

Award No. 2863

Docket No. MW-2851

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY**

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

(a) That Cecil Kelley, Machine Operator, Oklahoma Division, was improperly dismissed from the service by the Carrier on September 14, 1942; and

(b) That Cecil Kelley be reinstated with seniority unimpaired and paid for all time lost from the date of his dismissal until returned to service.

OPINION OF BOARD: In discipline cases previous awards are helpful but not generally controlling because of the disparity in the facts of each case. The general rule applicable has been stated so often it is now almost axiomatic. This Division of the Board is committed to the rule that it will not interfere with disciplinary measures unless it appears that the Carrier acted in bad faith, arbitrarily, capriciously, or upon a fundamentally wrong basis. Award 1632.

Where Carrier has meted out a penalty of dismissal, severest within its power, it is the duty of the Board to carefully study the record in order to ascertain whether Carrier acted within its discretion. This Division has in certain cases modified the discipline imposed by Carrier when it determined it was too severe, especially where there were mitigating circumstances involved. Awards 913, 1443, 36, 1033. In Award 1632 the punishment was modified on the ground that Carrier had proceeded upon fundamentally wrong basis in not giving proper weight to certain testimony.

We turn therefore to the facts in the instant case, concerning which there is not a great deal of dispute, to determine whether there is justification for interference with Carrier's judgment. Employee concedes that he refused to carry out the telegraphic and oral instructions of his immediate superior and is therefore guilty of a violation of Rule "T" of Rules and Instructions for Maintenance of Way and Structures, which, among other things, provides that employees must promptly obey instructions received from executive and general officers and heads of departments in matters pertaining to their respective branches of the service. We have here not merely an ordinary violation but one which the record indicates was deliberate, and reflected an attitude of defiance on the part of employee. We quote a part of the testimony of Track Supervisor Stephenson taken at the investigation:

"Question. When Machine Operator Kelley refused to comply with your instructions as to discing one mile at a time, what did you do in regards to this?

"Answer. I offered to let him work from one to three miles and he said, 'He would not operate with less than ten mile of restricted speed.' . . .

"Question. On Aug. 20th, did you talk to Mr. Kelley at Stuart and instruct him to disc one to three miles at a time, holding flagman a safe distance ahead and behind to avoid these serious delays to trains?

"Answer. Yes Sir.

"Question. He positively refused to take your instructions, did he?

"Answer. Yes Sir.

"Question. Mr. Stephenson you relieved Mr. Kelley because he disobeyed your instructions to restrict one mile of track while operating discing machine, did you not?

"Answer. I wired Mr. Kelley to cut his discing down, finish one mile at a time, when I arrived at Stuart at 3:30 P. M., Aug. 20th, 1942, I got a copy of the CT-97 from his east flagman at Stuart, in meantime he was coming in with disc machine, when he pulled up to tool house and stopped, I asked him if he got my wire he said yes he got and I asked him then why he didn't cut his order to restricted speed down as instructed, he advised me that he would not operate machine at less than ten mile restricted speed order, said that if he had to operate with less than ten mile I would have to get somebody else to operate it. I offered to let him work under two or three miles, he flatly refused, said it was ten mile or nothing, I told Mr. Kelley machine was tied up there."

This testimony of Supervisor Stephenson was not denied by Claimant. Employee's answer "ten mile or nothing" plainly reveals his attitude. It seems clear that employee not only refused to carry out instructions but defiantly insisted that either it had to be his way of operation or no way at all. When employee received his telegraphic instructions he could have at least contacted his superior and asked for more assistance or attempted to persuade him to change his instructions but instead he took matters into his own hands, continued to operate in violation of instructions, and determined in effect that he was running that part of the railroad and would decide for himself what was the best course to pursue.

We have read and reread the record with care in an endeavor to find one mitigating or extenuating circumstance in Claimant's favor but the only thing we can find is that it was his opinion that it was unsafe to operate in the manner suggested and he wouldn't have enough men to do it. The record indicates however that the operation could be and was safely carried on in the manner suggested in the instructions. Moreover, it was not for employee to determine the propriety of the instructions. Obviously the railroad could not long be operated without disastrous consequences if each employee were permitted to determine for himself whether it was wise or safe to obey an instruction of a superior.

It is contended that because the Carrier on the property offered to return employee without pay that he is at least entitled to that consideration now. If this was an offer of compromise it could not now be considered. Award 2283. We do not believe, however, that it was a compromise offer but rather an offer of leniency extended by Carrier. In some cases it might be proper for this Board to give consideration to the offer of leniency that was extended on the property but in our opinion this is not such a case. No doubt the offer of leniency was made in the instant case in consideration of assurances by employee that he regretted the violation and would cooperate in the future. Such assurances were not forthcoming. Instead he flatly refused to accept the leniency extended. To force Carrier now to extend this same leniency, especially upon the record of defiance by employee in this case, would, it seems to us, be an improper substitution of our judgment for that of Carrier.

We do not have here a case of an employee of many years' standing who has committed an infraction of a rule where there are mitigating circumstances involved. There is here involved a case of an employee of not quite six years of

service who has exhibited lack of willingness to comply with instructions. In such a situation we should not interfere with the discretion lodged with the Carrier. We wish to make it clear that this case is not intended as a precedent in any other case unless similar facts are shown.

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 employees involved in this dispute are respectively carrier and employees 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 record disclosed a reasonable basis for dismissal.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1945.