

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(Consolidated Rail Corporation

Dispute: Claim of Employee:

1. That Machinist J. M. Sprouse was improperly suspended from service for thirty (30) days.
2. That, accordingly, Machinist J. M. Sprouse's record be cleared and he be compensated for each and every day he was suspended.

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 J. M. Sprouse was charged with:

- (a) Insubordination, failure to comply with instructions of Supervisor by not going back to work at approximately 11:23 P.M. at Samuel Rea Wheel Shop, on August 25, 1977.
- (b) Antagonizing and assaulting a Supervisor by physically pushing him at Samuel Rea Shop, Hollidaysburg, Pennsylvania at approximately 11:23 P. M. August 25, 1977.

Claimant received a fair and extremely thorough investigative hearing, was thereafter found guilty of the charges by the Carrier, and given a thirty-day disciplinary suspension.

The role of the Board in reviewing such disciplinary matters has been discussed and determined in many previous awards, summarized recently in Award No. 7437 (McBrearty):

"Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion."

In this matter, the Board need not be concerned with conflict in testimony. Out of the lengthy hearing record, it is necessary only to refer to the testimony of the claimant's supervisor who was directly involved in the incidents leading to both charges. In pertinent part, his testimony is as follows:

". . . At approximately 9:30, I observed Mr. Sprouse talking with Mr. Simpson, his union representative. I didn't say anything to him and went back to work. Approximately fifteen minutes later I observed him with the union man again. I told J. Settlemyer, another foreman in the Wheel Shop and we went to the area that they were talking. I told Mr. Sprouse to go back to work. Mr. Sprouse told me that he was talking to his union representative. I told him he could not talk to his union representative on company time unless he had permission. I told him to go back to work again. He told me he was talking to his union representative. I told him a number of times to go back to work Mr. Sprouse went back to work.

. . .

/At approximately 11:10 P.M./ I went over to where Sprouse was working and I told him that I was going to hound him until he either bid out or went to work. Every time that I saw him goofing off, that I was going to hound him.

. . .

I turned and walked away. I stopped and Mr. Sprouse came by and he stopped, put his shoulder against mine and started glaring at me. I told him to go back to work several more times.

At this time, he told me that he couldn't go back to work that I was in his road. I told him to walk around me and go back to work.

At this time, he pushed me with his hammer in his hand. And, in an automatic reflex, I punched him." (Emphasis added)

Taking the supervisor's testimony (which is, in effect, the Carrier's case), an analysis shows the following:

1. In the first instance, the Claimant did not respond instantly to the order to return to work, but nevertheless did obey the order. It is difficult to visualize that the interchange took more than a minute. While this borders on insubordination (refusal to obey a proper order), it certainly does not constitute outright defiance of authority.

2. The supervisor's direct threat to "hound" the Claimant was a misuse of the supervisor-employee relationship and set up the atmosphere for what followed.

3. When the supervisor again directed the Claimant to return to work, the Claimant stated that the supervisor was in his way. Some credence to the validity of this is given by the supervisor's invitation to the Claimant to "walk around" him. Surely this is an unnecessary confrontation on the supervisor's part.

4. When the Claimant complied with the supervisor's order to return to work, the allegation is that the Claimant "pushed" the supervisor. There is no indication that this constituted a blow, and certainly no physical harm resulted in the Claimant's attempt to move beyond the supervisor.

5. The supervisor's response, in which he "punched" the Claimant, was of course totally unacceptable conduct.

From this the Board concludes that the Carrier's disciplinary action was unreasonable and a misreading of what occurred. Sprouse did not fail to comply with instructions; he was indeed momentarily insubordinate, but not to the extent of derogating the supervisor's authority. As to the second incident, the supervisor's own testimony would appear that he set himself up to be pushed, nudged, or otherwise brushed against as Sprouse proceeded to carry out the supervisor's order. If the supervisor had simply stepped aside, the incident would not have occurred. The supervisor's state of mind is clearly revealed in his response of assaulting Sprouse and causing him physical injury.

Had nothing further occurred beyond the first incident, a disciplinary warning to Sprouse concerning the necessity of prompt compliance with orders may have been justified. In view of what followed, however, the entire nature of the matter changed.

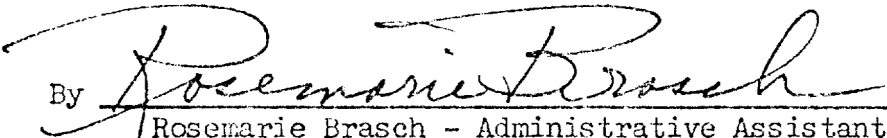
A W A R D

Claim sustained.

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 12th day of September, 1979.