

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { International Association of Machinists and
 { Aerospace Workers
 {
 { Chicago, Rock Island and Pacific Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement and the Chicago, Rock Island and Pacific Railroad Company schedule of rules the Carrier unjustly dismissed Machinist J. Lovell from service effective September 15, 1978.
2. That, accordingly, the Carrier ordered to restore J. Lovell back to service in the following manner: (a) restore Claimant to service with all seniority rights unimpaired, (b) compensate Claimant for all time lost, (c) make Claimant whole for all vacation rights, (c) pay the premiums for hospital and surgical and medical benefits for all time left out of service, (e) pay the premiums for group life insurance for all time held out of 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 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.

At the time of dismissal, the claimant was employed as a machinist with a seniority date of January 30, 1974.

On September 6, 1978, claimant was directed to attend an investigation to determine if he was in violation of Rules B, E, N, or Q in connection with his alleged insubordination to Foreman J. E. Diehl and his alleged absence from duty without permission on July 31, 1978. The rules quoted in pertinent part read as follows:

Rule B

"Employees must have a proper understanding and working knowledge of and obey all rules and instructions in whatever form issued, applicable to or affecting their duties."

Rule E

"Employees must render every assistance in their power in carrying out the rules and instructions. Courteous co-operation between employees is required for proper functioning under the rules and instructions."

Rule N

"Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other."

Employees must not be:

- (1) Careless of the safety of themselves and others.
- (2) Negligent
- (3) Insubordinate
- (4) Dishonest
- (5) Immoral
- (6) Quarrelsome or otherwise vicious"

Rule Q

"Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with, or substitute others in their place without proper authority."

From the outset, the organization argues that as a result of the conduct of the hearing officer, the claimant did not receive a fair hearing as guaranteed by the agreement. These arguments are extensive and at first glance cogent. However, we are precluded from entertaining this objection in the final analysis because it was not made at the time of the hearing. The carrier accurately points out that at no time during the hearing did the claimant, acting as his own representative, object to the conduct of the hearing officer. The Board notes, as a matter of fact, that the claimant acknowledged at the conclusion of the hearing that it was a fair one. It is well established that the organization is precluded from making procedural objections before the Board that were not made during the course of the hearing on the property.

The charges had to do with a conversation that took place between Foreman Diehl and the claimant while claimant was on duty. At approximately 10:55 p.m. the foreman approached the claimant, who at the time was talking to some other employees. Foreman Diehl questioned the claimant regarding, what in Diehl's opinion was, low productivity for the claimant's shift which began at 4:00 p.m. At this point, the carrier contends that the claimant then reacted to his supervisor's criticism in somewhat of a fit of anger and in a threatening manner toward Diehl. Then according to Diehl the claimant indicated he was going home. The carrier's argument is based on the following testimony by Diehl:

'Q: What was Mr. Lovell's reaction when you told him you felt that he was not properly attending to his duties?

A: He said something about wanting him to fly, started waving his arms around, screaming I am a bird several times. He then informed me that he liked no one to tell him what to do. That he was going home.

Q: In your opinion was Mr. Lovell angry during this conversation?

A: Yes sir, very much so.

Q: Did you feel his gestures were threatening?

A: I did.

Q: Did Mr. Lovell then get ready to leave the job?

A: Yes, he went up to the engine, removed his tools and from his tool locker, addressed me at the office door and said, 'Write in your book I hurt my neck and I am going home'. He then left the roundhouse."

In reviewing the transcript, the Board concludes that there is substantial evidence to support the charges. It is our opinion that when the record is read as a whole and all the evidence is pieced together the most rational conclusion is that the claimant did in fact behave in a way which would justify some discipline. We are convinced that the claimant did become incensed with his supervisor's criticism and that this type of behavior is clearly prohibited by the carrier's rules. The evidence that leads us to this conclusion includes the testimony of Foreman Diehl, the claimant, Mr. Dullard (Laborer) and Mr. Dorn (Machinist). We have already noted Mr. Diehl's testimony which is supported in part by that of the others. The claimant admitted he was upset at the way in which Diehl questioned his productivity. The manner in which he was questioned was undeniably profane. He further testified he stated to Diehl that "I am not a bird that I cannot fly around this place." Dorn testified he overheard Lovell and Diehl talking and that Lovell "talked with a higher voice than normal." Dullard testified that Lovell "seemed upset" and talked loud.

Regarding the portion of the charge relating to leaving his assignment without permission, the Board finds no evidence that the claimant sought or received permission to leave his assignment. The organization in its submissions to the Board argues by implication the claimant did not need permission to leave his assignment because he left his assignment as a result of an injury. They produce letters from doctors indicating the claimant did in fact have a neck condition. In the context of this case we believe the claimant simply used his neck condition as an expression of anger and as an excuse to retaliate against his supervisor. We do not believe the claimant has the right to resort to this type of self help. An employee, if aggrieved by the conduct of a supervisor, does not have the right to throw his hands up in anger and effectively walk off the job. If this type of behavior were condoned, the workplace would be in chaos. It is well established if an employee is aggrieved by a supervisor's conduct he must use the grievance system rather than resort to self help.

Having found that the charges against the claimant are supported by substantial evidence, the Board will consider whether the quantum of discipline is appropriate. The function of the Board in this respect is to consider whether the discipline when related to the seriousness of the charge and the claimant's past record was so unreasonable as to be considered arbitrary, capricious or excessive. The carrier argues that dismissal cannot be considered as excessive when the claimant's past record is considered. The Board agrees that the past record of the claimant does not distinguish the claimant as a model employee. However, there is not any evidence in the form of progressive suspension that would convince us the claimant is beyond correction and not worthy of continued employment and another chance. The claimant had been given several letters of reprimand for absenteeism which were the subject of two investigations. As a result of one he was given a 30-day deferred suspension. However, his past record as read into the transcript does not indicate he had served any actual suspension. Without seeing whether the claimant is responsive to a corrective suspension we cannot conclude he is beyond rehabilitation and not worthy of continued employment. As a result, we must say that dismissal for a charge of this nature for a claimant with no prior suspensions is excessive. Therefore we will direct his reinstatement with no back pay.

The Board understands the carrier's frustration with a "problem" employee such as the claimant. But in a certain sense the carrier has caused some of the problem. The carrier by ignoring all the claimant's transgressions and leaving them effective unpunished over a long period of time condoned undesirable behavior. The carrier can't expect to uphold dismissal for an offense of this nature after never having been anymore severe than giving the claimant a 30-day deferred suspension. They should have, for a charge of this particular nature, previously given the claimant a chance to prove himself capable of corrective discipline or responsive to reasonable efforts to correct his behavior.

The degree of discipline is partly mitigated by the conduct of Foreman Diehl when he questioned the claimant about his productivity. It is beyond question that this is the supervisor's right. However, it is undeniable that when he did so Diehl made a vulgar, profane and accusatory statement toward the claimant. It is understandable that the claimant was provoked to some degree by this conduct. If supervisors would attempt to treat employees in the same way they would like to be treated perhaps incidents of this kind would happen less frequently or be resolved on the property.

On the other hand, we are obviously not exonerating the claimant. He acted improperly as previously noted. The claimant should now understand the behavior that is expected of him by the carrier and by this Board. We reinstate the claimant with seniority and other rights unimpaired but without any compensation and this admonishment and warning that if continued employment is desired he should conduct himself in conformity with the carrier's rules.

A W A R D

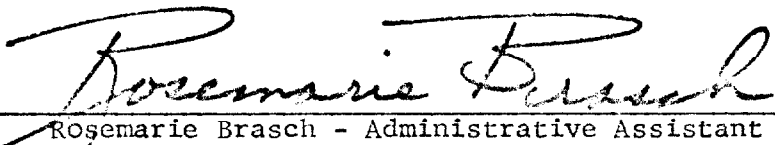
Discipline modified to the extent indicated in the Findings.

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Award No. 8563
Docket No. 8519
2-CRI&P-MA-'81

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 7th day of January, 1981.