

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

Parties to Dispute: ( International Association of Machinists and  
( Aerospace Workers  
(  
( Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it improperly suspended Machinist Lewis Caldwell, Jr. from service at 8:20 A.M. on March 12, 1975.
2. That the Norfolk and Western Railway Company violated the controlling Agreement when it assessed the above named claimant a five day actual suspension following an investigation held on March 20, 1975.
3. That accordingly the Norfolk and Western Railway Company be ordered to compensate Machinist Caldwell for six hours and forty minutes due to the suspension on March 12, 1975.
4. That accordingly the Norfolk and Western Railway Company be ordered to compensate Machinist Caldwell for forty hours due to the five day suspension resulting from investigation held on March 20, 1975 as well as make him whole for all other lost benefits and clear his record of all indications of investigation and discipline.

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.

The matter involves three separate elements:

(a) Claim by the Organization that the claimant was denied a fair hearing under the provisions of Rule 33.

(b) Dispute as to whether the claimant effectively put himself out of service on March 12, 1975, for six hours and 40 minutes, or whether he was suspended from work by the Carrier for this period.

(c) Whether there was justification for a five-day disciplinary suspension to the claimant for "insubordination in that you advised that you would not follow direct instructions of your immediate supervisor."

Rule 33 reads as follows:

"No employe shall be disciplined without a fair hearing by designated officer of the Railroad. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The Board has reviewed the record of the investigative hearing and finds that the claimant received a fair hearing, and that there are no procedural deficiencies which should disturb consideration of the matter solely on the merits.

As to the merits, the following circumstances are involved: Machinist Lewis Caldwell was ordered by his foreman to leave his work of stripping locomotive trucks and to go to another area to strip traction motors. Some discussion followed among Caldwell, the foreman, and another employe. Caldwell is alleged to have stated in reference to his new assignment, "That's all rights, 'cause I am not going to do anything when I get there anyway." This quotation is from the foreman's testimony, who later added, "He /the claimant/ could very probably directed it at me and Staples /the other employe/ together, or either or both ... /of/ us." Staples' version is that the statement was, "I will go down there, there is no sign I will work," and that it was directed at Staples and not the foreman.

There is no dispute, however, that the claimant then proceeded to the traction-motor area and that he was there when the foreman approached him. The claimant was not working but, on the other hand, the foreman testified that he had not as yet advised the claimant which motors were to be stripped and which left undisturbed.

The Carrier then checked Caldwell out for the remainder of the day, claiming that it was based on his statement that he was not going to work, and therefore he took himself out of service. An investigative hearing followed, and Caldwell was assessed a five-day disciplinary penalty for his actions.

Examination of the record shows that this is not a case of insubordination, which involves, according to Webster's Third International Dictionary, "Disobedience of orders, infractions of rules, or a generally disaffected attitude toward authority." Caldwell's comment was made either to the foreman or to a fellow employe -- even the foreman could not say for certain. Caldwell followed orders and proceeded to the new work area as assigned. That he was found only ten minutes after the initial conversation in the new area but still not working can hardly be considered a refusal to work -- especially since he had not been told which specific work to undertake. At best, this is a case of anticipated insubordination. What it required, at minimum, was a direct order by the foreman at the new working area to determine whether the employe was, indeed, insubordinate. Up to this point, he had complied with orders.

With slightly different but nevertheless parallel circumstances, Referee Norris found in Award No. 20919 (Third Division):

"We do not disagree with Carrier's contention that insubordination is a serious matter often justifying the discipline of dismissal. Nor, do we take issue with the cited precedents in support of this principle. Conversely, however, it is also well established principle that the burden of proof rests upon Carrier in discipline cases. The precedents on the latter issue are legion and need hardly be cited.

On the merits, therefore, and based on the record evidence, we are not persuaded that Carrier sustained its burden of proof on the charge of insubordination. Insubordination is defined as deliberate and inexcusable failure or refusal to obey a proper order of a superior.

Obviously, mere temporary delay in compliance due to other work involvement does not constitute insubordination; nor does the fact that protest was made thereafter. This is the sum total of what was involved in this dispute."

The only difference here is that, instead of "temporary delay", there was a statement, perhaps or perhaps not directed at the foreman, concerning intention not to perform the work. Certainly it was not direct, unequivocal refusal, nor can it be found that Caldwell actually failed to do the work once it was assigned to him.

It cannot be said, therefore, that Caldwell took himself out of service. He was directed to leave, prematurely and without sufficient cause. As to the five-day disciplinary penalty which resulted from the investigative hearing, the Board is reluctant to interfere with a carrier's judgment in the exercise of discipline. In this instance, however, and based on the conclusions expressed above, the Board finds the discipline to have been imposed in an arbitrary manner and based on "insubordination" which, in actual fact, did not occur.

A W A R D

1. Claim sustained as to payment to claimant of pay of six hours and 40 minutes for time lost on March 12, 1975.
2. Claim sustained as to payment to claimant of pay for 40 hours for time lost due to five-day suspension, less any earnings in outside employment during the same period: claimant's record is to be cleared of reference to this matter.

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 1st day of November, 1977.