

The Second Division consisted of the regular members and in addition Referee George V. Boyle when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
{ and Canada  
{ Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company did unjustly remove Coach Cleaner James Earl Moore, Jr. from service for a period of time encompassing April 4, 1979 to May 15, 1979.
2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to compensate Coach Cleaner James Earl Moore, Jr. for all lost time from April 4, 1979 to May 15, 1979.

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 is a coach cleaner at the Western Avenue Coach Yard in Chicago, Illinois. After a hearing he was suspended from service for a period of thirty days for alleged insubordination.

The Employees appealed their decision on the grounds that the "allegations of insubordination in this instant claim were not borne out in the transcript of this hearing", and therefore the Carrier had not met the required burden of proof. Further it is the Employees' position that the penalty meted out was not for the purpose of correction but rather, improperly, for punishment. Also the Employees object to the hearing procedures since witnesses to the specific occurrence, out of which the claimant was charged, were not brought to the hearing as requested and required under Rule 34(g) which says, in part, "... such employee will be ... given a reasonable opportunity to secure the presence of necessary witnesses".

With respect to the required burden of proof, the transcript provides a series of exchanges which bear out the Carrier's position that the Claimant was given a legitimate, explicit and unambiguous order to which he failed to respond properly:

The General Foreman questioned the Assistant Foreman,

"Q. What was Mr. Moore doing when you approached him concerning passenger car #20221?

A. He was waiting 'til two mechanics repaired the one toilet so that he could work there.

.....

Q. What were your instructions to Mr. Moore, Jr. at that time?

A. I told him to go pick up garbage bags between 2 and 3.

Q. Did Mr. Moore do the work as instructed?

A. No.

Q. Did Mr. Moore make any attempt at that time to follow through with your instructions?

A. No.

Q. Did Mr. Moore make any statements as to why he would not perform the work as he was instructed?

A. Yes. He said that he was waiting for the 2 mechanics to finish with the repairs before he could dump it and fill it.

Q. If Mr. Moore did not attempt to remove papers and other debris as instructed, what did he do?

A. He explained to me that he was only one person and he stayed where he was."

Under cross examination by T. Machione, Local Chairman, the Assistant Foreman testified:

"Q. In you honest opinion, would you say that Mr. Moore refused your request as to picking up the papers?

A. Verbally, no, but by his refusal to go and do it, he did. (By his lack of action.)"

The Claimant's own testimony, while frequently contradictory, substantiates the Assistant Foreman's account. The General Foreman questioned the Claimant:

"Q. While you were waiting for the toilet to be repaired, did Mr. Lee Thomas instruct you to pick up paper and other debris?

A. Yes.

.....

Q. You immediately picked up paper and other debris after Mr. Lee Thomas instructed you to perform this work?

A. No.

Q. Did you immediately pick up paper and other debris after Mr. Lee Thomas instructed you to perform this work?

A. No, we began talking.

Q. What did you tell Mr. Lee Thomas?

A. I said I was going to get the paper.

Q. When did you say you were going to get the paper?

A. In a few minutes."

Then the Local Chairman asked the Claimant,

"Q. Mr. Moore, in your own words, will you testify as to what took place March 11, 1979, as to why this hearing is being held here this morning?

A. He came through the car and I was standing there and he said 'Was I doing anything?' and I told him I was waiting to dump a toilet, and he said, 'Well, go pick up paper', and I said, 'Okay I'll go pick up paper. And then he raised his voice and said, 'I said go pick up paper now.' And that is when I told him I was only one man, and the electrician working on the toilet told me he would only be a few minutes which he was. That is when he said, 'Are you refusing me? Are you refusing me?', and I said 'You know I can't refuse, that's a dumb question.' Then he pulled out the book and started writing, and he walked away."

In the Claimant's deposition, read into the record by the Local Chairman, he states, "On March 11, 1979, Mr. Moore was instructed to perform his duties by Mr. Thomas, Car Foreman, and Mr. Moore was waiting a couple of seconds for the repair man to get through repairing the toilet on car #20221. In doing so, Mr. Thomas requested Mr. Moore to pick up papers. Mr. Moore replied, 'I will as soon as I dump this toilet.' Which he did comply with Mr. Thomas' instructions and did pick up the paper."

From the above accounts, there is no conflicting testimony. The Claimant was standing, waiting to dump the toilet on car No. 20221. There were a number of

other workers taking an unauthorized break in the same car, at the same time. The Car Foreman came upon the scene and proceeded to break up the gathering. He questioned the Claimant about his duties and finding him simply waiting for repair work to be completed ordered him to undertake other duties. The Claimant temporized and without verbally refusing outright to follow the foreman's instructions he simply continued to wait until the repair work was completed, performed his prior duties and then afterward complied with the explicit order given earlier. However one may choose to alibi or explain the circumstances or rationalize the time involved that action or inaction constitutes insubordination, "the act of refusing to submit to established authority".

Insubordination is not a minor concern. The Carrier properly requires that orders be obeyed and in this instant case assessed a disciplinary layoff for purposes of correction, not punishment. This is borne out by the record as well, wherein the claimant's foreman remarks upon his good work record and offers the opinion that "... if Mr. Moore was given another chance that he would be the right kind of employee. I don't believe he would do that again."

With regard to the question of procuring witnesses at the hearing, Rule 34(g) says that the employee "at a reasonable time prior to the hearing ... will be ... given a reasonable opportunity to secure the presence of necessary witnesses". Since the Claimant was notified on March 13 of his hearing on March 22 there was sufficient and reasonable time for him or his representative to secure any appropriate witnesses or to request a postponement to secure them. The time to request a postponement of this nature is not in the midst of the hearing. The Claimant and his representative were not unaware that other employees were present when the incident occurred and if they could have shed light upon his case then it was incumbent upon the Claimant to secure them. Further since the Claimant's own testimony corroborates that of the foreman there would be little to be gained from postponing the hearing especially since no evidence or testimony was introduced which indicated that they had anything whatever to add or to substantiate.

Thus the Board holds that the Claimant was properly disciplined for insubordination, the Carrier has sustained the burden of proof. The penalty was not too severe, nor for punishment but was corrective. Finally the Board holds that the procedure was fair and proper and accordingly we deny the claim.

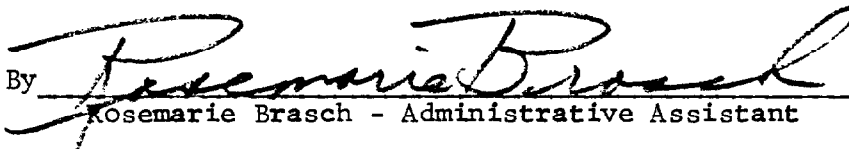
A W A R D

Claim denied.

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 22nd day of July, 1982.