

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: ( System Federation No. 2, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
(  
( Alton and Southern Railway Company

Dispute: Claim of Employees:

1. That Carman Robert French was improperly suspended April 2, 1976, and subsequently dismissed from service.
2. That accordingly, the Carrier be ordered to restore Carman French to service with all seniority rights, vacation rights, sick leave benefits, and all other benefits that are a condition of employment, compensation for all time lost plus 6% annual interest and reimbursement for all losses sustained account of loss of coverage under Health and Welfare and Life Insurance Agreement while held out of service.

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.

Claimant was a Carman at Carrier's East Saint Louis, Ill., yard. On April 1, 1976, shortly after he reported for work at 11 P.M. on his third trick assignment, Claimant was removed from service pending a hearing by his Foreman on the grounds that he refused to perform certain carman duties assigned him at approximately 11:15 P.M. After the hearing Claimant was discharged.

We have carefully reviewed the record in this case and have concluded that Carrier has not established, by substantial evidence, a showing of failure to comply with instructions of Claimant's foreman. First, the record does show that prior to this night, Claimant had apparently questioned some of the instructions given him by his foreman to work certain less

desirable tracks on the basis that there were purportedly more junior carmen available to perform this work. While we again caution employees of all railroads that the rule of the industry is "obey now and grieve later," we are unable to conclude here that Claimant precipitated and then actually failed to follow his foreman's instructions. The record does show that when Claimant first came on duty, he questioned his Foreman about what work he should perform, and his foreman did not answer his question. Shortly thereafter, his foreman instructed him to walk, and work, Tracks 130 and 132, at which time Claimant asked the Foreman, as he walked out the door, to "wait a minute". Thereupon, the Foreman began to lose his temper, and in an enraged voice, shouted to the Claimant that he could "...either work the tracks or go home."

Importantly, the testimony of all the principles and witnesses to this confrontation is substantively consistent to the extent that when this occurred, the Foreman continued speaking to the Claimant in an enraged and argumentative tone about his responsibilities as a Carman and never gave the Claimant an opportunity to either obey or disobey his instructions, nor to speak in response to the Foreman. Significantly, other witnesses consistently testified that the Foreman dominated the conversation so much that Claimant did not have an opportunity to interrupt his Foreman. Within seconds after the Foreman completed his speech to Claimant, he told the Claimant he was pulling him out of service. Of further importance is that testimony of others was consistent that Claimant did not refuse to perform the work assigned, albeit true that he hesitated for a minute to question his Foreman. Testimony of Claimant, and his fellow employees was also consistent that the Foreman, who carried a loaded firearm, had lost his temper and there was some fear that his highly emotional condition might cause him to do something which would endanger Claimant's and others' lives. Based upon our review of the testimony of everyone involved, even the Foreman, we cannot conclude that such a fear was imagined. Under these circumstances, we think that Claimant acted prudently by not attempting to continue the argument with the Foreman.

Essentially, the Foreman acted harshly and irrationally on the basis that he anticipated Claimant would not carry out his instructions. But his actions prevented the anticipated act of non compliance to become a possible reality. In recent Award 7382 (Marx), we held:

"Examination of the record shows that this is not a case of insubordination, which involves, according to Webster's Third International Dictionary, 'Disobedience of orders, infractions of rules, or a generally disaffected attitude toward authority.' Caldwell's comment was made either to the foreman or to a fellow employe -- even the foreman could not say for certain. Caldwell followed orders and proceeded to the new work area as assigned. That he was found only ten minutes after the initial conversation in the new area but still not working can hardly be considered a refusal to work -- especially

"since he had not been told which specific work to undertake. At best, this is a case of anticipated insubordination. What is required, at minimum, was a direct order by the foreman at the new working area to determine whether the employe was, indeed, insubordinate. Up to this point, he had complied with orders.

With slightly different but nevertheless parallel circumstances, Referee Norris found in Award No. 20919 (Third Division):

'We do not disagree with Carrier's contention that insubordination is a serious matter often justifying the discipline of dismissal. Nor, do we take issue with the cited precedents in support of this principle. Conversely, however, it is also well established principle that the burden of proof rests upon Carrier in discipline cases. The precedents on the latter issue are legion and need hardly be cited.

On the merits, therefore, and based on the record evidence, we are not persuaded that Carrier sustained its burden of proof on the charge of insubordination. Insubordination is defined as deliberate and inexcusable failure or refusal to obey a proper order of a superior.

Obviously, mere temporary delay in compliance due to other work involvement does not constitute insubordination; nor does the fact that protest was made thereafter. This is the sum total of what was involved in this dispute.'

The only difference here is that, instead of 'temporary delay', there was a statement, perhaps or perhaps not directed at the foreman, concerning intention not to perform the work. Certainly it was not direct, unequivocal refusal, nor can it be found that Caldwell actually failed to do the work once it was assigned to him."

While the foregoing, standing alone, provides us with ample authority to set aside Carrier's discharge of Claimant, we should also caution supervision that if it wishes to make a case for insubordination, it should not give an employe the option of performing the assigned duties or to go home. Rather, it should be made clear to employes, in a civilized and firm manner, that failure to perform assigned duties could be grounds for insubordination and severe discipline and also, immediate removal from service pending a hearing.

Accordingly, we conclude that Claimant's discharge should be set aside and that he should be reinstated with seniority unimpaired and compensated for all time lost as a result of this discharge, less all wages received by him from other sources and all money benefits received under the provisions of any Federal or State law which provides for unemployment insurance. The deduction of outside earnings and other sources of income is in keeping with the findings of recent Award 7229, between these same parties, and on the basis of this authority, we likewise find no support for the claim for 6% interest and no support for the claim requesting reimbursement of insurance payments and other so-called fringe benefits that may have been lost during the period Claimant was improperly held out of service.

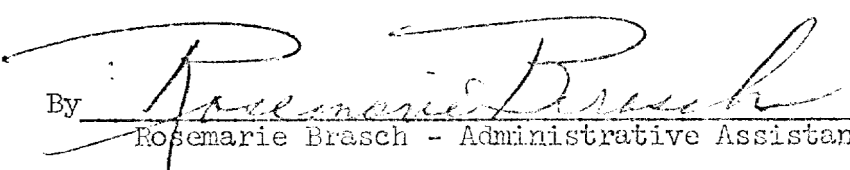
A W A R D

Claim sustained as set forth in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of June, 1978.