Award No. 4023
Docket No. 3799
2-P&LE-TWUOA-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

RAILROAD DIVISION, TRANSPORT WORKERS UNION OF AMERICA, A. F. of L. — C. I. O.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND THE LAKE ERIE & EASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) The carrier suspended Mr. J. C. Parker for refusing to work in violation of Rule 36 of our working agreement and also in violation of Rule 4116 of the Safety Rules. (2) General Foreman R. D. Redding acted as judge, jury and prosecutor at the investigation. The organization requests that the carrier rescind the sentence given J. C. Parker and compensate him for all time lost plus four (4) hours that he spent at the investigation as this was his regular scheduled rest day.

EMPLOYES' STATEMENT OF FACTS: This case arose at Youngstown, Ohio and is known as Case Y-130.

That according to Foreman Fitzpatrick in his testimony at the investigation admitted that J. C. Parker had not refused to release the hand brakes all he asked for was proper protection.

That the organization does have a rule that requires protection when employes do any kind of work on cars. Rule 36.

That it was the General Foreman R. D. Redding who gave the final orders that J. C. Parker release the hand brakes without any protection whatsoever.

That General Foreman Redding admitted he gave the final orders to J. C. Parker as to releasing hand brakes and if he did not do so to go home. He then gave J. C. Parker a notice to appear at an investigation.

AWARD 1979:

"Such hearing is not analogous to a criminal proceeding, requiring 'irrefragible evidence' of guilt, as urged by employes. We properly determine only whether there appears to be decision without prejudice and penalty without caprice. * * *"

CONCLUSION:

Carrier has shown that the evidence developed at the investigation conclusively established that Inspector Parker was guilty of the charge of insubordination which was placed against him and also that his refusal to obey the orders of his foreman was not denied by the organization.

Carrier therefore, submits that the request of the organization that carrier rescind the sentence given Inspector Parker and that he be compensated for all time lost plus four (4) hours for attending the investigation is completely without merit and should be denied.

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 were given notice of hearing thereon.

The evidence clearly shows that claimant was supended for refusing to work in violation of Rule 36. Although that rule is headed "Protection for Repairmen," it requires daytime blue flag protection for cars being **inspected** or repaired, by the placing of flags in the center of **inspection** or repair tracks, and expressly makes it the duty of foremen, inspectors and repairmen at work to know personally that cars being **inspected** or repaired are thus protected.

The hypertechnical objection is made that the rule did not apply because the inspection had been completed before claimant was ordered to release the brakes. But claimant's inspection duties were not completed by merely finding brakes applied and doing nothing about them; that is why the Carrier found him insubordinate for refusing to release them. Consequently, by proceeding with his work without the protection required he would have violated the rule, for which employes have been disciplined on this property.

Claimant was ordered to "knock the brakes off or be cut off from service," without blue flag or other protection. But the work was done by another inspector after, according to the foreman's testimony "I told the yardmaster to stay off the track until he heard from me." He testified further that the yardmaster seldom gave notice before putting additional cars on the track. The record shows that additional cars were being placed on the track during the period involved in this claim.

Rule 36 contains no exception, and in view of its evident safety purpose there is no apparent reason why it is not applicable to this situation. While there is some indication that the Public Utilities Commission of Ohio has authorized the testing of an alternative type of protection, it had no authority to overrule or amend Rule 36, which was adopted by the parties and must stand until changed by them, whatever substitute procedure others may deem adequate.

The Carrier quoted First Division Awards 9217 and 9224, in which it was said:

> "* * * the railroad industry is quasi-military in the sense that an employee must **generally** obey orders of his superior and make complaints afterwards if he thinks the rules have been violated." (Emphasis added).

Whether or not the expression "quasi-military" is appropriate, it is certainly true that a carrier's proper performance of efficient public service requires that orders must in general be obeyed, and that the proper remedy for the carrier's violation of rules is by claims under grievance procedure, and not by disobedience of orders.

But where the carrier's violation is of a safety rule agreed upon by the parties for the protection of employes in the performance of the very work ordered, an employe's refusal to do the work without that protection cannot fairly be called insubordination. In Award No. 2715 this Division said:

> "In clear and present cases of danger an employee should properly be permitted to decline a task which would imperil his life or limb."

He should also be permitted to decline a task which would force him to imperil the lives and limbs of others in clear violation of a safety rule for which he can and should be disciplined.

Under the facts of that award it was held that in doubtful cases the employe should point out the danger and then perform his work as ordered. But there is no doubt about the danger of inspecting cars without protection, as the parties recognized by adopting Rule 36.

In its submission the Carrier admits that without blue flag protection there is some hazard, but says that the movement of cars being worked on by car inspectors is the exception rather than the rule, and that the hazard must be accepted as part of a car inspector's job. Rule 36 was obviously adopted to make those exceptions as few as possible, and to minimize the necessary hazards.

Under the circumstances Claimant was not guilty of insubordination. He did not attempt to substitute his judgment for that of Carrier's management. He merely insisted upon the protection mutually agreed upon by Carrier and Organization.

There is no rule provision for claimant's payment for attending his investigation.

Claimant is entitled to recision of the discipline order and compensation for the seven working days lost during the ten calendar days' suspension, but not for the time spent at the investigation on a rest day.

AWARD

Claim sustained to the extent stated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July 1962.

CONCURRING AND DISSENTING OPINION OF LABOR MEMBERS TO AWARD 4023

We concur in that part of the Findings of Award 4023 reading:

> "Under the circumstances claimant was not guilty of insubordination. * * * Claimant is entitled to rescission of the discipline order and compensation for the seven working days lost during the ten calendar days' suspension, * * *."

We dissent from the Findings that the claimant is not entitled to four hours' compensation for attending the investigation on his regular scheduled rest day. The remedial procedure is provided in the collective bargaining agreement for processing a grievance (see Rule 38 of the agreement). Grievant's attendance at a hearing either within his regular working hours or outside his regular working hours constitute service within the scope of the collective agreement. Since the carrier elected to hold the instant hearing outside grievant's regular working hours he has been unjustly dealt with unless he is compensated in accordance with Rule 3(k) of the agreement.

C. E. Bagwell

T. E. Losey

E. J. McDermott

Robert E. Stenzinger

James B. Zink