

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

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employees:

1. That the Missouri-Kansas-Texas Railroad Company violated the agreement between the Missouri-Kansas-Texas Railroad Company and the Brotherhood Railway Carmen of the United States and Canada, effective January 1, 1957, as amended, when it unjustly disciplined Carman F. S. Giamalva as the result of an investigation held August 29, 1983.

2. That the Missouri-Kansas-Texas Railroad Company be required to rescind this discipline and that all reference thereto be removed from the personal record of Carman F. S. Giamalva.

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 employees 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.

The Claimant, a Carman with the Carrier and in service since May 18, 1976, was given a thirty day deferred suspension as a result of an Investigation held on August 29, 1983. The Claimant was charged with violation of Rule A and Rule D contained in Circular DP-2, last issued January 1, 1975, specifically, that employees must devote themselves exclusively to their duties, and employees must not be: (3) insubordinate. Subsequent to the Investigation, the Carrier found the Claimant to be not guilty of failing to devote himself exclusively to his duties but was found guilty of insubordination. The other Carrier employee involved in the incident was found not guilty on all charges.

The Organization argued several threshold issues. It claimed the charges were imprecise and vague in violation of Rule 26. Also, the Organization wanted a form of discovery. It had, prior to the Investigation, and by letter asked the Carrier to provide a copy of all documents and all

witnesses that the Carrier was going to present at the Investigation. Again, the Organization claimed the refusal to do this by the Carrier was a violation of Rule 26. Finally, it claimed the Reviewing Officer was prejudiced by refusing to allow the objections of the Organization and, in particular, to allow the Carrier witness to answer a particular question on Page 12 of the Transcript. With respect to the merits, the Organization stated the Carrier had not proven the charges in this case. The Claimant was charged with insubordination, and the record contains no facts that would sustain this charge. The Organization notes the Claimant did perform work for the Carrier even when he was ill, and, while there was a problem between the Yardmaster and the Claimant, there was no insubordination. He was just going home sick which he has a right to do.

The Carrier contended that the Investigation was conducted in the manner required by Rule 26, that it has no obligation to provide a form of discovery, and the Organization has substantial time to prepare for the Investigation as it was postponed several times and occurred approximately forty days after the original date. The Carrier claims the charges were specific as required in Rule 26, and, therefore, the Board should rule on the merits of the case. With respect to the merits, the Claimant was the Lead Carman on duty that day, and, while he specifically did not refuse to perform any work, certainly his attitude and the language he allegedly used towards his Supervisor, "I haven't really screwed you yet, but I will now. I am going home sick. Call in another man., " would constitute insubordination. Since the Carrier has proven insubordination, the penalty of a thirty day deferred suspension is certainly appropriate for this kind of activity.

Upon complete review of the evidence presented, the Board finds the Carrier has conducted a fair and impartial Investigation. The charges in this matter were precise enough to comply with Rule 26. The Claimant was provided with the specific Rule violations with which he was charged. He was provided with the specific time period, that being 10:30 A.M. to 12:10 P.M., and the specific date, that being July 9, 1983. With respect to the request by the Organization for all the documents and witnesses to be used by the Carrier in the Investigation, the Board can find no practice or Rule that provides for this, and no previous Awards were submitted that would allow for this. The Board finds nothing that would require the Carrier to comply with this request by the Organization.

With respect to the merits of the case, the charge against the Claimant is one of insubordination. This is a very serious charge. The Carrier has a right to expect its employees to carry out orders of their Supervisors. The Board is charged, however, with determining if the statement and attitude of the Claimant constituted insubordination. By the testimony of the Carrier's own witness, the Yardmaster, when asked if he could state any act of commission or omission of the Yardmaster's instructions, could not come up with any specific incident, just "cooperation as a whole with what was happening." In either the Claimant's or the Yardmaster's version of the facts the Board cannot find any activity that would constitute what is normally called insubordination. The Carrier has simply failed to prove its contention in this case. This does not mean that the Claimant was completely blameless in this matter, and, while the Board will partially sustain his Claim, the penalty will be reduced to a written reprimand. Certainly, the Claimant was guilty of a lack of cooperation with supervision, but lack of cooperation does not necessarily mean insubordination.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of March 1986.