

Award No. 5853

Docket No. 5724

2-WT-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. 106, RAILWAY EMPLOYEES'
DEPARTMENT, AFL — CIO
(Carmen)**

THE WASHINGTON TERMINAL COMPANY

DISPUTE; CLAIM OF EMPLOYEES:

1. That under the current agreement, Car Repairman, Local Chairman, M. A. Loveless, was unjustly removed from the service on January 8, 1968 and subsequently dismissed from the service of The Washington Terminal Company effective February 13, 1968.
2. That accordingly, The Washington Terminal Company be ordered to return Car Repairman, Local Chairmen, M. A. Loveless, to the service of the Carrier with seniority and vacation rights unimpaired and compensate him for all time lost since January 8, 1968.

EMPLOYEE'S STATEMENT OF FACTS: Local Chairmen, M. A. Loveless, hereinafter referred to as the claimant, was employed as car repairman with the Washington Terminal Company, hereinafter referred to as the carrier. On January 8, 1968 the claimant was removed from the service by carrier's assistant foreman, D. Swetman. On January 10, 1968 carrier's master mechanic served notice to claimant to report to Room 220, Union Station at 10:00 A.M., Tuesday, January 16, 1968 for a hearing on the charge;

"Refusing duty by not following the instructions of Acting Foreman D. Swetman when given your work assignment at approximately 8:05 A.M., January 8, 1968."

At the request of claimant's organization, hearing was postponed until 10:00 A.M. Wednesday, January 24, 1968. Claimant's hearing took place as scheduled. On February 13, 1968 the carrier's master mechanic notified the claimant that he had been found guilty of the charge and that he was dismissed from the service. On February 15, 1968 claimant's general chairman filed appeal and claim with carrier's manager who is the highest officer of the carrier to whom such matters are subject to appeal. On April 2, 1968 carrier's manager denied the appeal and claim. On April 26, 1968 further and informal discussions were held on claimant's appeal and during this conference carrier's manager offered to reinstate the claimant to the service, but, on a leniency basis and without compensation for time lost. The claimant declined

Second Division Award 4672, CM v NP, Referee Seff, claim denied:

"The dictionary definition of insubordination is a refusal to obey orders. The Claimants did refuse to obey orders and by so behaving they were resorting to self help. If employees may refuse to obey orders with impunity such a course of action would be destructive of discipline. A railroad cannot be run efficiently if its employees can refuse to obey orders given them by their superiors."

Special Board of Adjustment 394, Award No. 21, E v NYNH&H (Bailer):

"... compliance with the Carrier's instructions cannot be conditioned upon each employee's understanding of the rules governing his employment. If claimant felt he was being improperly used, his proper recourse was to utilize the contractually provided grievances procedure. None of the exceptions to prompt compliance (undue hazard, etc.) existed in the subject case."

The carrier submits that the petitioning organization failed to show why the claimant could properly defy his foreman's order in preference to progressing a grievance.

The claim is completely without basis and should be denied.

2. All Time Lost by the Claimant After April 29, 1968, is Due to Claimant's Own Volition.

In addition to the foregoing, regardless of any question about the propriety of claimant's dismissal, evidence submitted of record shows that this claimant spurned the carrier offer to return him to service April 29, 1968. (This offer was made without prejudice to any right of the claimant to challenge the propriety of carrier's action and to submit to the Board or elsewhere a claim for time lost to date.)

The circumstances under which this leniency reinstatement offer was made were that shortly prior to April 26, 1968, the petitioning organization's Vice President, I. L. Barney, requested a personal meeting with carrier's Manager for the purpose of trying to "get Loveless back to work." Management granted the request for the meeting believing that a leniency reinstatement request was what was going to be presented. In consideration of a variety of matters, but specifically excluding any admission of weakness as to its position in this case, the carrier made the offer of a leniency reinstatement. This offer the claimant spurned, preferring to take his chances that the Second Division would order the carrier to pay, month after month, for what claimant continued to refuse to do. Claimant's build-up of his back pay claim cannot conscionably be justified; it must be denied. (First Division Awards 20508 (Abernethy), 19880 (Daugherty); 18488 (McMahon), 16127 (D. R. Douglass), 15905 (L. Smith), 14447 (Connell), 14078 (Gallagher) and 13206 (Donaldson); Third Division Awards 14443 (Dolnick), 14225 (Wolf); Fourth Division Award 1123 (W. R. Johnson) and the awards therein cited.

The claim is without merit; it should 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 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.

In January 1968 Claimant M. A. Loveless, who had been employed for twenty years, worked as a car repairman and also served as the Carmen's Local Chairman. His regular assignment, on the 8 to 4 shift, was to a "Field and Platform" job at the Car Shop. Following a dispute concerning a specific assignment on the morning of January 8, 1968, Loveless was taken out of service and subsequently charged with "refusing duty by not following the instructions of Acting Foreman D. Swetnam." A hearing was held on January 24, following which, on February 13, 1968, Loveless was dismissed.

During an April 26, 1968 conference regarding Loveless' claim (submitted on February 15) Carrier offered to restore Loveless to service effective April 29, with seniority and vacation rights unimpaired, but without back pay. This offer was renewed, in writing, on May 1 when Carrier made clear that its offer was "without prejudice to the carrier's position in the case, and also without prejudice to any right of Loveless and/or your organization to progress to further authority an appeal challenging the propriety of the original dismissal and asking for pay for time lost . . ."

* * *

At the inquiry, Assistant Foreman Douglas Swetnam testified with respect to the events of January 8, 1968 substantially as follows: He served as Acting Foreman that day. Loveless held bulletined Platform or Field position No. 24. Three men (Morris, Stephens and Randolph) who customarily were assigned to work three sets of jacks were not at work because of ten-day disciplinary suspensions which commenced that morning. Their jobs had not been bulletined. Instead, he assigned Loveless, J. P. DeCarlo, John DeCarlo and P. Zelina to work the jacks. This was one more assignment than usual for the start of a shift.

At 8:05 or 8:06 A.M. he told Assistant Foreman T. J. Buckler that he (Buckler) could use Loveless on the third set of open jacks. When he gave Loveless the assignment he threw down his timecard and said, that the men assigned were suspended and as far as he was concerned the jacks would remain idle; he was refusing duty since he was not going to work those jacks. He (Swetnam) said: "We will work the jacks." Loveless again refused. Swetnam: "As far as I'm concerned you are out of service." Loveless replied that Swetnam could not take him out of service. He (Swetnam) responded that if Loveless didn't work that set of jacks that day he would charge him with refusing duty. He then left.

During their brief conversation Swetnam did not recognize Loveless in his capacity as Local Chairman. Afterwards Loveless came to his office and requested a meeting. Swetnam refused to meet with him because he was out of service. Loveless said that Swetnam was the only Company representative present. He also requested permission to be off the following day.

Assistant Foreman Buckler testified that he assigned Loveless to the jacks at about 8:05 A.M., after Swetnam told him (Buckler) that the employe was a field and platform man. Loveless replied that the jacks were out of

service for ten days. He then asked if the employe was refusing duty. Loveless replied affirmatively, handed Buckler his time card, and walked out. He had selected Loveless for the assignment because he thought the employe was a Vacation Relief man. He was not aware that Loveless held a regular position. He worked at the car shop on Mondays only.

Claimant Loveless testified, in substance, as follows:

1. He had obtained Platform and Field position No. 24 two weeks earlier through bulletin procedures. The job did not include working the jacks.

2. Management had at least four weeks' notice that the jack crew would be out (on disciplinary suspension) commencing January 8. No effort had been made to readvertise the positions or fill them, in advance, with vacation relief men, although those were the normal procedures used to fill vacancies.

3. There were six or seven men junior to him present on January 8.

4. Supervision had first picked three men to fill the three vacancies. Then he started to protest and he was picked too. Swetnam had asked him to come to the office and, when he arrived, "my first question to him after he got off the phone was a protest in behalf of the employees. But he firmly stated he didn't want to talk to me about it. I asked him if he was refusing to deal with me as a Union Representative of the employees and he said, listen Loveless, I don't have anything to say to you". It was his sole purpose to tell Swetnam the correct manner of filling jobs. The Acting Foreman didn't give him a chance. "You go to work or out of service." Buckler repeated: "Out of service." He said they didn't have a right to take him out of service since he was making a protest for all the men, as was his right under Rule 33. Swetnam said, "Damn it, you protest it, you work it." He then asked to be let off the rest of the day. Later he asked to be off on January 9 so he could contact his General Chairman. All requests were denied. "He wasn't going to talk to me in any way."

Loveless stated, "I knew this was going to happen. It has always been Mr. Swetnam's method to assign me a position while I was making a protest, especially the position I was protesting. . . . He would at times say, "since you're protesting it, you work it". Loveless has standing instructions from the Organization to submit protests under Rule 14 when Foremen remove employes from their regular positions.

Car Repairman G. DiGennaro overheard some of the conversation at the time card rack. He recalls that Swetnam told Loveless to fill in one of the suspended men's jobs and that Loveless protested, stating that he wanted to talk to the Acting Foreman about taking men off their regular duties and placing them in vacant jobs. "He was speaking for the men." Swetnam refused to talk with him and walked straight to the office, after saying, "Work it or else you're refusing duty". When Loveless refused to accept his assignment he was acting in behalf of the men.

DiGennaro also recalled that Swetnam had, upon several occasions, made threats against Loveless. On one occasion the Assistant Foreman had told him, "If Loveless gives me any more trouble, I'm going to make sure that I get him, one way or the other".

Car Repairman H. Kidwiler was present during the first conversation. He testified that Loveless didn't refuse the assignment; instead, he said he would rather go home. The Local Chairman was protesting for the entire group of men, he recalled.

Additional testimony was offered by other repairmen concerning the January 8 incident and Swetnam's attitude towards Loveless. The import of this testimony was that the Assistant Foreman resented the Local Chairman's actions on behalf of his constituents.

* * *

After carefully considering all the testimony and arguments we are not convinced that there was sufficient evidence, in the record, to clearly establish Claimant's guilt. If Loveless was, indeed, insubordinate, there is much to indicate that he was provoked: In his dual role of repairman and Local Chairman he had the responsibility for taking up grievances with his immediate superiors and, if possible, having them resolved without the necessity of prolonged appeals. While there is some conflicting testimony, it seems apparent that Claimant's January 8 protest was given short shrift. He was afforded no opportunity to explain his complaint, which related directly to the jack assignments. While not necessary to decide here, there is no convincing explanation on the record of why customary procedure was departed from in assigning four rather than three men that Monday morning or why seniority was not followed. It may be that the Acting Foreman was impatient and in haste to get on with the work without bothering to discuss or try to resolve the dispute. However, Rule 33 declares that ". . . each representative shall be free to discharge his duties in an independent manner without fear that his individual relations with the Company may be affected in the least degree by any action taken by him in good faith in his representative capacity." The alacrity with which Loveless was questioned as to his refusal to work, combined with the Acting Foreman's refusal to talk about the assignment dispute, raises serious questions concerning the grievant's treatment as Local Chairman. In any event, the Acting Foreman acted precipitately in taking Loveless out of service before according him a fair opportunity to be heard. Under such circumstances, and in light of a twenty-year service record without blemish, it was manifestly unjust to conclude that he was wilfully insubordinate and deserving of discharge. Accordingly, the claim for reinstatement will be sustained.

With respect to back pay, Carrier's suggestion that no compensation is due since April 29, 1968, is sound, in our judgment. Claimant was offered his job back, effective that date, without prejudice to his claim for back pay. He chose to reject the offer. Rule 29 declares that, "if it is found that an employee has been unjustly . . . dismissed from the service, such employee shall be reinstated with his seniority unimpaired, and compensated for his net wage loss, if any, **resulting from said . . . dismissal**" (emphasis added). Clearly, Claimant's wage loss, if any, since April 29, 1968 has been due to his rejection of reinstatement rather than to his dismissal.

A W A R D

1. Claim one sustained.
2. Claim two sustained in part. Mr. M. A. Loveless shall be reinstated to Carrier's service with seniority and vacation rights unimpaired, and compensated for his net wage loss, if any, between February 13 and April 29, 1968.

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.