

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employees'
(Department, A. F. of L. - C. I. O.
(Firemen & Oilers
(
(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Laborer H. E. Minnicks, Jr. was unjustly dismissed from the Carrier effective January 28, 1974.
2. That accordingly the Carrier be ordered to reinstate this employee with seniority unimpaired, vacation rights unimpaired, made whole for all health and welfare and insurance benefits including Railroad Retirement and unemployment insurance, and wages for all time lost retroactive to January 28, 1974 including 6% interest on all lost wages throughout the period of his dismissal.

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 employee 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.

This is a discipline case based on insubordination, Claimant having been in the service of Carrier for approximately four years. The precise charge against Claimant reads as follows:

"You are charged with insubordination to your Supervising Officer W. T. Allee, on Sunday, January 6, 1974."

Formal investigation was held pursuant to notice on January 9, 1974, at which General Foreman Allee, Supervisor Felton and Claimant testified. Claimant was found guilty as charged and dismissed from service on January 28, 1974. The letter of dismissal refers to "insubordination to your superiors". The charge, however, mentions only one "superior", Mr. Allee, and that is the sole issue with which we are here concerned.

Petitioner contends that Claimant did not receive a fair and impartial hearing as required under Rule 9 of the controlling Agreement; that Carrier did not sustain its burden of proving Claimant guilty of the precise charge against him; and that the discipline imposed was improper and Claimant was "unjustly discharged" in violation of Rule 14. Carrier asserts in reply that the affirmative is true as to each of these contentions.

Fair and Impartial Hearing

Examination and analysis of the record testimony indicates that there is much to be desired in the method in which the Investigation was conducted by the Hearing Officer. Leading questions were asked of the witnesses, extraneous and hearsay testimony was permitted, and the Hearing Officer made prejudicial comments and interjected his own "testimony" by referring to a prior incident relating to Claimant which occurred on December 11, 1973.

Nevertheless, Mr. Lagratta, Claimant's authorized Organization representative, who was present throughout, raised no protest or objection of any nature on any matter, did not request the opportunity to cross-examine any of the witnesses and, finally, when the offer was tendered and the Hearing Officer inquired:

"Q. Mr. Lagratta, do you have any questions or statements at this time?

Mr. Lagratta replied:

"A. No, I do not."

On balance, therefore, we conclude that Claimant was afforded a fair and proper hearing under the Rules on the specific charge against him, that he was fully cognizant of the charge and had ample opportunity to testify in his own behalf.

In these circumstances, notwithstanding some irregularities in the conduct of the Investigation, where Claimant and his authorized representative have been present throughout the hearing and have participated therein without objection, we have held that Petitioner may not be heard, after an unfavorable result, to complain of the fairness of the hearing thereafter. The onus of raising timely proper protest and objection rests upon Claimant and his representative; it cannot be shifted to Carrier.

See Awards 1402, 1251 and 1334; First Division Awards 11498 and 13606; and Fourth Division Award 1204.

Nor do the cases cited by Petitioner hold to the contrary. Thus, for example in Awards 6158, 6225, 6329, 6439, 6463 and 6795, the Hearing Officer became directly and repeatedly involved in interrogation "relative to the

"substantive matters involved"; or prejudged the guilt of Claimant and attempted to control the outcome by "conclusory statements of guilt before the hearing ended; or the complaining witnesses were not requested to testify or swear out affidavits; or Carrier witnesses who were present at the hearing failed to testify after Claimant's testimony but were permitted to submit written statements; or the Hearing Officer by continuous comments showed substantial bias and prejudice against Claimant so as to destroy his rights of due process; or refused to permit cross-examination "over the strenuous objections of Claimant's representatives" plus allowance of piece-meal testimony; or, finally, in 1st Div. Award 21046, was himself involved in the very dispute charged against Claimant and prejudged his guilt.

Additionally, when questions were put to Claimant in the case before us as to the specific incident upon which the charge was based, he replied to ten consecutive questions "No comment." Based on such refusal to respond, the Hearing Officer was justified in concluding, as was Carrier, that the answers if given would have been adverse to Claimant and, in effect, admitted the facts testified to by Mr. Allee.

INSUBORDINATION

The specific charge here is "insubordination" to Mr. Allee on January 6, 1974. The classic definition of insubordination, as contended by Petitioner, is the deliberate and inexcusable failure or refusal of an employee to obey a direct order or instruction from a superior officer. Petitioner contends that there was no direct evidence in the record establishing Claimant's guilt of such an offense.

We agree with the latter conclusion, particularly since we are excluding from consideration (1) the extraneous and hearsay testimony in the record on "prior events"; and (2) various letters contained in the file, from Mr. Lagratta and from Claimant's father, which occurred subsequent to the Investigation. These have no bearing on Claimant's guilt or innocence of the specific charge contained in the Notice of Investigation.

But this does not absolve Claimant of responsibility or guilt. Carrier contends that there are "various degrees of insubordination" and that its definition includes manifestation of "a spirit of defiance or indifference to constituted authority", citing Webster's Dictionary. We would hold that within the standards of industrial relations, insubordination (beyond the refusal to obey an order) also consists of contempt for authority and objectionable, demeaning and insulting language to a superior (here, to the General Foreman), which, taken collectively, shows disrespect of authority. The foregoing definition of "insubordination", when viewed in the light of the record testimony, is precisely applicable to the conduct of this Claimant and to his offensive comments to Mr. Allee on the date charged.

Most of the prior Awards cited by Petitioner and by Carrier, and they are many, are not germane since they relate to the "classic" definition of insubordination on refusal to obey a direct order. However, certain of these Awards do bear upon the issue before us in varying degrees.

Thus, for example, Award 5541 dealt with "abusive, quarrelsome and disobedient conduct" which were held sufficient to support the finding of "insubordination". In Award 17692 (3rd Div.) "indifference to duty and use of quarrelsome, loud and vulgar language to a Foreman" warranted dismissal, although "insubordination" was not charged. In Award 20263 (3rd Div.) "Claimant used abusive and profane language to a supervisor and refused to follow instructions", and was dismissed for "insubordination". In Award 11916 (1st Div.) insubordination was based on a charge of "fractious conduct and abusive language to a Yardmaster". In Award 13350 (3rd Div.) insubordination was based on "an uncooperative attitude".

We acknowledge that these cases are not all directly in point, but they do establish that considerations other than refusal to obey an order are within the concept of "insubordination".

We have held repeatedly that in discipline cases the burden of proof rests squarely upon Carrier to demonstrate by substantial probative evidence preponderating in its favor that Claimant is guilty of the offense charged.

See Awards 6580, 6620 and 6741. See also Awards 20471 (1st Div.) and Third Division Awards 14120, 20245, 20471 and 20252, among a host of others.

Applying our conclusions on the definition of "insubordination" as detailed above, we find that Claimant in this case was guilty as charged. The testimony of General Foreman Allee, as corroborated by Supervisor Felton and not disputed by Claimant, shows conclusively that Claimant used offensive, demeaning and insulting language to General Foreman Allee and was in contempt of authority. Such conduct by Claimant constitutes insubordination, as found by Carrier.

This Board has held in innumerable prior Awards that it will not substitute its judgment for that of Carrier in evaluating the evidence, provided substantial probative evidence is presented in the record supporting the charge against Claimant. The cases in support of this principle are legion and need hardly be cited here.

We conclude, therefore, that such substantial probative evidence is present in this case and that Carrier sustained its burden of proof.

DISCIPLINE

The discipline here imposed was outright dismissal; based, however, not on the "classic" charge of refusal to obey an order but on offensive and insulting language to a superior. Insubordination, therefore, can exist in

varying degrees of seriousness. Similarly, the discipline imposed should be measured by the seriousness of the offense. We have found no instance in the prior Awards cited by both principals where dismissal was imposed for such an offense as we have here. In fact, in all those cases where Claimant was disciplined by dismissal the offense consisted of refusal to obey a direct order, or physical assault upon a superior, or outright disobedience and contempt for authority.

There are two cases, however, which are based on similar facts and which are directly in point on the measure of discipline.

In Award 11916 (1st Div.), which did not involve any aspect of disobedience, but simply charges of "fractious conduct and abusive language to a Yardmaster", the discipline was five days suspension for insubordination. Similarly, in Award 13350 (3rd Div.) the charge was based on "an uncooperative attitude" as constituting insubordination. The discipline was "indefinite suspension" with the right to bid on a position at another location, plus probation for one year.

We do not quarrel with the established principle that this Board will not ordinarily disturb Carrier's assessment of discipline; provided, however, that it has not acted arbitrarily, capriciously or unreasonably or in violation of due process. Nor do we condone in any manner the offensive conduct of Claimant. However, we are constrained to point out that the record evidence on the specific charge does not show Claimant to have disobeyed a direct order, or that he used profane language or uttered any threats.

Accordingly, in view of all the circumstances of this case, we are of the conclusion that the penalty of dismissal here imposed was unduly harsh, unreasonable and arbitrary. Additionally, that it was not measured by the offense committed.

We conclude and find, therefore, that Claimant should be restored to service with all rights unimpaired; without, however, any award for loss of wages. As to the claim demand for "health and welfare and insurance benefits including Railroad Retirement and Unemployment insurance" same is denied, there being no Rule in the Agreement supporting such claim. Finally, no monetary award being here involved, the question of "interest" is of no relevance nor is it warranted under the Agreement.

A W A R D

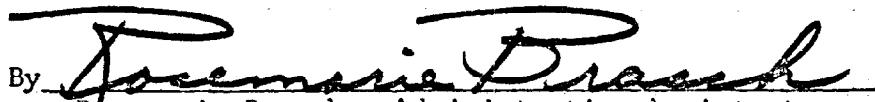
Claim sustained in accordance with above Findings.

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Award No. 7035
Docket No. 6904
2-B&O-F&O-'76

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of April, 1976.