

The Second Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

Parties to Dispute: { System Federation No. 114, Railway Employees'  
{ Department, A. F. of L. - C. I. O.  
{ (Carmen)  
{ Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That under the current Agreement, Carman D. A. VanDyne was unjustly deprived of his rights and compensation when he was improperly dismissed from service on March 15, 1978 after three years' service with the Carrier, as a result of investigation held on March 7, 1978.
2. That accordingly, the Southern Pacific Transportation Company be ordered to reinstate Carman D. A. VanDyne to service at Los Angeles, California in accordance with the provisions of Rule 39, and that he be made whole for all vacation rights, pension benefits including Railroad Retirement and Unemployment Insurance, and any other benefits he would have earned during the time 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.

Carman D. A. VanDyne was dismissed from service on March 15, 1979, for alleged acts of misconduct considered by carrier to be a violation of Rules 801 and 802. The pertinent parts of these rules read as follows:

"Rule 801. Employees will not be returned in the service who are ... insubordinate ... immoral."

"Rule 802. Courteous deportment is required of all employees in their dealing with ... each other ... vulgar language is forbidden."

The record shows that the claimant was in the Carpenter Shop, waiting for a carpenter to build him a stool that he could stand on while repairing a ladder on a car. The claimant's foreman observed him in the Carpenter Shop and directed

him to return to work when he finished what he was doing. The foreman testified that at this point, the claimant "gave him the finger", used obscene language, unzipped his pants, and shook his penis at him. The claimant denies these allegations.

The claimant asserts that the foreman approached him in the Carpenter Shop and twice said to him, "Get your ass back to work". The record shows that other employees were in the vicinity of the incident. They were not present at the hearings.

This case rests on the question of how one should weigh the foreman's word against that of the claimant as to what was said and done. This board, however, has stated on numerous occasions that it is not its function to decide issues of credibility. The Board, in rendering a decision, must confine itself to the facts as contained in the record.

The record before us clearly reveals that both the foreman and the claimant used improper language. To a degree, it could be argued that when the foreman said to the claimant, "Get your ass back to work", he could expect a similar statement in return. He could not expect, however, to have the claimant wave his penis at him. Both parties to this incident acted improperly. But despite the foreman's behavior, the Board cannot condone the actions of the claimant.

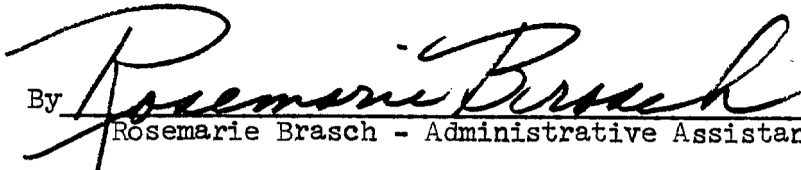
At the same time, in light of the facts of the case, we cannot uphold the claimant's dismissal from service. The claimant should be admonished for eccentric behavior and put on notice that the use of similar language in the presence of his supervisor or general disregard for company rules will surely result in his discharge in the future. The claimant should also be aware that when he returns to work, his time and attendance record should radically improve or additional charges for these infractions could legitimately be brought against him.

A W A R D

The claimant shall be reinstated to his former job with no back pay.

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 16th day of April, 1980.