Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8575
SECOND DIVISION Docket No. 8344
2-ICG-CM-'81

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. That under the current agreement, Upgraded Mechanic R. A. Denton was unjustly treated when he was dismissed from the service of the Illinois Central Gulf Railroad on September 2, 1978, subsequent to an investigation which was held on Tuesday, August 22, 1978.

2. That accordingly, the Illinois Central Gulf Railroad be ordered to restore Upgraded Mechanic R. A. Denton to service with all seniority rights unimpaired, compensate Mr. Denton for all time lost from September 2, 1978 until such time restored to service, and for any and all other benefits he would be entitled to as a condition of employment, account of the aforementioned unjust dismissal.

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, claimant had approximately four years service with the carrier.

On August 1, 1978, Carrier directed claimant to attend a formal investigation in connection with the following charges:

(1) Failing to properly report an alleged injury, and

(2) With being insubordinate to your supervisor on July 28, 1978, at Johnston Car Shop.

The investigation was held on August 22 after several postponements. As a result of the facts adduced at the investigation, the carrier dismissed the claimant effective September 2, 1978. In the carrier's opinion, the transcript clearly established that claimant was guilty on both charges.

The charges centered around several happenings on July 28. The first charge relates to a minor injury incurred by the claimant at approximately 11:00 a.m. on the 28th. The second charge relates to the company's contention that at approximately 1:30 p.m. the claimant refused to comply with his supervisor's orders. Mr. J. L. Tyson, the Supervisor, had instructed the claimant to either fix the angle cock on a tank car or to replace it with a new one. It is also important to note that after the discussion between Mr. Tyson and the claimant regarding replacing the angle cock or fixing it, the claimant filed an injury report regarding the injury that allegedly occurred at 11:00 a.m. and checked out of work.

As a matter of organization, the Board will consider the evidence as related to the two charges separately. We will consider the charge related to the injury first. The specific charge again was "failing to properly report an alleged injury ..." There are two different versions in the record as to what it means to properly report an injury. The union argues that company safety Rule No. 1 clearly establishes the requirements of employees regarding the reporting of injuries.

It states:

1. Employes must report promptly to the proper authority any injury sustained on duty or on company property.

2. Notification of the injury must be made prior to the end of the employee's tour of duty and before leaving company property.

The carrier argues that Safety Rule No. 1 was superceded by the instructions of the local supervisors at Memphis. The standing instructions at Memphis, according to the company, were to report injuries "immediately to the supervisor". The Union argues Rule No. 1 applies and should govern the claimant's behavior.

If we believe the Union's argument, it is easily seen the claimant is not guilty in respect to the first charge in that it is undisputed he reported the injury in writing to his supervisor prior to the end of his shift and prior to leaving the property. Conversely, if we see the local instructions as the properly promulgated rule regarding the reporting of injuries we must find the claimant guilty as it is recognized he did not report the injury for approximately three hours after it was incurred. Three hours is not "immediately" in most situations and certainly not in this one.

In considering the first charge, we conclude that it is not supported by substantial evidence. By all indications, the claimant complied with safety Rule No. 1 and it is our opinion that it is against this rule that the claimant's actions should be measured. We believe this to be so for several reasons. Firstly, this is the rule that is promulgated in writing and it is this rule that is customarily distributed to all employees. There is no evidence in the record that the rule that employees must report their injuries "immediately to their supervisor" was ever promulgated in writing or ever disseminated to the claimant. The testimony of the carrier witnesses in regard to this unwritten rule impresses us as slightly self serving. Secondly, it is in the company's best interest to

expect compliance with the written safety rule. The purpose of the written rules is to standardize practices and to limit deviations from those standards. Standards and rules are not beneficial if they are easily disregarded by local supervisors in favor of something they think is better. It is assumed that if the company goes to the trouble of establishing, publishing and disseminating company safety policy in the form of safety rules, then it is these rules that employees should be expected to comply with.

In support of the charge of insubordination, the carrier points primarily to the testimony of Mr. Tyson. Mr. Tyson testified that he was walking down track # 50 and noticed that Mr. Denton was having trouble removing a hose from an angle cock. According to Mr. Tyson, Denton then directed a vulgar comment toward the hose. Mr. Tyson then proceeded to assist Mr. Denton. Evidently, during this time, the possibility of heating the angle cock with a torch was mentioned because Mr. Tyson quoted Mr. Denton then as saying "that he was not going to light a torch because they have been rubbing the torch pay off his card so Mr. Berry could get his little funny ass out there and work on the car".

Mr. Tyson testified that he then told Denton if he could not fix the angle cock to put a new one on. According to Tyson, Denton replied as follows: "He was not going to put the angle cock on because they wasn't going to kill 'ole Tony Mutt's ass' and if he put it on the good Lord was an opossum, and he knew the good Lord wasn't an opposum."

The organization makes the following argument in response to the charge of insubordination:

> "The Claimant responded that it would be much simpler to remove the broken air hose than it would be to change the whole angle cock and as a last resort he would change the angle cock in the event he was not able to remove the broken air hose. The Claimant did not refuse to change the angle cock, he merely sated that he would attempt to remove the broken air hose first and as a last resort he would then change the angle cock which would require considerably more time in removing the U-bolt and removing and replacing the angle cock from the train line."

We find no support in this defense. It fails to overcome the clear and convincing testimony of Mr. Tyson that the claimant made a simple unqualified refusal to follow Tyson's instruction. As a result, there is clearly, as the carrier argues, substantial evidence to support the charge of insubordination.

In addition to the claimant's refusal to change the angle cock, we find other evidence that convinces us he is guilty of insubordination. Insubordination in some cases goes beyond the spoken word. The transcript read as a whole makes it clear that the claimant's general attitude on the day in question was combative, belligerent and uncooperative. The definition of insubordination in this case should be broad enough to encompass this kind of behavior as well as a verbal refusal to follow instructions. An example of his combative and belligerent behavior was the claimant's reporting of his injury, a scratched knuckle, and his leaving work as a result. He reported the injury and left work shortly after the conversation with Tyson and although he properly complied with the rules in reporting

the injury, in doing so he seemed to have done it more out of retaliation than a concern with complying with the rules. His leaving work allegedly as a result of the injury was clearly antagonistic. The injury was of such a minor nature it is hard to believe it was necessary to leave work. We cannot say that the carrier should be required to tolerate this type of behavior.

Having exonerated the claimant on the first charge the Board is faced with the question of whether a finding of guilt on the singular charge of insubordination is sufficient to uphold dismissal. We are mindful of our proper function which is not to disturb the measure of discipline unless it can be shown as arbitrary, capricious or excessive. In this case, we are convinced dismissal for the singular charge of insubordination is excessive and that the claimant is deserving of another chance to prove himself worthy of continued employment. Therefore, we will direct his reinstatement, with seniority unimpaired, but with no back pay.

A W A R D

Discipline modified to the extent indicated 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 14th day of January, 1981.