

Award No. 11276

Docket No. SG-12894

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Pennsylvania Railroad Company that:

The discipline of dismissal from the service assessed J. W. Sutton, Helper T. & S., Seniority District No. 6, by the Carrier following an investigation held on Wednesday, May 10, 1960, on an alleged insubordination charge was entirely too severe and therefore the Committee requests that Mr. Sutton should now be restored to service of the Carrier.

[Carrier's File: System Docket 176—Chesapeake Region Case 175]

OPINION OF BOARD: Mr. J. W. Sutton, whose seniority date as a Signalman Helper is July 30, 1929, was "dismissed in all capacities" on June 7, 1960. The grounds:

"Direct insubordination in failing to secure trousers in compliance with Safety Rule 3006 when so instructed by Assistant Supervisor C. & S., on Wednesday, May 4, 1960."

Rule 3006 provides:

"Wearing overalls or trousers with bottom of legs dragging or not secured to prevent catching is prohibited."

On May 4, 1960, Sutton was assigned to work in the Carrier's Railroad shop in Pennsylvania Station, Baltimore, Maryland. According to W. L. Hamilton, Assistant Supervisor C. & S., at about 9:00 A. M. Sutton did not have his trousers secured, whereupon Hamilton "directed" him to "go to the office and secure his trousers and keep them secured during working hours, in compliance with Safety Rules." Hamilton added that the Carrier "would not tolerate any further trouble" with Sutton with respect to having his trousers secured. Inspector Roy Cowan, who was with Hamilton at the time (and who places the incident as "between 9:00 A. M. and 10:00 A. M.") recalls that Sutton

told Hamilton 'he thought he was making an issue out of him'. There was further conversation which Cowan could not hear because of the noise.

Sutton believes this conversation occurred between 10:00 A. M. and 10:30 A. M., and recalls Hamilton saying he was making a "special case" of the employe and that Sutton would have to secure his pants "at 7:30 in the morning . . . 7:30 A. M. to 4:00 P. M." He did not refuse the order, Sutton says, but replied "Yes sir". (Hamilton recalls this reply which, he says, followed his own statement: "John, I don't want an argument. If you are going to work here, you are going to secure your trousers. Do you understand that now?". Sutton then turned and walked in the direction of the office, according to Hamilton.)

At about 9:45 A. M., T. & T. Inspector R. W. Rabuck testified, he received a phone call from Hamilton asking him to check to see if Sutton's trouser bottoms had been secured. Rabuck then went to the Shop where he observed Sutton's unsecured trouser bottoms. He asked Sutton if the employe realized the seriousness of his failure to act, and noted that it could mean possible dismissal. Since he noted a "discrepancy" between their interpretations of Rule 3006, Rabuck invited Sutton to his office where the rule was read and discussed. Sutton returned to work, whereupon Rabuck called Hamilton to advise him that Sutton's trouser bottoms had not been secured. A short while later Hamilton, accompanied by Rabuck, approached Sutton in the Shop (trouser bottoms still unsecured) and said (according to Rabuck): "John, your trouser bottoms are not secured, as per my instructions, and you are immediately dismissed. Here is the letter of dismissal, and time of trial. You had better read it over." It was then 10:15 A. M., Rabuck says. (Hamilton verifies the time and states that Sutton was working when the two supervisors conversed with him.)

Sutton has a different recollection of the sequence and time of events. He states (1) He talked with Rabuck (in the Inspector's office) before, not after, receiving instructions from Hamilton; (2) Hamilton first approached him between 10 and 10:30 A. M.; (3) Only 15 to 20 minutes elapsed between the time of Hamilton's order and delivery of the written notice; (4) He was on his lunch period (which extends from 10:30 to 11:00 A. M.) when the notice was delivered to him.

Sutton also declares that (1) he did not refuse to secure his trouser bottoms, (2) he intended to do this when he returned from lunch, (3) he was busy cleaning a rectifier in the interim period.

Sutton appealed his dismissal on June 9, 1960. The appeal was denied, as were subsequent appeals submitted by the Organization. Ultimately the matter was submitted to this Board.

POSITIONS OF THE PARTIES: The Carrier argues, in effect, as follows:

1. Sutton's conduct, in ignoring his superior's order to secure his trouser bottoms, constituted willful and premeditated insubordination. Therefore, any consideration given to his claim must be on the basis of a plea for leniency.

2. Sutton's conduct did not warrant leniency. He showed no remorse at his trial and, moreover, attempted to justify his actions by making un-

substantiated assertion regarding the events of May 4 and unsupported charges of discrimination.

3. Sutton's past conduct demonstrates his attitude and supports the Carrier's decision to impose the severe penalty of discharge.

4. The remission of an appropriate penalty on leniency is solely a matter of managerial discretion which this Board has no authority to exercise (Awards 6085, 8479 and 8675).

The Organization, on the other hand, contends in essence:

1. Dismissal from service was entirely too severe a penalty for this alleged violation of a safety rule.

2. The Carrier's action was arbitrary, unreasonable and discriminatory. A "special case" was made on Sutton by Assistant Supervisor Hamilton's own admission.

3. Strick compliance with Rule 3006 would not have enhanced the orderly and efficient operation of Carrier's business. Moreover, there was a discrepancy in the orders requiring men to secure their trouser legs. (The Supervisor C. & S. had given orders that men should have their pants legs secured in working on or about the track, thus leading Sutton to conclude that Rule 3006 did not apply at other times. On May 4, Sutton did not work on or near the tracks.)

4. Carrier did not enforce Rule 3006 uniformly as evidenced by the fact that none of the other men concerned in the May 4 events had secured their own trouser bottoms, including Assistant Supervisor Hamilton, and Inspectors Cowan and Rabuck.

Discussion

Sutton's dismissal, it should be noted at the outset, was for "direct insubordination", not for violation of a Safety Rule. Our primary concern, therefore, must be with the circumstances surrounding the alleged insubordination and the employee's prior record of insubordination or related infractions.

The term "direct insubordination" is not defined in the record and we cannot be sure of its precise meaning. The word "direct" carries the connotation of immediate action or outright defiance. Yet the evidence shows that Sutton did not verbally refuse to tie up his trousers when requested to by Hamilton. In fact, he agreed to do so, despite the fact that the Assistant Supervisor cut him short when he started to discuss the matter (apparently to question whether Rule 3006 applied equally in the Shop and on the track).

What, then, was the insubordination? Clearly, it consisted of Sutton's failure to comply with Hamilton's directive between the time that directive was issued and the time Sutton was ordered out of service. (At the investigation Hamilton stated: "Mr. Sutton's words were not insubordinate in any way.

It was his actions in not securing his trousers after being instructed to do so that constituted insubordination.") Although the employe estimates this to have been a period of only 15 or 20 minutes, testimony of Messrs. Hamilton, Rabuck and Cowan indicate that it was more. Hamilton sets the time of the first conversation at 9:00 A. M., Rabuck at 9:10 A. M., Cowan at "between 9:00 A. M. and 10:00 A. M." Both Hamilton and Rabuck fix the final conversation at 10:15 A. M. The insubordination, then, lasted about 65 or 75 minutes.

What, precisely, was the command which Sutton failed to obey? At the investigation Sutton stated "it wasn't a direct order . . . He told me he was making a special case of me, and that I would have to secure my pants at 7:30 in the morning . . ." Inspector Cowan, when asked to recall the exact words of the order as carefully as possible, said: "Mr. Hamilton told Mr. Sutton to secure his pants legs at all times while working for the Pennsylvania Railroad." Rabuck was not present. Hamilton said he told Sutton to "go to the office and secure his trousers . . ."

The dismissal of an employe with more than thirty years' service based on this set of circumstances, in our estimation, is quite unreasonable and constitutes an arbitrary exercise of Management's discretion and authority. While Carrier cites awards which point up this Board's policy against applying a "leniency" concept to modify an appropriate remedy, one of these (Award 6085) succinctly emphasizes the distinction which must sometimes be drawn between "leniency" and correction of excessive penalties:

"There is a vast difference between the correction of an excessive penalty and reinstatement on a leniency basis. We can correct an excessive penalty because the imposition of such a penalty is a violation of those provisions of the Agreement which are adopted to protect employes from arbitrary, capricious or discriminatory discipline by the Carrier. Reinstatement on a leniency basis is a discretionary remission of an appropriate penalty. We do not remit penalties on a leniency basis because we have no power or right to exercise managerial discretion."

In the case at hand, while in no way condoning Sutton's failure to promptly comply with Hamilton's instructions (any question regarding the meaning or application of Rule 3006 certainly could have been taken up later), it must be found that the discharge penalty was excessive in light of these facts and circumstances: (1) there was no outright refusal to comply with the rule or with Hamilton's instructions; (2) there is some question whether the supervisor ordered Sutton to tie up his trousers at once—that very minute; (3) while the employe did not comply with his superior's instructions for 65 or 75 minutes, there appears to be some indication that he intended taking the necessary action at the end of his lunch period (which was due to start 15 minutes later); (4) there is no evidence that immediate compliance was necessary to avoid existing hazards in the Shop or that Sutton and fellow employes were endangered by a delay.

Of course, frequent or recurrent insubordination, even on relatively trivial matters, can be a source of aggravation and may require appropriate disci-

pline. An employee's past record, therefore, should be considered when assessing penalties. In its Ex Parte Submission the Carrier cites three recent incidents (two on May 3, one on April 26, 1960) when Sutton was discovered working with his trouser bottoms unsecured. However, although these incidents must have been fresh in the minds of those concerned in the May 4 incident, they were not mentioned at the May 10 investigation, nor were they brought forward during any of the discussion on the property preceding submission of the case to this Board. Since the Organization had no opportunity to investigate these incidents and weigh their significance (and, incidentally, there is no evidence that Sutton was apprised of the fact that CT 990 Accident Prevention Observation Forms had been prepared) they cannot properly be considered by this Board.

What, then, of Sutton's disciplinary record as set forth in the transcript of the May 10 investigation? This shows that, during the period 1929-1960, Sutton was disciplined on eight occasions. In 1937 he received a reprimand and a one-day suspension for being absent or off duty without permission. In 1946, he received a six-day suspension for being absent without permission and three days for failure to carry out instructions. In 1947, he was dismissed for being off duty and leaving part of an assignment without permission, but this was modified to a 30-day suspension. In 1948, he received another 30-day suspension for absenteeism and failure to perform work as directed. In 1949, he was reprimanded for not clearing the track. In 1952, he was suspended for 60 days for absenting himself from work and warned that a recurrence of this offense would lead to dismissal.

Clearly, Sutton's attendance habits leave something to be desired. Six of the eight incidents involve unapproved absences and in 1952 he was given a final warning for this type of offense. But the record does not reveal an employee who is habitually or incorrigibly insubordinate. Only one recorded incident indicates failure to carry out instructions—which may or may not constitute insubordination. Under the circumstances, Sutton's discipline record cannot serve, in our judgment, to alter the conclusion that his dismissal for being insubordinate on May 4, 1960, represented imposition of an arbitrary and excessive penalty.

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 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 dismissal of J. W. Sutton from service constituted an arbitrary and excessive penalty and an abuse of Management's discretion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1963.