

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
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(Denver and Rio Grande Western Railway Company

Dispute: Claim of Employees:

1. The Carrier violated the provisions of the current controlling agreement when they improperly dismissed Sheet Metal Worker R. E. Wojahn from service on August 12, 1982 as a result of an investigation which was held on August 5, 1982 in connection with a charge of refusing to follow instructions and entering into an altercation with a supervisor.
2. That accordingly, the Carrier be required to restore Mr. Wojahn to service with all seniority rights unimpaired; make Mr. Wojahn whole for all vacation rights; reimburse Mr. Wojahn and/or his dependents for medical and dental expenses incurred while he was improperly held out of service; pay to Mr. Wojahn's estate whatever benefits he has accrued with regards to group life insurance for all time he was improperly held out of service; pay Mr. Wojahn for all contractual holidays; pay Mr. Wojahn for all jury duty and for all other contractual benefits.

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 employes 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, R. E. Wojahn, was employed as a Sheet Metal Worker at the Burnham Shops at Denver, Colorado, with approximately seven years of service with the Carrier.

On June 1, 1982, Claimant was notified to attend an investigation on June 4, 1982, in connection with a charge of refusing to follow the instructions of a supervisor and entering into an altercation with the supervisor on May 28, 1982. On August 5, 1982, Claimant was found guilty as charged and dismissed from the service of the Carrier.

The investigation transcript reveals that on Friday, May 28, 1982, Claimant's regularly scheduled workdays were Monday through Friday from 3:30 p.m. until 12 midnight at the Locomotive Back Shop. On May 27, 1982, Claimant reported for work at 3:30 p.m. but left early, with permission from his supervisor, at 6 p.m. At approximately 1 a.m. on the next morning, Claimant returned to the property to pick up some personal belongings.

Special Agent Thornley, who was driving a company vehicle, followed Claimant and approached him from behind after which an altercation ensued between Claimant and the Special Agent. This incident led to the termination of the Claimant.

The Organization contends that the Claimant was not afforded all of his rights because the charges were not precise and that Claimant was not afforded a fair and impartial hearing. The Organization contends that Special Agent Thornley was not a supervisor and, consequently, Claimant could not have refused to follow the instructions of a supervisor when he did not obey Special Agent Thornley. Moreover, the Organization contends that the record reflects the hearing officer's prejudgment of Claimant's guilt in his questions, which incorporate language such as "your refusal to properly identify yourself".

Moreover, the Organization argues that the charges were not proven because it was never shown that Claimant knew that Special Agent Thornley was a supervisor or an official of the Carrier. The Organization argues that the Special Agent identified himself only by saying, "How is it going tonight?" and did not give Claimant an opportunity to see his identification badge. In the dark, the Organization argues, Claimant had no way of knowing exactly who the Special Agent was.

Finally, the Organization argues that no instructions were given the Claimant during working hours to perform a certain task; and, therefore, Claimant cannot be charged with failure to comply with instructions. The Organization states that no altercation took place but rather one employe attacked another employe, and Claimant was merely attempting to resist the efforts of his attacker. The Organization calls the Board's attention to several awards, including Award 9219 and Award 9113, where arbitrators have stated that an employe who is trying to escape a violent assault should not be punished.

The Carrier contends that the Organization cannot seek back pay or other benefits other than reinstatement because the Organization did not seek those remedies in the early stages of the grievance.

The Carrier argues further that its special agent approached the Claimant on the date and time in question, and Claimant refused to show the Special Agent any identification or comply with his request. Special Agent Thornley testified that Claimant refused to provide identification upon request, and then the Special Agent tripped the Claimant from behind and they wrestled to the ground and struggled for several minutes. The Carrier contends that those facts demonstrate an employe who has engaged in an altercation with his supervisor.

The Carrier argues that its Special Agent had a walkie-talkie which should be further evidence to the Claimant that the Special Agent was an officer of the Carrier. Carrier argues that as Special Agent, Thornley had the authority to issue orders and instructions to persons on Carrier's property -- employes, as well as trespassers.

Carrier argues that the testimony is clear that Claimant refused to obey or follow Special Agent Thornley's instructions and was, thereby, insubordinate. Furthermore, the testimony reveals that Claimant did enter into a verbal and physical altercation with the Special Agent; and, therefore, he should be disciplined for it.

Finally, Carrier argues that the Special Agent is a supervisor because the definition of the word "supervisor" is "one who oversees the affairs of his employer". Since the Special Agent safeguards the Carrier's property, argues the Carrier, he is thereby a supervisor.

This Board has reviewed all of the evidence and testimony in this case. The Board rejects the procedural questions raised by the Organization and states that the hearing was held in a fair and impartial manner. The Board finds also that although the Claimant was not blameless in his behavior in the early morning hours of May 29, 1982, that it was totally arbitrary of the Carrier to terminate him for insubordination based on the facts presented, and he should be reinstated.

Although the record does demonstrate that Special Agent Thornley was acting properly when he demanded that the Claimant identify himself, it does appear that Special Agent Thornley acted too hastily in taking aggressive, physical action toward the Claimant when the Claimant did not respond. It was dark and Special Agent Thornley's first words to the Claimant were merely, "How is it going tonight?"; and those words do not immediately identify Thornley as a security guard. The Claimant, who may have been tired or intoxicated (it must be stressed that this incident did not occur during the Claimant's working time), may not have heard the questions or have been certain as to who the Special Agent was. Although it would have been more sensible for the Claimant to respond and comply, the actions of the Claimant were not akin to an employee who, during working time, refuses the direct order of a supervisor. The facts, as related through the testimony, are more akin to a situation of an individual walking alone at night, accosted from behind by an overly aggressive police officer, and not given an opportunity to assess the situation to determine what behavior to present.

This Board does not agree that Special Agent Thornley is a supervisor. He is a security guard. As the Carrier argues, he can take action against employees and trespassers alike -- supervisors have no authority over trespassers. Consequently, Thornley's role is not giving work orders, but his orders are more like those of police orders. Consequently, if an employee does not obey those orders, although the employee may be violating rules and subject to discipline, it is not insubordination in the sense that we all use that term.

Special Agent Thornley did not receive a quick enough response from the Claimant when he approached him that evening. He felt justified in taking physical action toward the Claimant. The Claimant fought back to defend himself and maybe even got somewhat aggressive in doing so. But, the Claimant was not insubordinate in the strict labor definition of the word.

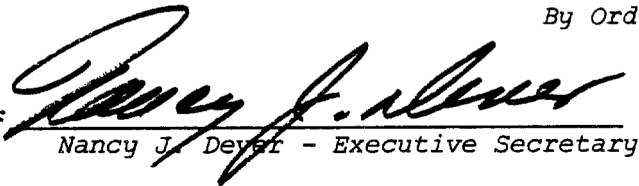
Claimant was not totally without fault here. He, like any citizen who enters private property, should have complied with the officer's request. It would not have been hard for him to identify himself as an employee. He also should not have engaged in the fight. But, Claimant's record is almost perfect over the seven years that he has worked for the Carrier, except for some discipline for absenteeism. That type of record does not warrant termination for this first offense -- which really is an after-hours altercation with a security guard. Hence, Claimant should be reinstated without back pay.

A W A R D

Claim allowed in part and denied in part. Claimant is hereby reinstated without back pay but with seniority.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of December 1984.