Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9124
SECOND DIVISION Docket No. 8715
2-C&NW-CM-'82

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago and North Western Transportation Company

Dispute: Claim of Employes:

1. Mechanic-in-Charge Eddie Shelton was unjustly assessed ten (10) days suspension on November 1, 1978.

2. Mechanic-in-Charge Eddie Shelton was erroneously charged with being insubordinate to General Car Foreman-Trainee Gary Mallen on October 21, 1978.

3. That the Chicago and North Western Transportation Company be ordered to make whole Mechanic-in-Charge Eddie Shelton, and compensate him for all lost time plus 6% interest on all lost wages, including overtime during the time held out of service in accordance with Rules 11 and 35(h).

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 approximately 8:10 PM on October 21, 1979, Claimant, a Mechanic-in-Charge at Carrier's Wood Street facility in Chicago, Illinois, who had already worked his regular 8 hour shift plus 5 hours as a Carman, was approached by G. Mallen, a General Car Foreman-Trainee, who, after a brief exchange, "... instructed Claimant to go with him and inspect the cabooses". Claimant, who alleges that he had already clocked out at 8:00 PM and thus was "off-duty", refused Foreman Mallan's request, and, as a result, Claimant was taken out of service for insubordination.

A hearing in the above stated matter was conducted on October 30, 1979, subsequent to which Claimant was adjudged guilty as charged and was assessed a 10 day suspension without pay. Said action is now the basis of the instant dispute.

Organization's basic position herein is that Carrier has failed to sustain its burden of proof in this matter and that Carrier's assessment of any discipline whatsoever is improper and, therefore, should be rescinded (First Division Awards 5201 and 20471; Second Division Awards 6580 and 6487; Third Division Awards 12252, 14120 and 15412). In support of the foregoing Organization asserts as follows: (1) Claimant apprised Mr. Mallen that he was "off work and ready to go home" and this fact was confirmed by W. McGee, Freight Car Inspector; (2) Foreman Mallen had no right to remove Claimant from service because Claimant was "off-duty" at the time and a supervisor has no jurisdiction over an employe who is "off-duty"; and (3) Claimant's overtime assignment was as a Carman and thus Foreman Mallen erred in assigning Claimant to perform work which was to have been performed by the Mechanic-in-Charge who was assigned on the second shift.

As its final significant area of argumentation, Organization also asserts that the award in this matter should direct that Claimant be "... made whole and compensated for all lost time plus 6% interest on all such lost wages including overtime during the time held out of service."

Simply stated, Carrier's position in this dispute is that "(F)rom all physical appearances and from the information supplied to him at the time, Mr. Mallen was acting with the knowledge that (Claimant) was on duty, and, therefore, was entirely within his rights to remove (Claimant) from duty when he refused a direct order." Carrier further argues that regardless of whether Claimant was on or off duty at the time when he was approached by Mr. Mallen, Claimant, nonetheless, "... was still an employe, was on the property at his regular work location, and was given a direct order which he chose to disobey." According to Carrier, it has been held that, in such a situation, Claimant should have performed the disputed task and then grieved it later; but by electing "... instead to refuse to comply", Claimant did so "... at his peril".

Regarding Organization's request for 6% interest on any back pay award which might be granted herein, Carrier contends that "... there is no basis under the controlling agreement for the claim for 6% interest".

After carefully reading and studying the complete record in this matter, the Board, for obvious reasons, is totally unpersuaded by Organization's arguments concerning Carrier's right to discipline Claimant because he allegedly had clocked out prior to the issuance of Foreman Mallen's directive and because Claimant was working overtime as a Carman but was ordered to perform Mechanic-in-Charge duties. In this regard, suffice it to say that insofar as Claimant was on the property at the time of this incident and also because of the Board's adherence to the time honored arbitral tenet of "work now and grieve later", regardless of classification assignment and except in the most serious of situations, these considerations are sufficient to dispatch with the two contentions as raised by Organization.

Turning next to Organization's assertion that Claimant specifically informed Foreman Mallen that he was "off-duty" and was going home, which indeed is the crux of Organization's entire argumentation herein, the Board is of the opinion that, even if Claimant did make such comments to Mr. Mallen, these comments were certainly not as precise and exact as Claimant/Organization would now have us believe; and, more importantly, Mr. Mallen's assumption that Claimant was in service at the time, though later found to be erroneous, was, nonethless, a reasonable assumption to make under the circumstances. In this latter regard the following factors are deemed

to be of importance: (1) Claimant was on the property, was wearing his work clothes at the time and was sitting in an area where employes normally take their rest breaks; (2) the encounter between Claimant and Mr. Mallen took place sometime during the middle of the second shift and the Foreman was unaware that Claimant allegedly was directed by Supervisor Prisuta only to "... work until it got dark" or approximately only one-half of the overtime shift; and (3) Claimant's regular assignment, as Foreman Mallen knew it to be, was as a Mechanic-in-Charge although on the evening in question Claimant was assigned to work overtime as a Carman.

Perhaps even more significant than the above in this analysis are the following responses of Claimant and Mr. McGee regarding this particular aspect of the case (Emphasis added by Board):

"Claimant: I told him I was taking a break, I had just come out in the yard, I told him I was off of work.

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Claimant: No. I just told him I was on a break and I was going home.

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Question by Mr. Schmidt: Mr. Shelton, you said that you were sitting in front of the Yard Office in your work clothes, is that correct?

Answer by Claimant: Yes.

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Question by Mr. Schmidt: When Mr. Mallen requested Mr. Shelton to go to the east end and check the cabooses, did Mr. Shelton tell Mr. Mallen was on a coffee break?

Answer by Mr. McGee: He probably did, but he was ready to go home.

Q. Do you remember if he told him that or not?

A. No, I don't remember that.

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Question by Mr. Schmidt: Was Mr. Shelton wearing his work clothes at the time?

Answer by Mr. McGee: Yes, he was.

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As can be seen from the foregoing, Claimant's admitted actions and words in this matter were anything but clear and definitive at the time of his encounter with Mr. Mallen. If Claimant had not wanted anyone to conclude that he was on duty at the time, why would he have stayed around on the property in his work clothes some 20-30 minutes after allegedly clocking out? Or, why would Claimant say he was "on a break" when he was "off duty"? Such actions certainly cannot be construed in any way to support the meaning which Claimant and his Organization now propose.

Having concluded the above and thus determining that there is sufficient evidence to support Claimant's guilt of the infraction as charged, such a determination normally would dispose of the matter. In the instant case, however, there is one additional factor which warrants our attention, and that is the propriety of the 10 day suspension which was assessed as the penalty herein. Given the fact that Claimant is an employe with approximately 11 1/2 years of unblemished service to Carrier; that Claimant's actions on the evening of October 21, 1979, were not premeditated and did not result in any apparent loss to Carrier's service, equipment, personnel or reputation; and further that Claimant had already worked for 13 hours on the day in question -- a 10 day suspension without pay does appear to be somewhat of a harsh penalty particularly in light of the fact that Carrier gave no apparent consideration to these potentially mitigative factors when considering the penalty which was to be assessed. Because of these determinations said penalty is found to be arbitrary and excessive, and, therefore, improper; and a more appropriate penalty will be a reduction to five (5) days. Any back pay which might be awarded, however, will be without interest or overtime as Organization requests because there is no contractual basis for such inclusions in the computation of a back pay award.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of June, 1982.