

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

Parties to Dispute: (Sheet Metal Workers' International Association
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(Burlington Northern Inc.

Dispute: Claim of Employes:

- 1. That the provisions of the current agreement Rule 35(g) in particular has been violated account Sheet Metal Worker D. D. Christensen was given formal investigation, held on August 25, 1978, resulting in excessive discipline being rendered, in that he was dismissed from service effective 7:00 A.M., September 20, 1978.
- 2. That because of such excessive discipline being rendered, that the Carrier be required to re-instate and compensate Mr. D. D. Christensen for all time lost, the record of his dismissal be removed from his personal record and that he be made whole for all fringe benefits 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.

Claimant was discharged for insubordination, Carrier charging that on night of July 6, 1978, Claimant refused to separate a locomotive from one consist in order that it could be added to the consist of Amtrak passenger train No. 7. Carrier contends that Claimant violated Rules 661, 664 and 667 of Carrier's Safety Rules.

Carrier further contends that Claimant's actions were aggravated in that his refusal to perform the subject task was a repeated and unmoderated action and, moreover, it was punctuated by Claimant's use of profane and abusive language directed toward his immediate supervisor. Additionally, Carrier maintains that Claimant's assertion that said assignment was unsafe is an inappropriate defense in that said objection was not raised at the time of the incident itself but was raised for the first time at the investigation hearing which was held on August 25, 1978.

Lastly, Carrier argues that Claimant's relative short tenure as an employee and his past work record involving similar violations, further militate against a favorable finding on the Claimant's behalf.

In the main, Claimant argues that the penalty of discharge is excessive. Claimant, in support of this position, contends that his refusal to perform the disputed task was predicated upon the sincere belief that said assignment was unsafe in that an abnormally severe thunderstorm was raging during the time in which Claimant was directed to perform said assignment. Claimant maintains that he did not specifically refuse to perform said assignment, but merely wanted to delay the work until the thunderstorm had subsided. In addition to these initial claims, Claimant further contends that the inherent danger of undertaking the performance of this particular assignment at this particular time was heightened in that Claimant believed that he was being directed to perform said assignment alone without the benefit of the additional crew members who normally assisted in the performance of this type of assignment.

The resolution of this dispute would be a relatively simple matter if it could be determined with any degree of certitude that the conditions present at the Carrier's property on the evening of July 6, 1978, were either safe, as the Carrier contends, or unsafe, as the Claimant and his Organization contend. Obviously, this Board does not have the benefit of first-hand information regarding this particular aspect of the controversy, and can only look to the record for some direction. Unfortunately, however, upon review of the record, this Board notes that there is considerable controversy regarding the two positions which are offered by the parties and, because of its appellate nature, this Board is without jurisdiction to resolve conflicts in hearing testimony or to determine the credibility of witnesses (See: Second Division Awards 7325, 7473, 7955, 7961, 7963, 8023 and 8201, also Third Division Awards 20602, 21241, 21290, 21442 and 22711). Accordingly, in disciplinary matters the scope of the Board's appellate jurisdiction is limited to: (1) whether Claimant received a fair and impartial investigation; (2) whether substantial evidence supports Carrier's finding of culpability; and (3) whether the discipline assessed is appropriate in all of the circumstances, or is arbitrary, unreasonable or capricious (See: Third Division Awards 21241 and 21342; also Second Division Award 7955).

The major thrust of Claimant's position herein is that the disputed assignment was unsafe and the resultant discharge, therefore, was excessive. Under these circumstances, the burden of proof, which normally is shouldered by the Carrier in a discharge case, then shifts to Claimant and/or his Organization to prove by some substantial or reasonable quantum of evidence that the disputed assignment was, in fact, unsafe. When this test is applied, the evidence strongly suggests that Claimant's refusal to perform the subject work assignment was motivated by other than purely safety considerations on his part; and because of this, it is deemed that the Claimant's refusal was insubordinate, and the resultant penalty which was assessed by the Carrier was not excessive and, therefore, will remain undisturbed by this Board.

The rationale for the conclusion posited above lies in the generally accepted arbitral principle that a refusal to work because of unsafe conditions must be a sincere and honest conviction on the part of the employee, and must be supported by some degree of tangible or creditable evidence. Furthermore, if possible, such a refusal should be articulated as clearly and as soon as possible by the employee to his/her supervisor.

A thorough analysis of the record in this case, particularly several of Claimant's own admissions, clearly demonstrates to this Board, however, that Claimant's actions were at variance with the previously stated principle in that: (1) Claimant's refusal was not based upon any reliable evidence but rather upon his mere assumption that, because of the rain storm, the assignment was unsafe; and (2) Claimant's initial refusal was predicated upon his belief that the previous crew should have performed the assignment rather than he.

Claimant's statements which the Board finds as being particularly critical in this aspect of the analysis are found in Employee's Exhibit "A". These responses are sufficiently clear in their implication and require no further elaboration by this Board. Said responses are as follows:

"209. Q. What did you do when Mr. Fretzmann told you to go down to Lyndale Yard?

210. A. I told him that I did not feel that it was necessary, I assumed that we were going in the company truck and under the conditions I did not feel that it was safe to be out in this severe weather and that I had stated the conditions of the ground the following week in a similar storm and conditions were similar to this same day the following, I mean the prior week before. Somebody was going to get hurt out there one of these nights if something wasn't done about the standing water out there. (Emphasis by Board)

233. Q. You heard the words that McCloskey used that he is alleging you said about the rain and what Mr. McCloskey could do with himself. Do you remember telling Mr. McCloskey those words?

234. A. I just stated up until this time I have not been upset until he insisted that I go out in the storm. I felt that afternoons had sluffed off on the job and then I was starting to get a little perturbed and yes I may have said something on this order because I am a hyper person and I apologize to everyone if I offended anyone, that was not my intentions. I may have said this, yes. At this time, I cannot deny anything that I said. (Emphasis added by Board).

"241. Q. Were you upset when you came to work that night?

242. A. Yes, because coming to work I had all I could do just to get into the parking lot and stop my automobile. I lost my brakes up in the parking lot going through all the water on Main Street where it keeps flowing the manhole cover off at 42nd and Main. The water was about six or seven inches deep when I went through there and got my brakes all wet. At that time I just felt oh boy this is going to be a nice night outside. Then I got to work and I find out all of a sudden there is a rush job right off the bat. That's when I started getting a little upset with the company. (Emphasis added by Board)

243. Q. Did you go to the office with the idea of a grudge with Mr. McCloskey or anything like that?

244. A. No, I don't believe so. Everybody at Northtown realizes that if you get out of line you end up with this matter that we're in here right now for and it was definitely on my mind and I tried to conduct myself but like I say I'm a hyper person and I can't take this arguing and bickering and getting nowhere with somebody when I'm asking, I think, a reasonable question and fair question. Like I say there was half an hour nobody at that time up until they felt that it was a must move, then all of a sudden it turns out because I'm here and it turns out it's all of a sudden a rush move. That's when I started getting upset, yes. Prior to that, no. (Emphasis added by Board)

275 Q. Rule 664 reads as follows 'Courteous, orderly conduct is required of all employees. Boisterous, profane or vulgar language is forbidden.' Do you understand that rule?

276. A. Yes.

277. Q. Did you concur with that rule?

278 A. I guess I didn't, I don't know. I got upset just like anybody else would get upset. At the time, foremen are saying that there was no need for a rush and when I come on all of a sudden there is a need for a rush. Afternoons had lead time to get the unit ready, they felt it was unnecessary. Now all of a sudden third shift comes on and it has to be a rush and when you rush, you normally don't work very safely. People are upset, hostlers get upset, he makes some crazy moves, people don't know where everybody is located at. I tried to follow the book. If the company doesn't want to adhere to what my statements,

"somebody's going to get hurt out there one of these nights with these rush jobs then we are going to have a real hearing."(Emphasis added by Board)

On the basis of the foregoing analysis, this Board concludes, without equivocation, that Claimant committed the act of insubordination as charged, and because of the gravity of such an offense, Carrier's dismissal determination was neither arbitrary, capricious, nor excessive as alleged. Furthermore, because of this and this Board's reluctance to interfere with a decision where sufficient or substantial evidence has been adduced, this Board can find nothing in the record which would serve to mitigate the discharge which has been imposed.

Accordingly, we will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 25th day of June, 1980.