

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Denver and Rio Grande Western Railroad Company

Dispute: Claim of Employee:

1. Under the current controlling Agreement, Mr. Vernell Mitchell, Laborer, Denver, Colorado, was unjustly dealt with when dismissed from service of the Denver and Rio Grande Western Railroad Company, effective November 9, 1979.
2. That accordingly, the Denver and Rio Grande Western Railroad Company be ordered to reinstate Mr. Vernell Mitchell to service with full seniority rights, payment for all time lost at the pro rata rate and any reference to this incident stricken from his personal file.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

On October 26, 1979, Claimant, a Mechanical Laborer at Carrier's Denver, Colorado Diesel Shops with approximately fifteen (15) months seniority, was assigned to work on the 3:30 p.m. to midnight shift. According to Claimant's Supervisor, Diesel Maintenance Supervisor M. A. Candelaria, at approximately 3:30 p.m. Claimant was assigned to perform laborer's duties and was specifically assigned "(T)o clean up the Back Shop area where the pits are ..." the "... south area of the middle of the Back Shop ..." Claimant maintains that Supervisor Candelaria merely assigned him "... to do (his) usual job ... of picking up paper, emptying trash, sweeping floors ... (in) ... the south end of the shop."

At various times throughout the early part of the shift, Supervisor Candelaria allegedly observed Claimant "... about five times standing around, not doing anything" and at approximately 5:45 p.m. Supervisor Candelaria approached Claimant in the Back Shop lunch room and "... asked him if he (Claimant) was going to start his work". Claimant allegedly responded "... that he had all night to start ... (and that) ... he would start when he got good and ready". At that point Supervisor Candelaria informed Claimant that if he (Claimant) was not going to start working then he (Candelaria) was going to "pull him out of

service". Supervisor Candelaria then walked to the Diesel Shop office for the purpose of securing another supervisor to witness Claimant's refusal of Mr. Candelaria's direct order. According to Mr. Candelaria, Claimant followed him up the steps to the Diesel Shop office and made the statement to Mr. Candelaria that if he (Candelaria) "... didn't like the way he (Claimant) was doing it (carrying out his work assignment), then we can step outside".

Supervisor Candelaria allegedly ignored Claimant's invitation, entered the Diesel Shop Office and asked Diesel Relief Supervisor F. Marzano to come with him to serve as a witness to Claimant's insubordinate behavior. The two supervisors walked to the Back Shop to make their observation of Claimant. When the two supervisors entered the Back Shop area at approximately 6:00 p.m. they found Claimant in the north end of the Back Shop area talking with two other employes, C. M. Haley, Machinist Helper, and A. Griego, Mechanical Laborer. As the Supervisors approached the trio the other two employes walked away and resumed their duties and Supervisor Candelaria again confronted Claimant and ordered him "to take care of the duties which had been assigned to him at 3:30 p.m.". According to the Supervisors the Claimant replied, "No, I don't have to now; I will go when I'm ready". Claimant maintains that his response to Supervisor Candelaria's inquiry was simply that he (Claimant) was performing the duties which Mr. Candelaria had assigned to him. At that point the two supervisors and the Claimant walked over to the pit area and Claimant indicated that the particular pit which Mr. Candelaria was apparently referring to had been covered by a snow plow when Claimant was previously working in the area. Claimant then asked if Mr. Candelaria wanted him to clean that particular pit "now"; to which Mr. Candelaria allegedly responded, "No, ... I already pulled you out of service, so you can go home". The time at that point was a little after 6:00 p.m.

Mr. Candelaria maintains that after he ordered Claimant to leave the property the Claimant refused to do so. Because of this alleged refusal Mr. Candelaria called one of the Carrier's Special Agents to assist in escorting Claimant from the property. The Special Agent, R. Prince arrived at Mr. Candelaria's office at approximately 6:50 p.m. and confronted the Claimant who informed Mr. Prince that he (Claimant) had called for a ride which was due to arrive at 7:30 p.m. According to Mr. Prince, Claimant then left the office, clocked out at 7:12 p.m. and left the property without further incident.

As a result of the aforesaid incident, Claimant was charged with "... alleged failure to promptly obey instructions of his supervisor, and his willfull neglect of his duties about 6:00 p.m., Friday, October 26, 1979". Pursuant to an investigation hearing which was conducted on November 5, 1979, Claimant was adjudged guilty as charged and he was terminated from Carrier's service effective November 9, 1979. Said termination is the basis of the instant claim.

Organization's basic position in the instant dispute is predicated upon procedural objections as well as upon the merits of the case itself. Procedurally, Organization maintains that Carrier's dismissal notice was untimely; that Claimant was denied due process because the Hearing Officer served in a multiplicity of roles throughout the investigation; and that Carrier's contention that "Organization materially amended the claim" must be rejected because "... this argument was not presented on the property and is improper at this time".

Turning to the merits portion of this dispute Organization contends that Carrier's dismissal of Claimant "... was an arbitrary, capricious and unjust action and an abuse of managerial discretion". In support of this position Organization asserts that: (1) on October 26, 1979, Claimant was assigned his customary duties of cleaning the south back shop area and that Claimant complied with this directive; (2) Claimant did not clean the "first pit" during the beginning of his assignment because a snow blower was parked over the pit and "... it was normal practice to clean the floors (first) and work the pits at the end of the shift"; (3) Claimant "... did not refuse to clean the pit, but merely to postpone that work until later that night (as per customary practice)"; and (4) there "... is not sufficient evidence to warrant the Claimant's removal from service or penalty of dismissal".

Carrier's position in this matter is also predicated upon both procedural and merits considerations. Regarding its procedural arguments Carrier asserts that: Organization's original claim was "materially amended to include new additional alleged violations"; and that the claim was not handled "in the usual manner" on the property as required by Section 3, First (i) of the Railway Labor Act (Second Division Awards 5312 and 5783). In counterpoint to Organization's procedural objections Carrier maintains that: a decision was rendered by the Hearing Officer within the 10 day time limit specified in Rule 11(c) of the Agreement (Third Division Award 10254); that the Notice of Dismissal was hand delivered to Claimant on November 9, 1979 when he came into the office to pick up his pay check; that "... Rule 11 does not stipulate or provide that the Local Chairman or Organization receive a copy of a decision as a result of an investigation"; that Organization's objection concerning the Hearing Officer's serving multiple roles was not raised when the claim was handled on the property (Second Division Award 8367; Third Division Awards 16678 and 18375); and such a multiplicity of roles by the Hearing Officer is not prohibited by the parties' agreement (Second Division Awards 7032 and 5849).

As to the merits of this dispute, Carrier argues that there is sufficient evidence in the record to prove that "... Claimant failed to promptly obey instructions of his supervisor and willfully neglected his duties" as charged (Second Division Awards 7956, 7973, 8223 and 8390). Additionally, Carrier also argues that "(D)ismissal is further substantiated due to the short employment tenure ... of Claimant"; and that having determined that "... there is some substantial evidence in the record to sustain a finding of guilt..." the "... Board ... in discipline cases is not to substitute our judgment for that of the Carrier or to decide the matter in accord with what we might or might not have done had it been ours in the first instance to determine" (Third Division Award 16678).

The Board has carefully read and studied the complete record in this dispute and finds that the parties' various procedural arguments are basically without any substance and, therefore, will be dismissed. Claimant was given notice of the disciplinary action which was taken against him when he picked up his pay check on November 9, 1979; the matter of the serving of multiple roles by the Hearing Officer has been resolved previously by this Board and such action is not prohibited per se by the parties' agreement; the multiplicity of roles of the Hearing Officer argument was not raised by Organization when the dispute was handled on the property; and Carrier's contention that Organization's claim was "materially amended" is not supported by the record.

Though having resolved the procedural portion of this dispute with relative dispatch, the resolution of the merits portion of the dispute appears to be a considerably more elusive matter. In this regard the Board finds that some amount of support can be attributed to various portions of each party's respective positions. While the Board cannot say with any marked degree of certainty what exactly transpired on the evening of October 26, 1979 between Claimant and Supervisor Candelaria, or what caused the incident to occur between the two men, it is reasonably clear that Claimant was "somewhat dilatory" in carrying out his assigned duties. Even if we were to give Claimant the benefit of the doubt by subscribing to Claimant's contentions that he may have misunderstood Supervisor Candelaria's order, or that the snow plow was parked over the pit during the early part of the shift, or that the cleaning of the pits was generally performed in the latter part of the assignment, the testimony of Mr. Griego (who was assigned to finish Claimant's assignment to clean the south end of the back shop after Claimant was removed from service) can only be interpreted to mean that Claimant had not properly performed even his customary assigned duties up to that point. Moreover, in the absence of any specific job descriptions or some other specified plan of work, an employee, when given a direct order by a supervisor, may not decide on his own which duties are important and which ones are not, or which duties could be delayed until the end of the shift and which ones are to be performed immediately. If Supervisor Candelaria ordered Claimant "to clean the pits", then Claimant should have immediately attended to that particular assignment. The fact that Claimant may have previously performed that particular duty at the end of his shift does not excuse Claimant from carrying out Supervisor Candelaria's directive at that time -- post haste. To do otherwise surely is to invite trouble since such action suggests an insubordinate attitude on the part of such an employee (Second Division Awards 7956, 7973, 8223 and 8390). Indeed, Claimant's very own testimony indicates that he had been previously assigned duties out of sequence and that he had performed these duties. Under the circumstances, the same type of situation was operative on the evening of October 26, 1979, and the Claimant was similarly obligated as he had been previously.

In view of the aforestated determination it would appear that Claimant's dismissal would be upheld by the Board. Such is not the case, however, because there are several factors which are present in the case which indicate the propriety of a reduction in the penalty which has been imposed. In the first instance, although Carrier has sought to characterize Claimant's actions on the evening of October 26, 1979, seemingly in as negative a manner as possible, said actions were not marked by any proven degree of hostility, abuse or intemperance on Claimant's part. There is no proof that Claimant challenged Supervisor Candelaria "... to settle the matter outside"; none of the witnesses observed Claimant to be offensive in his demeanor toward Supervisor Candelaria at any time; nor did Claimant specifically refuse to perform the disputed job assignment. In addition, Claimant's explanation of his reason for remaining at the job site for a short period of time after having been removed from service appears to have been acceptable to Mr. Prince, the Security Guard who testified as Carrier's witness in this regard, yet Carrier has chosen to ignore Mr. Prince's testimony concerning this particular aspect of the case. In this particular instance it appears that Carrier has attempted to embellish its position in this case when no such embellishment appears to have been justified.

All in all, though unfortunate and unwarranted, it appears that the incident which occurred on the evening of October 26, 1979, was one in which all principally involved parties simply overreacted to an otherwise seemingly minor confrontation. While we cannot and will not excuse Claimant for his actions as described hereinabove, under the circumstances, we cannot justify the imposition of the discharge penalty for same. In view of the total record, it appears that such a penalty is excessive and without proper justification, and therefore, for obvious reasons, is deemed to be improper. Claimant's apparently unblemished work record (albeit for a short period of time for comparative purposes) which Carrier has summarily refused to consider in its evaluation of the proper penalty which was to have been assessed, as well as the fact that several critical elements of Carrier's case either have not been proven or have been dropped as this case as progressed, are two factors which have been considered and which are significant in this regard. Because of these determinations, therefore, the Board will direct that the Claimant will be restored to his position with Carrier with full rights and benefits restored but, because he bears primary responsibility for the development of this entire incident, no back pay will be awarded.

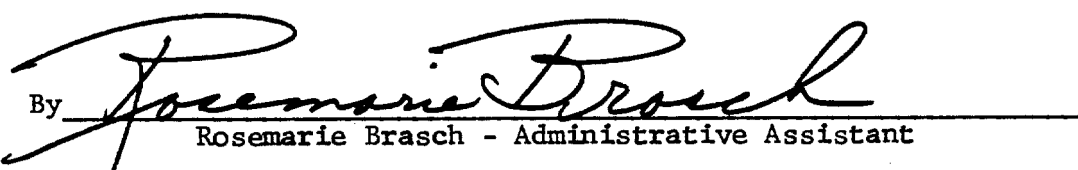
A W A R D

Claim sustained to the extent and in the manner set forth in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of March, 1983.