

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 97, Railway Employees'
(Department, A. F. of L. - C. I.O.
((Firemen & Oilers)
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(Atchison, Topeka & Santa Fe Railway Company

Dispute: Claim of Employees:

- (1) That the Carrier erred and violated the contractual rights of Mr. Joe D. Nevarez when they removed him from service as a result of an investigation held on January 22, 1975.
- (2) That, therefore, Mr. Nevarez be restored to service with all rights, privileges and benefits restored and that he be compensated for lost time from January 16, 1975 and to continue on the same basis until he is returned to service.

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 employees 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.

The Claimant entered Carrier's service as a Laborer at San Bernardino, California on November 6, 1973. At the time of the events which lead to this dispute he was Relief Motor Truck Operator at the San Bernardino Shop temporarily assigned to the position of Lye Vat Attendant for approximately one week and one day prior to January 16, 1975. On that date he arrived on shift at 7:00 a.m. and learned the other employee who worked with him had not reported in. Claimant then sought safety equipment which was not available because his locker was locked.

Meanwhile, Labor Foreman Fortino found the lye vat unmanned and he requested Machine Shop Foreman Sizemore to help him look for the Claimant. At approximately 8:00 a.m. they located Claimant at the lye vat area where he was changing his work boots. In reply to questions where he had been, Claimant indicated it was none of their business and he had been to the Safety Hall for safety equipment. Claimant indicated further he worked for Supervisor

Martinez, not Sizemore. Thereafter, Sizemore requested that Claimant accompany him to the General Foreman's Office to answer questions there. Claimant stated he would not go to the office with Sizemore and generally questioned what he had on him. Claimant then went back to work until 3:15 p.m. that day when an attempt was made to deliver to Claimant a written notice that a formal investigation would be held on January 22, 1975 in connection with alleged insubordination and possible violation of Rule 17 of "General Rules for the Guidance of Employees, Form 2626 Standard, 1966 Edition." The same notice advised Claimant of his immediate suspension pending outcome of the investigation. Claimant refused to acknowledge receipt or accept said notice and it was read to him in the presence of a witness. Claimant then was escorted off the property.

Rule 17 of the Rules provides:

"17. Employees must not be careless of the safety of themselves or others, indifferent to duty, insubordinate, dishonest, immoral, quarrelsome, or vicious. They must conduct themselves in a manner that will not bring discredit on their fellow employees or subject the railroad to criticism and loss of good will."

On January 22, 1975 the investigation was held on schedule and Claimant was represented by Local Chairman Castanon and he had the opportunity to testify on his own behalf. The Carrier's witnesses included Machine Shop Foreman Sizemore; Labor Foreman Fortino; and Assistant Superintendent of the Shop, P. A. Jones. Based upon this investigation record, Claimant thereafter received notice of his dismissal from the Carrier's service by letter dated February 10, 1976.

The record developed during the investigation indicates there was substantial evidence to support the Carrier's conclusion that Claimant was insubordinate in that he refused to answer questions of the supervisor and accompany him to the office. These were violations within the prohibition of Rule 17. The defense was urged that Claimant was not subject to the jurisdiction of Supervisors Sizemore and Fortino and he was under the jurisdiction of Supervisor Martinez. This contention lacks merit in that it was established without contradiction that Claimant was under the general supervision of Sizemore and Fortino. Although Claimant also was subject to supervision by Mr. Martinez and Mr. Souther this did not justify Claimant's insubordination. In addition, Claimant maintains he had been "harassed or discriminated against by supervision". The record does not include more than an allegation to this effect. Moreover, the failure of supervisors to conduct themselves properly is not an excuse for an employee to be insubordinate and refuse to obey instructions or answer questions. See Award 4782 (Whiting).

The Claimant makes the additional argument he was refused the opportunity to have his union representative present. The record indicates such a request was made in the afternoon but not in the morning and no request for representation was made during the morning dispute.

Claimant also urges that the investigation notice was not adequate in that it did not properly identify the person to whom Claimant was insubordinate and did not detail the insubordination. The answer provided by Carrier is that such objections were not timely made in that they were not raised during the investigation. The awards of this Division are clearly of the view that failure to object at the investigation will be considered a waiver of such objections. See Award 4035 (Johnson) and Third Division Award 14444 (Dolnick). Moreover, there is no indication in this record there was any discussion of this notice insufficiency on the property. Under the well established rules here, such an objection cannot be made before this Board for the first time. Carrying this matter still further, there is scant basis to urge that Claimant was denied the opportunity to prepare a defense and meet the charges against him. In fact, the transcript indicates he was well apprised of the charges and he urged his defenses accordingly. See Award 6346 (Williams).

We are mindful of the line of awards that permit an employee to refuse to obey an order when a question of personal safety is involved. It would be an unwarranted extension of this concept to suggest they have application here. The fact the Claimant may have been absent from his post seeking safety equipment might have relevance to a different charge such as being absent without permission. It could have no relevance to charges of insubordinate conduct in refusing to answer proper questions as to where he had been and refusal to accompany the supervisor to the office.

It cannot be said the Carrier failed to meet its burden of proof here regarding Claimant's insubordination. That is a serious rule violation and it cannot be tolerated in the railroad industry. Orderly and safe operations require that an employee obey orders first and raise his objections later. That should have been the procedure followed here. It is most unfortunate that it was not because there is every reason to believe the matter would have gone no further or at least the offense would not have been compounded.

We do not second guess the Carrier on the punishment here. We recognize that insubordination carries a heavy penalty. However, we are moved to hold that there are mitigating circumstances and this Claimant should be restored to service without back pay or benefits. In doing this we assume he will be admonished to follow instructions of supervisors and conduct himself properly. Should there be a future repetition of such insubordination, the Claimant must recognize that he would face dismissal from service.

A W A R D

Claim sustained to extent of our findings.

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 13th day of January, 1978.