Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8520
SECOND DIVISION Docket No. 8470
2-SLSW-EW-'80

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(St. Louis Southwestern Railway Company

Dispute: Claim of Employes:

1. That the St. Louis Southwestern Railway Company (hereinafter referred to as the Carrier) improperly and unjustly placed forty-five demerits on the personal records of Radio Equipment Installers L. E. Sykes and H. M. Hoover as a result of the Carriers findings resulting from Investigation held in their behalf on March 15, 1979.

2. That accordingly this Carrier be ordered to remove the forty-five (45) demerits and clear the records of Mr. L. E. Sykes and Mr. H. M. Hoover, resulting from said investigation.

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.

Claimants L. E. Sykes, Jr. and H. J. Hoover are both Equipment Installers with seniority dates of November 1970 and February 1976 respectively. They were charged March 8 with violating Rule M-801 in that they were allegedly insubordinate to Assistant Superintendent H. R. Vaughn. The company contends they were insubordinate when they refused to climb a floodlight tower to make antenna repairs on March 7, 1979. The tower in question is a tapered tubular tower with pegged steps approximately 75 feet tall.

The general arbitral rule regarding insubordination cases is that employees are bound to "obey now and grieve later", even if instructions are believed to be contrary to the contract. There is one exception to the "obey now, grieve later" rule. This might be referred to as the "safety exception". It has been previously held that an employee need not comply with orders that are without sufficient regard to the employee's safety as to imperil their life or limb. However, the safety exception cannot be invoked in all situations where compliance with an order would be hazardous to life or limb. It must be

recognized that hazard and risk are inherent as a matter of business necessity in many jobs. In cases where risk and hazard are inherent in an employee's position, the safety exception can only be successfully invoked and when the company's order was unreasonably careless and failed to take into consideration necessary precautions to limit the inherent danger to a sufficient and reasonable degree. Also, it has been held when the organization invokes the safety exception, the burden is on them to show that lack of safety was the real reason at the time of refusal. Inasmuch as it was clearly established that climbing towers and the inherent danger involved was part of the claimants' normal duties, the burden is on the organization to show a disregard on the company's part for the necessary safety precautions when they issued the order to climb the light tower.

The organization has argued that both claimants refused to climb this tower because they were not provided the necessary safety equipment or sufficient instruction to be able to climb it safely. They contend Sykes and Hoover lacked the experience and qualifications to perform this work. They direct the Board's attention to company safety rule 70 which states:

> "Climbing poles except in emergency by employees not qualified and equipped to do so is prohibited."

The Board finds little support for the employees assertions. Evidently there were two conversations between Mr. Vaughn and the claimants in regard to climbing the tower. On the first occasion, Mr. Sykes had cited safety and training considerations for his reluctance to climb the tower. However, there is evidence that Mr. Sykes refused to climb the tower even after safety equipment and instructions were provided. Mr. Vaughn testified:

> "At a previous time Mr. Sykes had told me that he would not climb that tower without climbing harness and instructions on how to use this climbing harness. I arranged with Mr. Reeves of the electrical dept. for the harness and Mr. Reeves agreed to instruct in its use. Mr. Sykes then told me that there (sic) was power on that pole that he would climb over it because it was hot, he also told me that he needed (sic) a ladder to get to the bottom steps on the pole. I arranged with Mr. Reeves to provide an electrician to take the power off the pole and to provide a ladder."

Mr. Vaughn also testified that this was the same safety equipment used by others when climbing this same pole. Mr. Sykes also admitted he received the equipment. It was described as a belt harness that clamped onto the tower which is equipped with a safety guide.

In view of Mr. Vaughn's testimony, it is seen the organization's contention that safety equipment wasn't provided is without foundation. The company did in fact provide the customary and necessary safety equipment to do the climbing.

We also see there is insufficient evidence to support the organization's contention that climbing the tower was unsafe because the claimants lacked sufficient instruction. The union argued on the basis of Mr. Sykes testimony that the instruction provided by the electrician was insufficient. The Board, however, is at a loss to understand how Mr. Sykes could make such an assertion when he refused to receive any instructions at all. The claimants were given the order to climb the tower and informed inside the shop that instruction was available at tower site. However, they refused to go to pole to receive the instructions. This was established in Mr. Vaughn's testimony as follows:

"(Q) Are the power lines on this pole in particular is it exposed?
(A) Yes, but the electrician was there to remove all power.

(Q) Did you make this arrangement before the men went to do the job or afterwards?
(A) The men refused to go to do the job, therefore the arrangements were made before.

(Q) So there was an electrician waiting for them there or to meet them their (sic) the first time they had gone to do this job or it had been brought to their attention?
(A) The electrician was at the pole at the time they refused the job.

(Q) Were they not there the previous day without the assistance of the electrician?
(A) They were not on the pole the previous day.

(Q) Could you give me length of time of instructions that the electrician presented to these men?
(A) <u>These men did not go to the pole to receive any instructions.</u>

(Q) You have stated that the electrician instructed them on how to use the equipment?
(A) <u>What I said was that the electrician had agreed to instruct them on the use of the equipment at the pole, he was there.</u>

(Q) So then no instructions was actually done?
(A) <u>The men did not leave the shop.</u>"

(Emphasis added)

The claimants' defense on the basis of the safety exception is without foundation in the light of this testimony. The equipment and instruction that Sykes requested was provided and still they refused to climb the tower even without having availed themselves of the instruction provided.

The Board also noted other testimony and evidence that convinces the safety exception defense is without foundation, particularly in respect to Mr. Hoover. Mr. Vaughn testified that Mr. Hoover had previously climbed the same tower. Mr. Hoover admitted this although added it was with some difficulty.

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Also, it was established that both claimants had climbing experience and training on other towers such as microwave towers. Microwave towers are different in that the climb is made inside the structure with a different type harness but it seems that their training and experience in this regard coupled with the instruction and equipment offered for climbing the light tower constitutes the reasonable amount of precaution necessary to have done the job. In fact one company witness whose testimony was unrefuted indicated the safety harness for the light tower climb was simple and the light tower was actually safer to climb than microwave towers.

In conclusion, the Board finds the claimants reasons for refusal were not valid. Had the company refused to provide the necessary equipment and instruction we would have found differently; the Board endorses the safety exception to the "obey now, grieve later" rule. Every person has a right to self protection. This is an important right. However, some positions have inherent hazard and when reasonable precautions are taken into account for those hazards the employee is expected to perform the duties of the position they accepted. The fact is the company did provide the equipment and the fact is the employees refused to avail themselves of the instruction that was offered.

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 3rd day of December, 1980.