

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
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(Indiana Harbor Belt Railroad Company

Dispute: Claim of Employee;

1. The Indiana Harbor Belt Railroad Company violated Rules 35 and 39 of the controlling Agreement.
2. That, accordingly, Machinist Daniel E. Spriggs be compensated for July 15, 16, 17, 18, 19, 22, 23, 24, 25 and 26, 1978 at the prevailing machinist rate of pay.
3. That the five (5) day record suspension be removed from his record.

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 record indicates that the claimant entered the employment of the Carrier on June 23, 1976, and on the date involved in this dispute, July 15, 1978, he held position of temporary Machinist at Gibson Enginehouse, Gibson, Indiana, tour of duty, 3:00 P.M. to 11:00 P.M.

As a result of alleged insubordinate conduct toward Assistant General Foreman Forrest Blaker during his tour of duty on July 15, 1978, the Claimant was removed from service by Mr. Blaker.

Following the investigation held on July 19, 1978, the Carrier notified the Claimant that:

"It is the decision of management that you be assessed with a ten (10) day actual and a five (5) day record suspension. Your actual suspension will be served July 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 1978. You may return to work on July 29, 1978."

The Employees charge the Carrier violated Rule 35 of the controlling Agreement when "they refused the claimant to settle a grievance under this procedure". The

Employees contend the machinist that was involved in the work that was alleged to be unsafe, did not have to go to the supervisor personally, as he reported it to his committeeman. The Employees assert the Claimant was a committeeman acting on behalf of the Employee involved. The Employees argue Mr. Blaker, Assistant General Foreman, was aware of the fact that the Claimant was a committeeman.

The Employees also claim the Carrier violated Rule 39 of the controlling Agreement when Mr. Blaker, Assistant General Foreman took the Claimant out of service while he was notifying his Local Chairman, of the incident. The rule reads:

"The Company will not discriminate against any committeeman who from time to time represents other employees covered by this agreement."

The Employees report the whole incident transpired in a matter of three or four minutes, when Mr. Blaker took the claimant's time card out of the rack (or wherever), and walked up to the Claimant and removed him from service without any reason given. The Employees maintain that the Claimant did not refuse to return to work or do his job. The Employees argue the only thing he did was return to his area and make a phone call to his local chairman, which was common practice at this point, when a Committeeman could not resolve a grievance that, in his judgement, was against the agreement and Company safety rules and Company policy.

Carrier asserts that the transcript of the investigation contains substantial evidence which proves Claimant's guilt of the charge on which he was investigated; that the discipline of a ten day actual suspension and a five day record suspension assessed against the Claimant was not unreasonable; and that no change in the Carrier's decision is warranted.

The record of the hearing indicates that Claimant Spriggs, who was a local committeeman, after a discussion with fellow employee Mr. Bicanic, communicated to the foreman the complaint that it was unsafe for certain men to work "on engines without platforms". The Assistant General Foreman in his testimony reported that the Claimant charged:

"That I had ordered men to perform an unsafe task. I stated to Mr. Spriggs that he didn't know what he was talking about and told Mr. Spriggs to return to his job. Mr. Spriggs turned from the office, started in the direction of his assigned work area and never reached the 71 (8871), but turned and went immediately to the phone. I waited approximately 3, 4 minutes, picked up Mr. Spriggs' card, walked to the telephone, and I instructed Mr. Spriggs that he was out of service for insubordination and would be notified by Certified Mail. At no time had Mr. Bicanic had any conversation with me concerning an unsafe condition."

The Assistant General Foreman by his own admission, acknowledged that he was aware of the Claimant's position with the Union. Apparently this was not the first instance in which the two men had discussed conditions in the work areas. The Claimant was identified by the Union as the "Assistant Local Chairman - 2nd Trick". Effective July 29, 1978, he was also recognized by the Carrier as the newly installed Vice President of the Local.

The pivotal question in dispute in the instant case is whether or not the Claimant's actions constitute insubordination. The record is clear that the Claimant, in his role as a local Committeeman reported a condition, alleged by the Employees to be unsafe, to the foreman who told him "to return to his job". The Claimant admits he went to the telephone to report the incident to the Union. That action on his part, of telephoning rather than resuming his work, in the Carrier's view constitutes insubordination.

The foreman in his testimony stated:

"Mr. Cook: Did Mr. Spriggs tell you he refused to go back on his job?

Mr. Blaker: He didn't comply with my instructions.

Mr. Cook: Did he tell you, 'I refuse to go back on my job?'

Mr. Blaker: As I said prior, he didn't tell me anything. He just didn't return to his job.

Mr. Cook: You seem to have trouble, Mr. Blaker, answering questions. I asked you, did Mr. Spriggs tell you verbally, 'I refuse to go back on my job'.

Mr. Blaker: Verbally he did not. He was insubordinate to me. He failed to comply with my instructions."

It is unrefuted that the Claimant was the local committeeman on the shift. The Claimant testified under cross examination:

"Mr. Maglish: Did you return to your work area?

Mr. Spriggs: Yes sir, I did. I went to the 8871, back on my job, then I went and borrowed a dime from an electrician that was by my job and went directly to the telephone and called Mr. Cook."

Mr. Cook was the Local Chairman of Lodge 327. The Carrier acknowledges that had the Claimant requested permission from his superior to make the phone call in his role as a Local Committeeman, this could have been granted.

The failure of the Claimant to inform his Foreman that, as the shift committeeman, he was going to pursue the Union's claim of an unsafe condition with the Chairman of the Local is critical in the instant case. Had he so informed his supervisor of his intent, his rights as a Union official operating under the Agreement could have been protected. Instead he acted on his own, contrary to the instruction that he "return to work". In so doing, he failed to follow his supervisor's instructions and subjected himself to a sustainable charge of insubordination albeit on somewhat technical grounds.

This Board in Second Division Award 1389 (Referee E. B. Chappell) found:

"The primary question presented for decision is whether or not such action of the Carrier was arbitrary, unreasonable or unjust. Being a discipline case, it is elementary that the Division can not substitute its judgement for that of the Carrier unless it was so tainted with one or more of such three elements of injustice."

While the Carrier's charge of insubordination is supported by the record, note must also be made of Third Division Award 21763 (Referee James Searce) who observed:

"The Carrier would argue that this is a case primarily of an employee refusing to follow a direct order from appropriate management. We find it not that simple. We find that the claimant was in the process of carrying out her responsibility as a duly authorized Union representative. It should be remembered that the Messenger sought her out for his own reasons and asked her assistance. The Carrier suggests no grievance existed-merely a minor work dispute. That is not for the Carrier to decide. If an employee feels an action or impending one effects his wages, hours or working conditions, he has a right to raise it within the scope of the collective bargaining agreement. The messenger did precisely this. At his behest, the Claimant represented his interest. Her communication was with the proper person-his immediate supervisor. Whether the issue was resolved or not would clearly rest with the two individuals who were dealing with the matter first hand. A relationship in collective bargaining depends upon the ability of individuals who must deal with problems having the opportunity to do so. It ill-serves collective bargaining to put a stop watch on such activities. The line of demarcation between when an employee is performing Union business and when not is not so easily defined. In this case, perhaps another minute or so would have resolved the matter."

A similar fact pattern exists in the instant case. His role as a Committeeman does not excuse the Claimant from his responsibility to follow the instructions of his supervisor. However, while technically guilty of insubordination, after an investigation found to be proper, there exists the mitigating circumstance that the Claimant was performing a function he perceived appropriate, and is appropriate to his role of local committeeman, that is, reporting a claim of an alleged unsafe working condition to his Union.

Further, there is the acknowledgement of the Carrier's witness that the Claimant did not actually refuse to go back to work and also that his decision in calling the Union, could have been permitted, had he made such a request.

Given such mitigating circumstances, and only one unrelated prior offense, the penalty of ten (10) days actual suspension and a five (5) day record suspension, for this particular offense, is deemed "unreasonable", and not justified from the record before us, and thus excessive both in light of the circumstances surrounding the incident and the nature of the incident itself.

Accordingly, the penalty is reduced to the five (5) day record suspension with the Claimant being reinstated with his seniority rights unimpaired and compensation for net wage loss, if any, resulting from the ten (10) days suspension being restored.

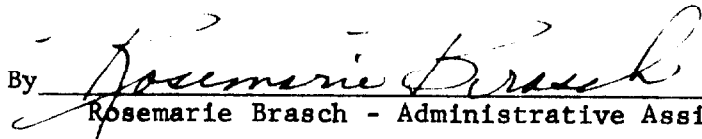
A W A R D

Claim sustained to the degree and limits specified above.

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, 1982.