

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)
(
(Chesapeake and Ohio Railway Company

Dispute: Claim of Employees:

1. That under the current agreement Jack E. Taylor, Laborer, was unjustly dismissed from the service of the Carrier effective at the regular starting time at 11:00 P.M., December 14, 1973.
2. That accordingly the Carrier be ordered to reinstate Jack E. Taylor with seniority unimpaired, made whole for all wages lost from December 14, 1973, protected for health and welfare rights, Railroad Retirement benefits, and other benefits of the agreement be protected from December 14, 1973, date of dismissal.
3. That the Carrier be ordered to pay Claimant 6% interest annually on the wages lost.

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.

On November 14, 1973, the date involved in this dispute, Claimant was employed as laborer in Carrier's Roundhouse at Stevens, Kentucky, and assigned to the third shift, 11:00 p.m. to 7:00 a.m. Carrier asserts that at about 11:30 p.m. on said date Foreman Eads instructed Claimant to blow out and wash the flues on a wreck crane; but that Claimant "mumbled something about his back", refused to comply with these instructions and then "proceeded to go home."

As a result, Claimant was noticed to attend formal Investigation on November 21, 1973 on a charge of insubordination "by reason of your refusal to obey instructions" of Foreman Eads. The Investigation was actually held on December 6, 1973, Claimant was found guilty as charged and dismissed from service on December 14, 1973.

Petitioner's contentions are several. In essence, these are that the hearing was improperly conducted; that the Hearing Officer prejudged Claimant's guilt and assessed the discipline; that the evidence was insufficient to sustain the charge of insubordination; and that, in any event, claimant was justified in "refusing to obey", assuming that he did, in view of his physical condition and his fear of bodily harm. Carrier disputes each of these contentions and asserts to the contrary.

Petitioner contends initially that a two-member Board of Inquiry conducted the hearing, rather than one "designated Carrier officer" as provided in Rule 44 of the controlling Agreement. We consider this objection to be rather technical in nature and to be without substance. In point of fact, only one Carrier officer conducted the Investigation, Master Mechanic Long. Nor did the fact that a two-member Board presided, prejudice Claimant's rights of due process in any manner.

We acknowledge that the Hearing Officer did in some instances ask leading or conclusory questions of the witnesses. However, we have examined the transcript carefully and cannot conclude that the Investigation was unfairly conducted. Claimant was fully apprised of the exact nature of the charge, was represented by Organization officials (whose assistance he declined), was allowed full latitude to cross-examine witnesses and to present his version of what occurred.

In view of the latter findings, therefore, we cannot sustain Petitioner's contentions as to the alleged impropriety of the Investigation.

See, for example, Awards 6004, 6538, and Third Division Awards 4840 and 8725.

Nor do Awards 6329, 6439, and 6795, cited as precedent by Petitioner, hold to the contrary. In each of these cases the Hearing Officer acted as a witness and showed marked bias sufficient to violate the employee's rights of due process. This is not the case here.

Petitioner asserts further that the same Carrier officer conducted the hearing and assessed the discipline. We find no Rule in the Agreement, however, rendering such procedure improper or setting forth specifically who shall prefer charges, conduct the hearing or assess discipline. Hence, we do not sustain Petitioner's objection on this issue.

See First Division Award 18119, and Third Division Awards 10015, 12001, 12138, 13383, 14021, 15714 and 20828, among others.

Proceeding, therefore, to the merits of this dispute, Claimant testified that Foreman Eads requested him to perform certain duties consisting of cleaning flues out of a crane, "which I felt was unsafe, therefore I disobeyed, due to accident which occurred on C & O property this year." He testified further:

"Q. Mr. Taylor, you state you disobeyed?

A. Yes.

Q. Did you tell Mr. Eads why you wouldn't perform these duties?

A. I said something like this; if I did that I would probably be off a week, I would rather take a night off than lose a week."

Mr. Eads corroborated Claimant as to the reasons stated by him for not wishing to do the assigned work. However, Mr. Eads was not quite so conclusive as to whether or not Claimant had disobeyed a direct order. He testified, in response to a leading question asking whether Claimant "refused to do the work", by saying "Yes, that's right." But he testified further as follows:

"Q. Mr. Eads did you tell him to go home?

A. I told him, this was after the time cards had been changed from 11:00 p.m. to 12 Midnight, I told him if he didn't want to perform work I had assigned him the best thing for him to do was to go home, because we didn't have any engines to work."

Thus, the testimony is inconclusive as to whether Claimant was given a direct order to do the work in question or whether he was given the option of doing the work or going home "because we didn't have any engines to work."

Assuming, however, that Claimant did refuse to do the work, was his refusal of such nature as to justify his dismissal on a charge of insubordination. That is precisely the issue which confronts us here.

The record indicates that Claimant did in fact suffer a back injury and that Carrier had knowledge thereof. As stated by Mr. Long:

"The Company is aware that on January 16, 1973, Mr. Taylor alleged that he hurt his back while on duty."

This "allegation" of back injury is buttressed factually by two of Petitioner's Exhibits in the file, to which Carrier has raised no objection. Dr. Berning's letter of October 9, 1973 (Exhibit "L") states, in essence, that Claimant "had a fall on 16 Jan. 73 while on the job" and that "he is

presently being treated by Drs. Carothers and Le Van. He was sent to these physicians by the railroad physician, Dr. Foglia." Dr. Berning stated further "... I think his situation is one in which he has injury to the lower lumbar and lumbo sacral regions." And that "His past medical history is entirely negative and does not include any previous low back troubles."

Dr. Berning's letter of April 19, 1974 (Exhibit "M") states that Claimant "is still seeing Dr. LeVan of the Carothers, LeVan office" and that Claimant was suffering from a "continuing back strain problem with a left sciatica" and that excessive physical exertion would be "hazardous to his back and he would have an acute episode which would temporarily lay him low."

We acknowledge that the latter report is dated several months after the incidents here involved. We cite both letters to indicate that Claimant's back injury was real, that he was being treated by Carrier physicians, among others, and that the condition was serious enough to continue in duration from January 16, 1973 to at least April 19, 1974, at which time he was no longer employed by Carrier.

Faced with the serious reality of Claimant's back injury, are we justified in concluding that his refusal to do the assigned work was without good reason; that it was feigned and merely an excuse to avoid doing "a dirty job", as contended by Carrier.

We think not. We find that Claimant was reasonably in fear of serious injury and that this constituted proper justification for his "disobedience." In short, that he was not guilty of insubordination in these circumstances.

The following principles, well established by past Awards in this and other Divisions, are pertinent to the issues here involved:

1. Absent such reasons as health or safety, an employee must comply with Management's instructions and, if the propriety of the instructions are disputed, submit his grievance thereafter.

See Award 7032 and Third Division Awards 16744, 16286, 16074, 17771, 20030 and 20769.

2. This Board will not require an employee needlessly to place his life in jeopardy as a condition of continuing employment, nor require him to execute a specific assignment when faced with an immediate danger to himself. See Awards 2540, 4023, 4742, 5861, 6033, 6547 and 6910, as well as Third Division Awards 17021, 17398, 18799, 17045, 20651 and 20769.

Applying these principles to the particular facts and circumstances of this case, we reach the following conclusions:

a) Manifestly, in view of the causal relationship of the assigned work to Claimant's fear of aggravated physical injury, the principle of "comply and grieve later", is obviously inapplicable.

b) Claimant was faced with danger in the prospect of immediate aggravated injury due to his back condition and this clearly related to his "health and safety". Under the principles and supporting precedent cited above, these reasons justified his refusal to do the assigned work and did not render him guilty of insubordination.

Awards 2007, 2401, 3568, 4782, 5360 and 20030 (3rd. Div.), all cited as precedent by Carrier do not hold to the contrary and are clearly distinguishable. In each of these cases insubordination was established as fact, but in none of them was any physical danger involved or fear of physical injury. Additionally, in Award 5747 Claimant first refused to comply, then "feigned illness and marked off sick". This is not the situation which confronts us here.

c) At the time of this incident, Claimant had been in Carrier's employ for approximately five years. There is no showing in this record that Claimant had ever been insubordinate or guilty of any rule infraction during the entire period of his service. We find, therefore, that within the particular circumstances of this case, Claimant's fear of personal injury was neither unreasonable nor unfounded, and that these considerations as well as Claimant's prior unblemished service record, were not given sufficient weight when dismissal from service was deemed an appropriate punishment.

See Third Division Award 11172.

In short, that the discipline of dismissal here imposed was unreasonable and arbitrary, and unduly harsh in the circumstances. Accordingly, we will sustain the claim, subject to the following on the measure of "damages".

Rule 44 specifically provides that "If the judgment be in his favor, he shall be compensated for the wage loss, if any, suffered by him". Impliedly, the "wage loss, if any" is subject to offset to the extent of any earnings by Claimant in other employment during the period claimed.

We find and hold, therefore, that Claimant should be restored to service with all rights unimpaired; that the instant charge should be stricken from his record; and that he should be compensated for all wage loss "suffered by him", less earnings in other employment during the period claimed.

In all other respects, including the demand for interest, the claim is denied, there being no Rule in the Agreement supporting such demands. Additionally, the overwhelming weight of authority in this and other Divisions of the Board is to the contrary.

See Awards 4866, 4793, 5467, 5672, and 6261 (citing many supporting Awards); as well as First Division Awards 12989, 13098 and 13099; and Third Division Awards 8088, 18464 and 18660, among many others.

A W A R D

Part "1" of claim sustained.

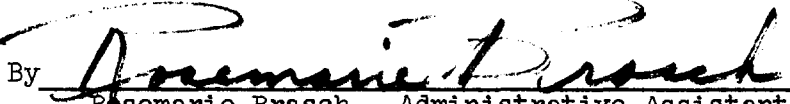
Part "2" of claim sustained in accordance with above findings; otherwise denied.

Part "3" of claim denied.

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 4th day of June, 1976.