

The Second Division consisted of the regular members and in addition Referee Albert A. Blum when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employees:

1. That the Illinois Central Gulf Railroad Company violated the controlling agreement, particularly Rule 39 when they improperly and unjustly suspended Sheet Metal Worker O. L. Bush from service with the I.C.G. Railroad for a period of 30 working days excluding holidays, beginning August 21, 1979 through October 3, 1979, as result of investigation held August 6, 1979.
2. That accordingly the I.C.G. Railroad Company be ordered to:
 - a. Compensate Mr. Bush for all time lost.
 - b. Make Mr. Bush whole for vacation rights.
 - c. Pay Mr. Bush for all contractual holidays.
 - d. Pay Mr. Bush for all contractual sick days.
 - e. Pay Mr. Bush for all jury duty attendance.
 - f. Remove all correspondence relating to this improper investigation and unjust suspension from Mr. Bush's personal file.

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 Claimant, Sheet Metal Worker O. L. Bush, was suspended for thirty (30) days for refusing to obey an order from his General Locomotive Foreman J. B. Hollowell on July 13, 1979. The Organization claims, first, that the hearing was unfair. There was a delay before it started. Moreover, the hearing officer also preferred charged and rendered the decision. The Organization responds that this in itself is not a violation of rules but, in this case, the Organization feels that the hearing officer included his own opinions into the questioning. He also went off the record when he asked whether the Organization had any need to call any further witnesses after it had called several. All of this, the Organization claims, shows that the hearing officer had prejudged this case.

The Organization then discusses the case's background. It reports that shortly before the date of the incident, the Carrier's Paducah Shop had reduced its force

and had said it would also reduce overtime. It did furlough employees but, according to the Organization, overtime increased. The workers at the unit did not want to work the overtime under such conditions and organized resistance to such work. The Company, therefore, placed notices on the bulletin board telling the employees they would have to work overtime.

As a result of what happened on July 13 when the general foreman went around with seniority lists to secure workers to work overtime (which also produced this and related grievances), an informational picket line was formed. The Carrier and the Organization then met. The Organization feels that the supervisors, as a result of pressure from their superiors, felt that they had to discipline those who refused to work overtime and this precipitated the disciplinary actions taken against the Claimant for the July 13 incident. The Organization also feels it affected the hearing officer's judgment.

Moreover, the Organization declares that the Carrier's general foreman accepted excuses from employees in his own department and excused them from overtime. He, however, did not give the Claimant who did not work in his department a chance to offer any excuse as to why he did not want to work overtime. In addition, the Organization claims that the Carrier knew that the employee had not worked overtime because of a work injury. The Organization feels that the Claimant neither behaved improperly nor was insubordinate to his supervisor when he refused to work overtime. On the other hand, the Organization feels that the supervisor acted in an arbitrary fashion and was guilty of discrimination in dealing with the Claimant by not asking him why he did not wish to work overtime.

According to the Carrier, Foreman Hollowell secured a copy of the seniority list and assigned overtime as needed, asking first those with the least seniority. If the employee offered a reasonable excuse, he was excused. When he reached the Claimant's name, the foreman assigned him to work overtime. The Claimant refused this direct order. The Claimant gave no reason why he could not work. The Carrier claims that two other supervisors were present when the Claimant rejected the order to work overtime and he was warned that his refusal might subject him to discipline. The Carrier declares it has the right to require overtime, and the Organization knows this to be the case even if the Claimant did not.

In addition, the Carrier feels the hearing was fair. First, the Carrier points out that there is no evidence that the Claimant was prejudged. Second, the combining of the functions of bringing charges, hearing the case, and issuing the discipline in one person in no way affects the fairness of the hearing as many Board awards indicate. Third, there is no definition of the term "prompt". In any case, the notice of the investigation was sent to the Claimant within fourteen days of the incident. Fourth, the fact that the hearing officer told the stenographer to go off the record did not affect this case since the Organization's objections to his going off the record was put in evidence. For all of these reasons, the Carrier feels the hearing was fair.

Finally, the Carrier feels the discipline was justified since it proved the charge of insubordination and a host of previous Board decisions state that insubordination merits discipline. This is particularly true since in this case, the Claimant could have obeyed his supervisor, and if he felt the order improper, grieved later.

The Board, in analyzing the record, does not feel that the hearing was held in an unfair manner. All of the evidence that the Organization wanted to bring forward was, in fact, brought forward and there is no evidence showing that the Claimant was prejudged. The other complaints are minor and did not viably affect the hearing.

Concerning the substance of the case, it is clear that Foreman Hollowell told the Claimant that he "was going to force him to work Saturday, July 14". The Claimant refused. He never gave a reason. The Claimant states he never was asked if he had a reason or was given an opportunity to give a reason. Two other supervisors said the Claimant did have the opportunity to give a reason but just refused to work. The Organization justifies the employee's refusal on the basis of a past work injury. In his testimony, however, the Claimant says that he did not work overtime because he worked Monday through Friday, "they gave me Saturday and Sunday off and that's the days I expect to be off".

The Organization also challenges the fact that Pipefitter Bush was suspended for 30 days while the other two Claimants in related grievances were suspended for five (5) days. The Organization charges that there was no "justification for imposing a penalty six times greater only on one of the accused". To this argument, the Carrier responds that the Claimant's file indicates several letters of warning, plus one previous 15 day suspension for insubordination. As a result, the Carrier feels the thirty (30) days suspension was "quite warranted". The Board does feel that it is appropriate for the Carrier to take into account a Claimant's past record in determining the amount of discipline given the employee. The past record is particularly relevant when the employee is charged with an offense similar to those for which the disciplinary action was taken against the employee before.

Since the Claimant neither knew nor questioned whether he was the most junior pipefitter being told to work; since he did not know that Foreman Hollowell had accepted excuses from his own subordinates so that they did not have to work; since he never told the Foreman that he could not work overtime because of a work related injury; since employees have to recognize that supervisors have a right to request overtime based on the seniority list and employees have the responsibility of giving specific reason if they wish to be excused from overtime, the Claimant was, in fact, insubordinate.

On the other hand, it also appears clear that Foreman Hollowell gave those employees who worked directly under him a chance to give a reason to be excused while his treatment of the Claimant in this case gave the Claimant little, if any, opportunity to give any reason for not working overtime or any hope that if he gave a reason, Foreman Hollowell would pay any attention to it. For this reason, there was, in fact, discriminatory behavior - one reason that the Board becomes justified in altering discipline.

There should be a suspension since the Claimant was, in fact, insubordinate. The suspension should be reduced from 30 to 25 days since the Claimant was treated in a discriminatory fashion. The Claimant should be made whole for the five days lost minus whatever he might have earned while out of service during that time.

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Award No. 9168
Docket No. 9258
2-ICG-SM-'82

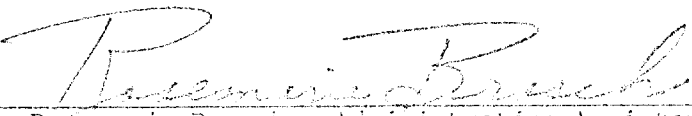
A W A R D

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 - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of June, 1982.