreement Carrier had the right to order Claimant to "Q" Interlocking. Claimant has presented no valid reason for his refusal to obey that order.

Claimant received a fair and impartial hearing. When asked by the Hearing Officer if he had any comment to the way the trial had been conducted, he replied: "No sir, I have nothing."

There is no question that dismissal from service is an extreme penalty. Whether it is justified depends upon many factors and circumstances in each case. Primarily, it is incumbent upon Petitioner to show that the Carrier was either vindictive, arbitrary or malicious in assessing this penalty. An employee's past work record may not be considered in determination of his guilt of the charges brought against him, but it may be considered in assessing a penalty.

In this case, Claimant's work record shows that in the four and one-half years of employment, Claimant was disciplined once and reprimanded four times. The last time, February 4, 1961, a discipline penalty was reduced to a reprimand on appeal. On one occasion he reported late for his assignment; on another he failed to cover his assignment. It is understandable that a Supervisor can become excited and tenacious after a long telephone conversation with an employe who refuses to obey an order. This is what happened in this case.

On the basis of the record, we fail to find any evidence that Carrier was vindictive, arbitrary or malicious in assessing the penalty of dismissal.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schuly
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.