NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23026
THIRD DIVISION Docket Number MW-23087

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation
((Former Lehigh Valley Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Foreman Robert Jacques for alleged insubordination was without just and sufficient cause, unwarranted and in violation of the Agreement (System Docket LV-75).

(2) Foreman Robert Jacques shall be afforded the remedy prescribed in the last sentence of Rule 5-a."

OPINION OF BOARD: Prior to his dismissal from service, claimant, who had about four years of service with the Carrier, was employed as a foreman in Carrier's South Kearny Display Yard.

On September 7, 1978, claimant was notified to attend a hearing and investigation on September 15, 1978, to answer charges in connection with:

> "Alleged Insubordination on that on August 31, 1978, at approximately 8:40 AM, Location-South Kearny Display Yard, you were ordered by A. Bernabel, Asst. Supervisor of Production, to work on the yard cleaner changing brushes. Mr. Bernabei told you not to leave job site or you would be out of service. Upon receiving this order you turned and left the job site placing yourself out of service."

The hearing and Investigation was held as scheduled, with the claimant present and represented. A copy of the hearing transcript has been made a part of the record. On September 21,1978, claimant was notified that he was "Discharged in all capacities," for the offense with which charged.

Following claimant's dismissal, claim in his behalf was appealed in the usual manner to the Carrier's highest designated officer of appeals by respresentatives of the Brotherhood of Maintenance of Way Employes, which Organization is the duly authorized representative of the craft in which claimant was employed. Failing to reach an adjustment on the property, the Organization, on July 5, 1979, filed notice with this Division of the National Railroad Adjustment Board of its intention to file an ex parte submission in the dispute with Statement of Claim as indicated.

During the course of the investigation several objections were raised by the claimant's representatives, including, (1) Rule s-b-2 of the applicable Agreement was not read into the record, or questions permitted concerning the rule; (2) testimony was not permitted as to whether an emergency existed; (3) whether a second shift was employed on the yard cleaner. Other issues were also raised.

While the hearing may not have been conducted in an exemplary manner, the hearing officer was attempting to confine the hearing to the actual charge of alleged Insubordination because of claimant refusing to comply with instructions of Carrier's Assistant Supervisor of Production, Mr. A. Bernabei. A review of the hearing transcript, including claimant's own statement, shows substantial evidence in support of the charge of insubordination. It was raining at the time of the occurrence. Assistant Supervisor Bernabei testified in pert:

"Hearing Officer: On August 31, 1978, were you the Supervisor of Mr. Jacques?

Mr. Bernabei: Yes, I was

Hearing Officer: At South Kearny Display Yard at approximately 8:40 AM when this incident occurred, would you please state for the record what happened?

Mr. Bernabei: I approached Mr. Jacques and he told me that, 'I was not going to work in the rain,' and I said: 'You won't be working in the rain.' You are going to be under the machine changing brushes. He stated to me the rain rule under his agreement and he told me he was leaving the job due to inclement weather and I told him he was not to leave the job site and he repeated again that he was leaving under the rain rule and I told him that if he left the job he would be Out of service and he turned and went to his car and left."

and: ". . . I did not tell Bobby Jacques to work in the rain. I told him he was not to leave the job site. As far as not being told there was an emergency situation, he did not stay long enough and I don't believe as a supervisor I should be questioned by my actions.

Also, Mr. Aaea not knowing that it is an emergency situation because he was not there and I as Supervisor had the track out of service. Also I would like to state that other employees from the Lehigh Valley were also there and were told that if they left the job site they would be held out of service and they remained and worked."

A mechanic, who was presented as a witness for the claimant, testified in Hart:

"Mr. Myron(representative):All right, what happened.

Mr. Swarrow: Well there was no operator for the machine. Mr. Bernabei told Mr. Jacques to change the brushes on the yard cleaner. Mr. Jacques asked me for wrenches. I gave him the wrenches and he started to change brushes and it began raining. About half hour later, well, you know a half hour after he left it started raining and Jacques came back and he said he was taking himself out of service under rule so and so, Rule 4-b-2 of the Lehigh Valley Agreement.

Mr. Myron: Then what happened.

Mr. Swarrow: Mr. Bernabei told him if he left the job site that he was out of service and Mr. Jacques turned and walked to his car and left the job site."

The claimant testified in part:

"Hearing Officer: The Notice thatyourecelved charges, 'Alleged insubordination on that on August 31, 1978, at approximately 8:40 AM, Location-South Kearny Display Yard, you were ordered by A. Bernabei, Asst. Supervisor of Production, to work on the Yard Cleaner changing brushes. Mr. Bernabei told you not to leave the job site or you would be out of service. Upon receiving this order you turned and left the job site, placing yourself out of service.' Tell us what you know concerning this incident.

Mr. Jacques: I was given orders when Mr. Bernabei came to the road site as which I got the tools from, his mechanic Amis Swarrow and I proceeded to change brushes with my track laborer, Kenny Bristol and approximately 8:40-8-30, around that time it started raining and I came from the machine and notified Mr. Bernabei Rule 4-b-2 of the former Lehigh Valley Agreement, the inclement weather rule that I was leaving my job site, stopping and going home; at which time he told me to go back on the machine, it wasn't raining under the machine and go back and change brushes. I repeated myself under the Lehigh Valley Rule and he said he ordered me nottoleave or I would be out of service at which time I turned, stopped my own time and I left.

Hearing Officer: Clarify the records. You said Mr. Bernabei ordered you not to leave.

Mr. Jacques: Yes, I did. He told me it wasn't raining under the machine and Ivas to go back and change brushes.

Hearing Officer: And vhat did you do?

Mr. Jacques: I notified him again of the rain rule.

Hearing Officer: And then what did you do?

Mr. Jacques: I turned and left."

The Board does not consider that claimant's rights were prejudiced in the manner in which the investigation was conducted.

The record establishes support for the charge of insubordination against the claimant. It is well settled that employes must comply with instructions of their superiors axl then complain later if they think they have been mistreated or that their Agreement rights have been violated, except where a real safety hazard is involved. There is no contention of a safety hazard being involved in our present dispute. If an employe contends that a safety hazard is involved, there must be proof by the employe of such situation.

The Board concludes that claimant's actions in this case warranted severe discipline as insubordination simply cannot be condoned. However, under the circumstances involved, and the record showing no prior discipline against the claimant, permanent dismissal appears excessive. We will award that claimant be restored to service with seniority and otherrights unimpaired , but without any compensation for tine lost while out of service.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 the discipline imposed was excessive.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1980.