

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: ( International Association of Machinists  
( and Aerospace Workers  
(  
( Southern Pacific Transportation Company

Dispute: Claim of Employee:

1. That under the current Agreement Machinist J. A. Nino (hereinafter referred to as Claimant) was improperly suspended from service on March 6, 1975 and subsequently dismissed on April 9, 1975.
2. That, accordingly, the Carrier be ordered to compensate Claimant for all wage loss from date of suspension to the date of his restoration to service which was August 30, 1975.

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.

I

The Claimant, Machinist J. A. Nino, is an employee with eleven years of service in the employment of the Carrier. On March 6, 1976, the Claimant's hours of assignment were 3:00 P.M. to 11:00 P.M. At approximately 3:35 P.M., the Claimant's immediate Supervisor, Mr. J. J. Lipke, testified that he saw the Claimant seated at the lunch table in the locker room. He thereupon asked the Claimant why he hadn't reported for his assignment and the Claimant told him that he was punched in and ready to go to work (Tr-5). The Claimant had in fact punched in at 3:04 P.M. and was required to be on duty at 3:15 (Tr-16). Mr. Lipke testified that the reason given for not reporting was that the Claimant wasn't feeling good and that he was in an accident the prior day. He advised Mr. Lipke that he was going home (Tr-8). Mr. Lipke then told him that when he was feeling better to give 8 hours notice that he was coming back (Tr-9). When Mr. Lipke left the locker room, he testified, that Mr. Nino opened the door and tossed his time card out in a wadded up manner and informed him that he could shove it up his ass (Tr-9). Mr. Nino testified that as Committeeman for the second shift he was detained by Union

questions by a Mr. Jernigan. Mr. Jernigan testified that he had delayed Mr. Nino with questions on the Union Agreement (Tr-66). Mr. Nino testified that he tossed his time card to Mr. Lipke not at him (Tr-71). He denied using vulgar language. Mr. Lipke testified that he reported what had taken place to the Plant Manager, Mr. Robinson, who then advised him to have Mr. Nino report to him. Upon doing so Mr. Lipke testified that Mr. Nino replied "Fuck, Mr. Robinson. If he wants me, he knows where he can find me" (Tr-11). The Claimant denies he said this. (An employee present at the time, Mr. Jernigan, testified that he did hear the conversation between Mr. Lipke and Mr. Nino concerning Mr. Robinson wanting to see him (Tr-62). No questions were asked of this witness concerning what was said by the Claimant in response to the directive.) Mr. Lipke testified that some five minutes later the Claimant had in fact reported to Mr. Robinson's office. The Claimant testified that he changed his clothes and went to the office (Tr-62). Mr. Jernigan testified that when Mr. Lipke told Mr. Nino to see Mr. Robinson he had his pants off in the process of changing clothes (Tr-66). It is an uncontroverted fact, with slight variation in the time factor, that Mr. Nino did report to the Plant Manager as directed.

The Claimant's immediate Supervisor, Mr. Lipke, testified as follows:

"All that transpired is that Mr. Nino said he wasn't feeling well and was in an accident and called up the day before to Roundhouse and wasn't feeling well. When I left I thought he had enough problems, and I didn't want to cause him any more.

The charges are that he entered into a verbal altercation with you in this instance. Was it more so in the form of argument?

No, the man just made a statement.

Then he did not enter into a verbal altercation with you?

No.

Did he enter into an argument with you?

Just on one occasion when I instructed him to go to Mr. Robinson's Office, when he made his refusal.

But you say there was no verbal altercation?

No."

The Claimant was charged with violation of Company Rule 801 and 810 as follows:

- (801) "Employes will not be retained in the service who are... insubordinate ... quarrelsome ..."
- (810) "Employes must report for duty at the prescribed time and place, remain at their post of duty and devote themselves exclusive to their duties during their tour of duty..." (Carrier Exhibit "B")

The Carrier dismissed the Claimant from service based on alleged evidence adduced at the formal hearing held in the office of the Plant Manager on March 25, 1975, which the Carrier asserted established that the Claimant was responsible for being away from his post of duty, entering into an altercation with his supervisor and refusing to comply with his instructions to report to the office of the Plant Manager (Carrier's Exhibit "C"). The charge and finding of responsibility according to Carrier's Exhibits B and C relate solely to Mr. Nino's dealings with Mr. Lipke and not to events that took place in Mr. Robinson's office, which will be discussed later.

Concerning the finding of guilt "for being away from his post of duty" we find that when the Claimant said he would go home and his Supervisor advised him that when he was feeling better to give eight hours notice, the matter of Mr. Nino's presence in the locker room was disposed of and that aspect of this case could not be the subject for major discipline. He was either "not feeling good" as testified by Mr. Lipke or doing Union business, as testified by Mr. Nino. If Mr. Nino was in fact conducting Union business without first getting permission from his Supervisor, Mr. P. W. Kaliszewski, the General Foreman, testified that the penalty for this would be to dock the Committeeman for the time (Tr-54). There is no way that the circumstances involving Mr. Nino's present in the locker could support suspension or discharge.

Since substantial evidence was found in the record for the Carrier to find that Mr. Nino did in fact tell Mr. Lipke to shove the time card up his ass, some discipline under rule 801 would be appropriate as Mr. Lipke recognized this was a statement and not an altercation or an argument (Tr-11). It was conclusive at that point that Mr. Nino had lost a day's pay and his statement was in anger over this. Again, substantial evidence is contained in the record for the Carrier to find that Mr. Nino, did say "Fuck Mr. Robinson. If he wants me, he knows where he can find me". However, Mr. Nino's actions were to finish changing his clothes and do exactly as ordered, that is go to see Mr. Robinson. The fact that he made the statement to Mr. Lipke is a Rule 801 violation, but the fact that he acted as directed significantly mitigates the rule violation. While it may be argued that Mr. Nino had no obligation to report to the Plant Manager since he was off the clock at the time, we find that since he was on the property and in the midst of a controversy he had the obligation to respond to proper managerial directives.

At this point in time no basis for requiring representation was contended. And the facts show he did report as directed.

Based on the facts as set forth above as they relate to the charges and the finding of responsibility the extreme penalty of the discipline of dismissal of an employee with a clear service record of eleven years was arbitrary, capricious and untenable. Nor does the fact that the Claimant was reinstated on August 30, 1975, bring the discipline in line with the factual record and offense. We find that any discipline beyond 30 days actual suspension would be clearly excessive and we so order that the Claimant be made whole for wage loss beyond a 30 day actual suspension (to be counted from March 6, 1975) with the Carrier's liability being reduced by the amount of the Claimant's outside earnings, if any.

II

Plant Manager H. W. Robinson testified concerning the events that took place when Mr. Nino responded to his directive to see him. The questions are asked by Conducting Officer DeLellis:

"When I entered the door of the office, Mr. Nino was at the counter and he turned to me and says did you want to see me? My reply was yes, come into my office, I would like to see you.

Did Mr. Nino comply?

Mr. Nino did not comply.

What did Mr. Nino do?

Mr. Nino told me that he wanted a witness. I told him a witness would not be necessary. I would like for him to come into my office as I wanted to talk to him.

...

What action did he take?

He turned and went outside of the main building." (Tr-27)

Under question by Mr. Hughes, the Claimant's Representative, Mr. Robinson testified:

"Did Mr. Nino at any time ask you if the other Supervisors were going into the office with you?

After the second or third time that I asked Mr. Nino to come into my office he pointed in the direction of General Foreman Kaliszewski and said--is he going 'to be there'? At this point I replied yes, and this is when Mr. Nino opened up the door and went outside."

Mr. DeLellis, the Conducting Officer questioned Mr. Nino as follows:

"...When Mr. Robinson asked you to come into his office, why did you not obey him then?

He did not ask me. He told me in a strong tone of voice which led me to believe that there was going to be disciplinary action taken against me.

When you stated that he told you, are you saying that he was giving you an order?

Yes, Master Sergeant type of order.

When Mr. Robinson said to you to come into his office you recognized this as an order?

When he told me that 'I better get in there, I didn't consider it an order but a threat.' (TR-79, 80)

Mr. Nino testified that he intended to go into Mr. Robinson's office but when he saw Mr. Kaliszewski and Mr. Lipke directing themselves towards that office and when he was informed that he was not to meet with Mr. Robinson alone, he then asked for a witness and when this was refused he told Mr. Robinson that he was being denied his right to representation (Tr-75). Mr. Nino testified that he returned to see Mr. Robinson with his Union Representative, Mr. C. D. Esqueda, within an hour, and at that point Mr. Robinson refused to see him but did see Mr. Esqueda (Tr-83). The Carrier argues that the testimony shows that the matter would have ended with a talk between the Claimant and the Plant Manager (Carrier's Submission p. 31). Mr. Robinson, as of the next day, suspended the Claimant by letter dated March 7, 1975. And, the Claimant was thereafter dismissed and not returned to service until August 15, 1975.

Any fair minded reading of the transcript of the instant case would show that a central aspect to the Claimant's hearing was the matter of his refusal to enter the Plant Manager's private office to be confronted by at least Mr. Robinson, and Mr. Kaliszewski. He was not officially suspended and charged with refusing to be confronted by Mr. Robinson and Mr. Kaliszewski without a witness or Union representation nor was he found responsible for this, in the Carrier's dismissal letter. However, a major portion of the testimony of the hearing was directed to proving this point. See for example the questions set forth above to Mr. Nino by the Conducting Officer. We need not and therefore do not reach the question of right to representation at an investigations interview since the whole matter was beyond the charge and the finding of responsibility. Certainly the Carrier has no right to discipline an employee beyond the charge and finding of responsibility. As set forth in Part I of the Findings the discipline is reduced to conform to the charge and findings of responsibility.

A W A R D

The Claim is sustained for the period of time the Claimant was suspended from service beyond 30 days, less Claimant's outside earnings, if any, as set forth in the Findings.

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 17th day of May, 1977.