

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { International Association of Machinists and  
Aerospace Workers  
{ St. Louis-San Francisco Railway Company

Dispute: Claim of Employes:

1. That under the terms of the Agreement, Machinist George Stokes was unjustly and improperly suspended from the service of the St. Louis-San Francisco Railway Company on May 4, 1978, and, subsequently, dismissed June 8, 1978, for failure to comply with an order by General Foreman to wear head protection. Mr. Stokes was not allowed due process, inasmuch as he was not afforded an investigation, as per Rules 35 and 36 of the controlling Agreement which guarantee this right when discipline is assessed.
2. That, accordingly, Machinist George Stokes be restored to service with all pay for time lost, seniority rights and all other benefits unimpaired, beginning with his improper suspension on May 4, 1978, and continuing until this matter is settled.

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 were given due notice of hearing thereon.

Claimant, a machinist with thirty-five years of service, has not worked for the carrier since May 4, 1978. On that date, the general foreman told him to wear protective head gear (either a hard hat or a bump hat). When the claimant refused, the general foreman placed claimant's time card in the time clock and punched it out.

In 1971, the carrier established a mandatory hard hat rule in claimant's work area. Claimant complied with the rule. Sometime in 1975, he developed vertigo and headaches which, according to his doctor, were caused by the hard hat. In September, 1975, the claimant gave the carrier a medical note which stated he could not wear a hard hat. The carrier gave the claimant a specific exemption from the hard hat rule. Thereafter, for almost three years, claimant performed his usual duties without wearing either a hard hat or a bump hat. On May 4,

1978, the carrier began to strictly enforce the hard hat rule and revoked the exemption previously provided to the claimant. No charges were brought against the claimant. The carrier advised the claimant to take a leave of absence (pursuant to Carrier Rule J). When no leave of absence request was received, the carrier formally closed his personnel record on June 8, 1978.

The organization urges us to reinstate the claimant with back pay and all benefits because the carrier removed the claimant from service as a penalty for stubbornly refusing to wear a hard hat. Since such removal constitutes discipline, the claimant was entitled to notice and a hearing before discharge in accord with Rules 35 and 36. The carrier characterizes the facts in a different fashion. The claimant, the carrier says, voluntarily disqualified himself from work due to a physical inability to wear a protective cap. The carrier also contends this Board lacks jurisdiction to adjudicate the claim because union bypassed the initial two steps of the grievance procedure in violation of Rule 34. On the merits, the carrier asks us to deny the claim because the carrier must strictly enforce all safety rules pursuant to the Occupational Safety and Health Act. The organization responds by asserting that the carrier, through its past practice, is obliged to continue Claimant's exemption from the hard hat rule.

While we are obviously reluctant to dismiss a claim because of a procedural defect, dismissal is appropriate where the organization's processing of the complaint clearly violates Rule 34. Second Division Award No. 7104 (O'Brien); Second Division Award No. 4175 (Harwood). If the organization has substantially complied with the procedure, a minor procedural irregularity will not defeat the claim. Second Division Award No. 7505 (Marx). Rule 34 mandates that the grievance be presented (not necessarily in writing) to the foreman and then the general foreman. The record discloses that the local chairman orally brought the matter to the attention of the foreman in spite of the latter's denial. Furthermore, because the general foreman punched out claimant's time card, the organization's vigorous prosecution of the grievance at these lower levels was futile. Second Division Award No. 3280 (Carey); Second Division Award No. 3138 (Ferguson).

The question of whether the claimant voluntarily disqualified himself from service due to physical disability without a proper leave of absence or whether the carrier unilaterally dismissed him is also not so easily resolved. However, after careful review of all the surrounding circumstances, we conclude the claimant was dismissed without being afforded notice and a hearing under Rule 35. Several facts lead us to conclude that the carrier's actions amounted to discipline. First, the general foreman told the claimant to put on a protective cap which the claimant refused to do. The claimant's separation from service occurred immediately after what appears to be insubordination. Second, the claimant was fully prepared to work on May 4, 1978. The general foreman prevented him from working and there is no indication that the claimant voluntarily disqualified himself; he only refused to use a hard hat. Third, the carrier's emphasis on the claimant's physical ailments appears to be a pretext. The carrier was aware of the claimant's condition for three years, yet he was permitted to work. If the claimant's physical impairment (which remained constant for three years) was a factor, he should have been disqualified in 1975. This Board has allowed the carrier to remove an employe from service due to physical incapacity

as soon as the ailment is discovered. Compare: Second Division Award No. 4582 (Daly) with Second Division Award No. 4174 (Harwood). Here, the carrier knew of the ailment in 1975 and decided it did not warrant removal from service. So, the claimant's dismissal constituted discipline resulting from the claimant's failure to wear a hard hat. Any disciplinary action by the carrier triggers the claimant's fundamental due process rights under Rule 34. Since he was not afforded a hearing, the carrier's action was improper. The carrier should have charged the claimant with insubordination and failure to follow a safety rule and, at the hearing, presented evidence showing dismissal was warranted. Under the provisions of Rule 35, if the carrier reasonably believed the claimant had committed a serious offense, he could have been promptly suspended on May 4, 1978. While the Occupational Safety and Health Act may allow the carrier to revoke the claimant's exemption from the hard hat rule, it does not supercede the Rule 35 hearing requirements.

We need not discuss the validity of the medical excuse, the exemption from the hard hat rule, the carrier's decision to strictly enforce the safety rule or the claimant's apparent disobedience of a superior's instruction. These are issues which would have been resolved at a Rule 35 hearing. From a practical standpoint, this Board realizes that the same problem may occur when claimant returns to work. Our decision should not be interpreted to sanction the claimant's exemption or to prevent the carrier from taking future disciplinary action against the claimant for refusing to wear a hard hat upon his return to work.

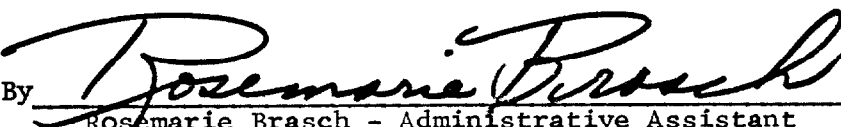
The claimant shall be reinstated with back pay and full seniority. He should be compensated at the rate of pay in effect during the time he was out of service. The claimant's request for overtime, interest and other benefits is denied. Any earnings from other employment or unemployment compensation received by the claimant during the time he was out of service shall be deducted from the back pay award.

A W A R D

Claim is sustained to the extent consistent with 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 3rd day of December, 1980.