



Award No. 5852

Docket No. 5723

2-C&O-CM- '70

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Arthur Stark when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, AFL — CIO
(Carmen)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That carman, Richard H. Chapman's service rights and rules of the controlling agreement were violated when he was dismissed from service as result of investigation held in Car Superintendent's office at Columbus, Ohio, November 16, 1967, the charges were not true and the discipline administered was unreasonable.
2. Accordingly Chapman is entitled to be restored to service with seniority rights unimpaired, compensated for all time lost and all benefits accrued had he not been dismissed from service.

EMPLOYEES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Company hereinafter referred to as the carrier, owns and operates a large facility at Columbus, Ohio known as the Parsons Terminal, consisting of shop track, diesel house and transportation yards, where cars are switched, repaired, classified and cars are interchanged from other roads to the C&O lines, 24 hours a day, 7 days each week, where a large number of carmen and carmen-helpers are employed and hold seniority under rule 31 of the shop crafts agreement.

Carman Richard H. Chapman, hereinafter referred to as the claimant was regularly assigned at the shop track, second shift, 3:30 P.M. to 12:00 Midnight, work week Monday through Friday, rest days Saturday and Sunday. Claimant was charged with insubordination when failing to carry out instructions given him by his supervisor and being under the influence of intoxicants during claimant's tour of duty on Friday evening, November 10, 1967.

Claimant was dismissed from service as result of investigation held in car superintendents office at Columbus, Ohio, November 16, 1967. This dispute has been handled on the property with all officers designated to handle such disputes, including carrier's highest designated officer, all of whom have declined to make a satisfactory adjustment. The agreement effective July 1, 1921 (Reprint July 1, 1950) as subsequently amended is controlling.

In the statement of Foreman Orcutt it is noted that it is stated that Chapman's speech was slurred, and his eyes were red. Chapman was absent from the scene for quite some time and when he did return, he endeavored to instruct the supervisor to get out of the way, that he (Chapman) was going to take over and handle the wreck. It is also brought out that Chapman climbed on the crane and tried to interfere with the operation thereof. When asked by Orcutt if he was refusing to work, Chapman stated, "Yes, I am." Orcutt's statement clearly shows Chapman's insubordination and Orcutt clearly stated that in his opinion, Chapman had been drinking.

In R. D. Conkle's statement it is noted that Conkle states that Chapman was unstable, that he stepped on top of the rails, rather than stepping over the rail, which is an indication of Chapman's condition since stepping on top of a rail is a very unsafe practice and is not practiced by railroaders in control of their faculties. Conkle's statement further shows that Chapman made effort to persuade others not to work.

In Chapman's statement, it will be observed that after going for the gloves, Chapman, notwithstanding the fact that he was supposed to be clearing a derailment on the yard to restore operations, took considerable time supposedly in assisting someone in starting a stalled automobile. Chapman acknowledged in his statement that he refused to work. When asked if he had been drinking any intoxicants, Chapman replied that the only thing he had been taking is cough syrup and further stated that he had not any ill effects from taking such cough medicine.

Chapman called as a witness in his behalf Yard Conductor J. M. Harrison. Harrison's statement shows that Chapman attempted to give a signal to the crane operator. This was not Chapman's duty or responsibility and supports the earlier testimony given with respect to Chapman attempting to take over the operation. There is nothing contained in Harrison's statement which would in any way disprove or refute any of the previous information developed bearing on the charges.

The investigation clearly shows Chapman guilty of each of the charges. Review of Chapman's record indicates that he was first employed on December 15, 1950, and that he had been previously disciplined on two separate occasions. Once for loafing and sleeping on the job, the other for leaving the job without permission. There is nothing in Chapman's record or the knowledge of the local officers under whom he worked which would contribute to any extenuating circumstances or justify any special consideration or leniency in Chapman's case.

The employees have advanced no argument or information which would justify disturbing in any way the discipline which has been rendered in this case and the carrier urges that the claim of the employees be denied in its entirety.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant Richard H. Chapman is a Carman. He was employed by Carrier in 1950. He was suspended twice during 1954, once for loafing and sleeping on the job, once for leaving job without permission. Some years later (the record is imprecise on the exact date) Claimant suffered an on-the-job back injury. Since then he has worn a back brace.

On the evening of November 10, 1967, Chapman was assigned to assist in the retracking of two derailed cars at the west end of Parsons Yard, Columbus, Ohio. On November 13 he was charged with "insubordination when failing to carry out instructions . . . and being under the influence of intoxicants during your tour of duty on Friday evening, November 10, 1967." A hearing was conducted on November 16 and, on November 24, Claimant was found guilty of both charges and dismissed.

Testimony at the November 16, 1967 hearing was given by Car Superintendent T. H. Conkle, Relief Tool Car Foreman W. G. Orcutt, Relief Foreman R. D. Conkle, General Car Foreman Wayne Lowe, Yard Conductor John M. Harrison, and Claimant Chapman. This testimony may be summarized as follows:

Foreman Orcutt: At about 9 P.M. he received instructions from Superintendent Conkle to call two men to assist Foreman Conkle with a derailment. He could find no-one, and went to look at the wreck scene. He and Superintendent Conkle agreed to use the RC6 and its crew. He returned to the office where he observed Carman Chapman talking on the phone. He instructed Chapman to change into work clothes and then alert the other two members of the RC6 crew. Chapman continued his phone conversation. Chapman's speech was slurred and his eyes were red. He (Orcutt) changed clothes, told Chapman he better get moving since Conkle was waiting, and went to the shop where he instructed two men to put on their work clothes. At about 9:45 P.M., as the three men were ready to leave, they were joined by Chapman. As they approached the RC6, Chapman said he had to get some gloves. Orcutt did not see him again until about 10:45 P.M. when he (Orcutt) arrived at the wreck scene. On the way to the wreck Orcutt had instructed Crane Operator M. Prater not to take orders from anyone else.

When the RC6 arrived, Chapman ran out to the middle of the track with his arms in the air; he told Orcutt to get out of the way since he was going to take over and handle the wreck. Orcutt replied that he would handle the movements of the RC6 himself as far as the wrecking end was concerned. A few minutes later Chapman climbed on the crane and tried to interfere with its operation by trying to convince the crane operator he wasn't under blue flag protection.

Some time later Superintendent Conkle asked why Chapman (who was standing at the side) wasn't working, had he refused? Orcutt said no, but he would go find out why. Orcutt then told Chapman that he was heading for serious trouble if he didn't start to work. Chapman replied that he wasn't working without blue flags. Orcutt: Are you refusing to work? Chapman: Yes, I am. Orcutt informed Conkle of this conversation, following which Conkle talked directly with Chapman.

R. D. Conkle: He observed Chapman approach the wreck scene at about 10 P.M. Chapman asked two or three times whether the track was flagged to work on. Conkle gave no direct answer since he was busy supervising his own crew. However he noticed that Chapman's condition was "rather unstable". He observed Claimant step on top of the rails when crossing the tracks and, when alighting from the crane, fall to the ground.

T. H. Conkle: When Orcutt informed him that Chapman had objected to working without blue flag protection, he informed Orcutt they were protected and a blue flag was not necessary. Orcutt concurred and said he had told that to Chapman. He (Conkle) then asked Chapman to help with the work, stating that they were fully protected and in this case did not need a blue flag. Chapman replied, "You know better than that". Observing that Chapman's speech seemed slurred, his eyes were slightly blood shot, the odor of strong liquor on his breath, Conkle said, "you have been drinking". Chapman made no direct response. Conkle: "Then you refuse to work?" Chapman: "Yes." Conkle: "As of now, 11 P.M., you are through."

J. M. Harrison: At the scene of the wreck he and Chapman talked for three or four minutes about pulling the crane back to the derailment or just letting the crane go back under its own power. Chapman walked over to the crane, talked to the operator, and stepped backwards to give a signal. Harrison told him to wait, that he would cut his engine away and back up to No. 3 rail. This was done and the crane rerailed the cars. Harrison left. During his conversation with Chapman they were about one foot apart. Claimant did not appear to be under the influence of liquor. He (Chapman) always speaks with a speech defect and a slur. The night in question was miserable; it was raining and slippery.

Claimant Chapman: When Orcutt first mentioned a derailment in the office he asked whether any blue flags were up and was told they were not. On their way to RC6 he realized he had forgotten his gloves. After picking them up he was asked by W. Borders to shove that employee's car which wouldn't start. This delayed him. When he looked for the crane it was gone, so he drove to the wreck scene. He observed two cars derailed, but a line of cars was moving past on the south side. He and Yard Conductor Harrison stopped to talk a few minutes. The crane had not yet arrived. When it did, he began giving signals to the crane operator. Orcutt came up; he got off and stood to one side. About ten minutes later Orcutt came over and said that Conkle had directed him to find out whether he (Chapman) was going to work. Chapman asked if there were blue flags up. Receiving a negative answer, he refused to work. In a few minutes Conkle came over and asked if he was going to work. He replied he was not, that his back ached and he'd rather not go to work without a blue flag up. Conkle replied, "You're drunk. You're fired as of 11 P.M."

Claimant denied drinking any intoxicants except cough syrup that night. His right eye has been blood shot since age thirteen. He had never been assigned to work on a derailment before and he believed the tracks were supposed to be blue flagged since "in all procedures, when you were working on a live track, you were supposed to have blue fags on each end." Asked why he had questioned the judgment of supervision with respect to safety precautions, he replied, "While I was standing there that night, I seen an engine coming up and with its bright lights on and in no way, shape or form did it know that there was a wreck down there".

The record does not provide conclusive proof that Claimant was under alcoholic influence on the night of November 10, in our judgment. Two of the major indications which prompted supervisory personnel to draw that conclusion were Chapman's bloodshot eyes and slurred speech. Yet there is unrefuted evidence that these were permanent characteristics of the Claimant. (Note also in this regard the testimony of Orcutt that he observed Chapman's speech to be slurred and his eyes red in the Office. Despite this, the Foreman had no hesitancy in assigning Chapman to work on the wrecked

cars.) A third indication of alleged intoxication was Claimant's instability, as evidenced by his falling when climbing down from the crane. But the record reveals that this was a rainy, slippery, miserable night. Claimant was somewhat handicapped by a back brace. To slip or fall under these circumstances one need not necessarily be "under the influence." The fact that Claimant stepped on, rather than over some rails is not conclusive one way or the other. True, Superintendent Conkle smelled alcohol on Chapman's breath. But no-one else did and that, either by itself or in conjunction with the other alleged indicia, is insufficient to prove the charge of intoxication on the job.

There is no doubt, on the other hand, that Claimant refused to work at the wreck. He admits as much. Insubordination, of course, is a very serious offense for which the penalty is frequently discharge. Each case, however, must be judged on its own facts. In the present case, these facts stand out: (1) Claimant was obviously concerned about safety precautions, possibly because of a prior injury; (2) He had been well schooled in the rules about blue flag protection of live track; (3) He had observed a moving engine on one of the tracks involved; (4) He had never been assigned to wreck work before and consequently was unaware of the precautions normally taken in such circumstances; (5) Despite Claimant's openly expressed concern about safety, neither Foreman Orcutt, Foreman Conkle, nor Superintendent Conkle made any effort to relieve his anxiety by explaining what precautions had been taken. All the supervisors, in fact, were well aware that the men were protected at one end by the switch tender, who was in charge of allowing trains to pass on orders from the Yardmaster in the high tower, and at the other end of the block signal.

It may be that, with all the commotion associated with a night wreck, bad weather, and the like, the supervisors were too busy to give much heed to one employe's problem. Moreover, they probably assumed that he was as familiar with track protection during wreck work as the other employes (none of whom had raised an issue). Nevertheless, there was a lack of communication for which the supervisors were at least partially responsible.

Claimant, however, was certainly not without fault. When assured that protection had been supplied, and unaware of what it was, he could have made further inquiries, particularly since other employes were working without protest. His failure to pursue the matter demonstrated an unfortunate attitude which warranted discipline.

It is our conclusion, in sum, that there were extenuating circumstances surrounding Claimant's refusal to work on what appeared to be an unprotected track. His discharge, consequently, constituted an unreasonable exercise of Management's discretion. Claimant, who was not without fault, should be reinstated without back pay.

A W A R D

1. Claim one sustained.
2. Claim two sustained in part. Claimant R. H. Chapman is to be restored to service with seniority rights unimpaired. His claim for compensation for time lost, however, is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February, 1970.