

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

Parties to Dispute: (System Federation No. 96, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Lehigh Valley Railroad Company, Debtor

Dispute: Claim of Employees:

That Carman Howard Waite was unjustly dealt with when he was disciplined to the extent of fifteen (15) working days suspension beginning with August 3, 1973 violating the controlling agreement, particularly Rule 37.

That Carman Howard Waite be compensated fifteen (15) days wages at his applicable rate of pay for the dates suspended and that his service record be cleared accordingly.

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.

At the time this dispute arose Claimant was regularly assigned to the position of Car Inspector in Carrier's Transportation Yard at Sayre, Pennsylvania. Claimant has been in Carrier's employ for approximately 40 years. On August 2, 1973, Claimant was formally notified by Carrier that he was being suspended effective August 3, 1973, pending hearing, "in connection with your refusal to perform duties in accordance with instructions from Yardmaster Ernest Doney and Mr. D. J. Pace at approximately 8:25 a.m. on Thursday, August 2, 1973."

This was the charge against Claimant, on the basis of which formal investigation was held on August 20, 1973 and completed on August 24. Thereafter, Claimant was found guilty as charged and assessed discipline of 15 days suspension, less time held out of service.

Petitioner contends that Claimant was unjustly disciplined in violation of Rule 37 of the controlling Agreement and demands that Claimant's service record be cleared of the charge, plus compensation for time lost.

The incident on which the alleged insubordination is based related to certain work of coupling track and releasing handbrakes. There is a sharp conflict in the testimony as to whether Claimant did in fact refuse to obey a direct order to perform such work; he contends that he merely stated "That is not our job". Further, that during the more than 39 years of his employment he had "never refused any job that they told me out of my craft." Testimony of Carrier witnesses supports Claimant in the latter assertion.

We are concerned, however, with a more basic issue; i.e., whether Claimant was actually on duty at the time this incident occurred.

Claimant testified that after he "worked the Apollo One" he went to the westbound yard where Mr. Novak, the other carinspector, told him "Mr. Doney wanted to have track 39 coupled and handbrakes released". He then went to the yard office and said to Mr. Doney, "That is not our job" and walked out.

Up to this point, no direct order had been given to Claimant to perform the disputed work, nor had he refused to perform any job.

He testified further that immediately thereafter, at about 8:25 or 8:30 a.m.:

" . . . I went to the old yard master's office and called the steel yard to report off with a headache which had been bothering me all morning. I could not reach anyone at the steel yard office so I went to Mr. Doney's office and told Mr. Doney I was going home with a headache. . . ."

Thereafter, several conversations were had with Mr. Doney and with Mr. Pace in reference to the disputed work, as to which, Claimant testified:

" I told Mr. Pace that I had not refused to do the work. All I was doing was going home with a headache. . . ."

Mr. Doney testified as follows:

"Q. Mr. Doney, did Mr. Waite report off before you talked to Mr. Cardone?

A. He just told me he was going home sick, and told me he wasn't going to release handbrakes and was going home sick.

"Q. Mr. Doney, did he report off to you before you called Mr. Cardone?

A. He reported off and then I in turn called Mr. Cardone.

Q. Then there is no doubt that Mr. Waite had reported off and was going home and all these other activities took place after Mr. Waite had reported off and started toward the east-bound shanty to go home?

A. Yes." (Emphasis added).

Without burdening the record by further quotes from the testimony, the fact that Claimant "had already reported off" was reaffirmed by Claimant and corroborated by further testimony of Mr. Doney.

We do not dispute the established principle that this Board will not ordinarily substitute its judgment for that of Carrier in evaluating the evidence or determining the credibility of the witnesses; provided, there is substantial probative evidence in the record establishing the guilt of Claimant. This, however, is not the major issue before us.

The testimony of Claimant and, more important, the testimony of Yardmaster Doney, are quite clear that prior to the time when the various conversations as to performance of the disputed work took place, Claimant had already "reported off sick" and was proceeding "to go home". This being so, Claimant was off duty and the charge of insubordination cannot be sustained on what occurred thereafter.

Accordingly, we are compelled to sustain the claim.

Finally, in view of our findings and conclusions on the merits, we deem it unnecessary to review the various procedural issues raised by Petitioner.

A W A R D

Claim sustained.

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 28th day of May, 1976.