

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
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(St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Company unjustly suspended Carman S. C. Roberts, Pine Bluff, Arkansas from service on December 15, 1973 and subsequently dismissed him on January 2, 1974 in violation of the controlling agreement.
2. That Carman S. C. Roberts be restored to service with seniority rights unimpaired; made whole for all vacation rights; made whole for all health and welfare and insurance benefits; made whole for pension and unemployment insurance; made whole for any other benefits he would have earned during the time he was held out of service, including lost wages.

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.

Claimant was employed as Carman at Carrier's Pine Bluff, Arkansas Terminal, primarily working as a car inspector. Carrier has for several years utilized car toads, gasoline powered vehicles, for Carmen to ride to and from the train yard and up and down the tracks as they make their inspections. In July 1973 Claimant sustained an injury to his left hand and arm while operating a High Boy car toad and was not returned to service by medical authority until September 8, 1973. On or about December 8, 1973 Carriers Car Foreman directed car inspectors to work from a so-called Low-Boy car toad. By letter dated December 11, 1973 some 98 car inspectors filed a written petition protesting that the Low-Boy

vehicles were unsafe and hazardous. The Claimant herein, S. C. Roberts, was the second signatory on this petition which read as follows:

"Gentlemen:

We the undersigned employees of the St. Louis Southwestern Railway Lines, who are required to work in the Gravity Yard, in the Trainyard, during all or a part of our assigned jobs, wish to make formal protest of the LOW-BOY CARTO Machines. We protest them on the following grounds: 1. We cannot turn around far enough to see danger approaching from the rear. 2. We have to sit astraddle of the wheel support post. 3. We cannot dismount in a hurry in an emergency. 4. we are so low that we cannot see the holes in the cartoad paths. 5. There is no place to carry tools. 6. We are liable to be run off and be run over by cars and trucks on the roads in the yard.

We feel that no consideration is being given to the safety or well being of the men required to use these machines. We believe that this yard is totally un-suited for this type machine.

Fearing for our life and limb we hereby respectfully request that you withdraw this machine from service.

Please see the attached list of names of men working in the yard."

On December 15, 1973 Claimant was working as car inspector 7:00 A.M. to 3:00 P.M. Claimant was assigned to use Low Boy Vehicle #25 and to inspect a train on Track No. 55. At approximately 11:30 A.M. the Car Foreman encountered Claimant working Train 55 on foot with his vehicle parked at the end of the train. The Car Foreman asked him why he was not riding the vehicle along the fill and Claimant replied in words or substance that it was not safe and that he would ride it to and from the locker room but not between the trains. The Car Foreman directed Claimant to go to the locker room for further instructions and then instructed him to inspect Train No. 144 on Track No. 54. The Car Foreman again saw Claimant walking the train rather than driving the vehicle at which time he called in the Assistant Terminal Superintendent, M. E. Thompson. Thompson arrived accompanied by J. E. Davis, Carriers Assistant Trainmaster. The three Carrier supervisors confronted Claimant and the Car Foreman again asked Claimant why he was not riding the Low Boy and received the same answer as before. Thompson thereupon directed the Car Foreman to order Claimant to ride the vehicle while making inspections and repairs. Claimant responded that the vehicle was unsafe for such work whereupon Thompson advised him the vehicle was not unsafe. Thompson advised Claimant to ride the machine and file a grievance if he felt mistreated. Claimant declined whereupon Thompson accused him of insubordination and removed him from service pending investigation.

Claimant was called to a formal investigation by notice dated December 17, 1973 as follows:

"You were withheld from service pending investigation and decision.

Arrange to report to Office of Assistant Terminal Superintendent, Pine Bluff, Arkansas, at 9:00 a.m., December 21, 1973 for formal investigation on the charge that you violated General Rules "B" and "N" of the Uniform Code of Safety Rules while on duty as Carman, Pine Bluff Gravity Yard, about 12:30 p.m., December 15, 1973, it being alleged that you refused to comply with instructions given you by Car Foreman J. E. Plunkett to use inspection vehicle (Car Toad 25) to inspect Train 144 inbound in Track #54.

You may have a duly accredited representative of your choice if you so desire.

Please arrange to report for this investigation at 9:00 a.m.

Please acknowledge receipt and understanding of this letter by signing the attached copy, and returning it to the undersigned."

Thereafter, Claimant was dismissed from all service with Carrier by notice dated January 2, 1974 as follows:

"Formal investigation was conducted in Office of Assistant Terminal Superintendent, Pine Bluff, Arkansas, beginning at 9:00 a.m., December 21, 1973, on the charge that you violated General Rules "B" and "N" of the Uniform Code of Safety Rules while on duty as Carman, Pine Bluff Gravity Yard, about 12:30 p.m., December 15, 1973, it being alleged that you refused to comply with instructions given you by Car Foreman J. E. Plunkett to use inspection vehicle (Car Toad #25) to inspect Train 144 inbound in Track #54.

As a result of the facts developed in this investigation, you are hereby dismissed from the service of the company, effective this date.

Please arrange to turn-in all property that was issued you by the company.

Please acknowledge receipt of this letter on the attached copy, which is for this purpose."

By letter dated February 13, 1974 the Organization appealed Claimant's dismissal and sought his reinstatement. The claim was denied at all levels of handling on the property and comes to us for resolution.

It is well established that an employee generally is required to obey the orders of management even if believed to be in violation of the Agreement and then turn to the grievance machinery for relief. See Awards 1459, 4782, 5038 5038, 5167, 5301, 6518. But a major exception to the "obey now - grieve later" rule is recognized, even in some of the Awards cited heretofore, where obedience would involve a safety or health hazard. See Awards 4367, 5861, 6547.

Clearly the burden of justification in such cases is on the employee. The standard for determining when a refusal is justified is elusive and the possibilities range from requiring a factual demonstration of clear and present imminent danger to a subjective standard that the employee is sincere in his belief, even if unfounded. We think the preferred test should be whether the facts and circumstances known to the employee at the time of the incident would have caused a "reasonable man" of like experience and ability to fear for his safety or health. It goes without saying that there must be a reasonable basis for the allegation and at least prima facie evidence that the work or equipment is unsafe.

In the facts and circumstances of this particular case we are persuaded that Claimant has met the burden of showing his refusal to ride the Low Boy between the trains was justified. Claimant had been injured only four months earlier riding a similar vehicle. Claimant as well as 97 other car inspectors had gone on record only four days before the incident protesting the safety of the equipment and listing nine reasons for their objections. Testimony at the hearing shows that the very vehicle in question had shimmy and excessive play in the steering mechanism both before and after December 15, 1973. We are additionally impressed by the fact that Claimant did not refuse to perform his assigned work but rather declined to ride this particular vehicle. We are not persuaded that he is guilty of insubordination and accordingly the discipline of dismissal was arbitrary, unreasonable and capricious.

We shall sustain the claim for reinstatement but we note that by the express terms of the Agreement the reimbursement for such unjust dismissal is as follows:

"24-4. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

A W A R D

Claim sustained to the extent indicated in the Findings.

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Award No. 7065
Docket No. 6821
2-SLSW-CM-'76

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 11th day of June, 1976.

