

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21760
Docket Number MW-21864

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Chesapeake and Ohio Railway Company

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

(1) The dismissal of Machine Operator Duane Lehner was excessive and grossly disproportionate to the charges on which he was tried - the first offense within his employment history with this Carrier (System File 142 G/16; B/I ... MG-1466).

(2) The claimant shall be restored to service with seniority, vacation and all other rights unimpaired.

OPINION OF BOARD: Careful review of the record indicates that claimant does not dispute his insubordinate act. He was afforded a reasonable opportunity to conduct an intelligent defense during the investigative hearing and his due process rights were scrupulously observed.

Evidence presented clearly establishes that it is an industry practice for employes to follow instructions by all foremen, irrespective of a fairly continual superior-subordinate relationship, if the exigencies of the moment require it.

In the instant case, claimant states that he was ordered to snap on anchors by hand by another foreman and asserts that he had worked all day unloading rail and throwing out tie plates. While acknowledging his refusal to obey this instruction, he avers that it was a spontaneous and momentary act.

The nature of the railroad industry demands unquestioned obedience to supervisory orders. Insubordination, of necessity, cannot be countenanced. Third Division awards are explicitly supportive of this requirement. Moreover, since this Board serves as an appellate body, it cannot substitute its judgment for that of the Carrier, unless it can be shown that the assessment of discipline was grossly unjust, arbitrary and capricious. Third Division Award 10790, quoted in part, is pertinent thereto:

"This Board frequently has distinguished between a plea for leniency which addresses itself to the carrier and the correction of an excessive penalty which is a proper function of the Board."

The dismissal investigation substantiates the charge of insubordination. In fact, claimant does not challenge this conclusion. The question before the Board is the severity of the penalty. Examination of First, Second and Third Division awards reveals the remediative thrust of National Railroad Adjustment Board disciplinary decisions. It has become an operative principle that a reasonable attempt should be made to rehabilitate problematic employees. This Division unmistakably articulated this review in Award 19037 when it stated, in part, that:

"The purpose of administering discipline to employees for infraction of rules is not to inflict punishment but rather to rehabilitate, correct and guide in the proper performance of their assigned duties."

This Board has long recognized perceptible degrees of insubordination. It has dealt firmly with employee infractions that are detrimental to the safety and welfare of the industry. It has dealt understandably with employee infractions that are amenable to promising remediation.

Claimant was not abusive, under the influence of alcohol or narcotics, or dishonest. There was no vitriolic exchange of expletives. The record shows that he was a loyal and fairly competent employee. He had no prior disciplinary record. He had worked all day in inclement weather and was contrite about his behavior. The record does not show that his refusal to follow the foreman's instructions posited a clear, immediate and compelling danger to the Carrier. A presumption of imminent harm, on the other hand, cannot of course be lightly dismissed. However, this Board has long held that the ultimate penalty of dismissal is reserved for repeated and serious infractions of work or conduct rules. It has ruled that discipline must be reasonable.

Based on the entire record, the Board finds that the claimant's dismissal was excessive. It is ordered that claimant be reinstated to his position without loss of status or seniority, but without back pay.

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 the discipline was excessive.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1977.