

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
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(The Washington Terminal Company, Washington, D.C.

Dispute: Claim of Employee:

1. That the Washington Terminal Company improperly dismissed Car Cleaner G. A. Callaway in violation of the agreement and particularly Rule 29 after investigation August 8, 1979.
2. That accordingly Mr. Callaway should be made whole in line with Rule 29. He should be restored to service with seniority and vacation rights unimpaired and be compensated for his net wage loss.

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.

On Saturday, July 28, 1979, at approximately 8 AM, Claimant, a Relief Car Cleaner at Carrier's Union Station, Washington, D.C., with service date of February 24, 1979, was involved in an incident with his supervisor, J. S. Moss, concerning the washing of the outside of Train #441. According to Supervisor Moss, Claimant was instructed to help wash the outside of said train, but refused to do so; and, consequently, Claimant was taken out of service and charged with "...being insubordinate,...while on duty or while on Company property..." Claimant contends, however, that he did not refuse to perform the disputed assignment and that Ms. Moss had given him the alternative"...to either work the job or go home."

Pursuant to an investigation which was held on August 8, 1979, Claimant was adjudged guilty as charged and was terminated from Carrier's service. Said termination is the basis of these proceedings.

In addition to Claimant's above posited version of the precipitating incident, Organization further contends that: (1) Claimant was being harassed by his supervisor(s); (2) "Claimant had every right to question his Gang Leader's order...because Claimant's seniority was being negated as a result of said assignment"; (3) Claimant's hearing was not conducted fairly or impartially since the Hearing Officer "...persisted in questioning three company witnesses about... 'prior incident problems'", which "...were not part of the precise charge of which Claimant and his duly authorized Committee had been apprised..."; (4) the disputed termination was further in violation of Rule 29 because, even if Claimant has been proven guilty of the alleged infraction, "...dismissal for the

first offense charged against an employee with a clear record would be excessive...", (5) Carrier's reference to Claimant's employment record which was amassed during a period of prior employment with Carrier, may not be introduced in this matter because said information "...has not been provided to the duly authorized representative of the Claimant nor has it been a subject of discussion at any time during the handling of this claim on the property".

Carrier's position in this dispute is that Claimant was proven to have been insubordinate by refusing to perform his work assignment on August 8, 1979, as charged and that such an infraction "...is a serious offense and is major in nature which requires (that) discipline commensurate with this offense be necessarily assessed..." (Carrier Ex "C"), (Third Division Award 4449). In support of this same point, Carrier further argues that though there are conflicts between the testimony of Claimant and his supervisors regarding various details of this incident, there is, nonetheless, substantial evidence in the record to support Carrier's position; and that, under the circumstances, the Board may "... not substitute its judgment for that of the Carrier on issues of guilt and discipline" (Third Division Award 5032 and Second Division Award 6489).

Continuing, Carrier next argues that the basis of Claimant's refusal ("...washing the outside of Train #441 wasn't his work") was insufficient reason for Claimant to depart from "(O)ne of the basic well established practices of the Industry..." of "...obey now, grieve later"; and that by having made such a departure, Claimant "...placed himself in an untenable position" (Second Division Award 8223).

As its last significant area of argumentation, Carrier argues that Claimant is not a "new employee" in the true sense of the word since he was previously employed by Carrier as a Car Cleaner from January 1975 to December 1977 and was dismissed at that time by Carrier following a series of disciplinary actions -- the final one of which resulted from another incident of "Insubordination". According to Carrier, subsequent to said prior termination "Claimant was re-employed (by Carrier) as a Car Cleaner on personal assurances that his transgressions...would occur no more." Thus, Carrier argues that, in view of the above, Claimant's "(D)ismissal is not a disproportionate punishment for the offense of insubordination..."

A careful analysis of the complete record which has been presented herein leads the Board to conclude that there are but two separate, yet interrelated factors, which are critical to the resolution of this entire matter. These are: (1) the appropriateness of Claimant's refusal to perform the disputed assignment; and (2) Carrier's consideration in the instant case of Claimant's disciplinary record which was amassed during a period of previous employment with Carrier.

In this regard, suffice it to say that, despite the alleged specificity of Claimant's words, or lack thereof, at the time of the incident, Claimant's actions on the morning of July 28, 1979, were clearly insubordinate and improper, and thus warranted the imposition of severe disciplinary action by Carrier. Claimant clearly had no good reason not to perform the contested assignment or to abandon the more reasonable and acceptable course of action of "obey now and grieve". Having made that choice, however, such action was at Claimant's own peril and he must now

accept the inevitable consequences thereof.

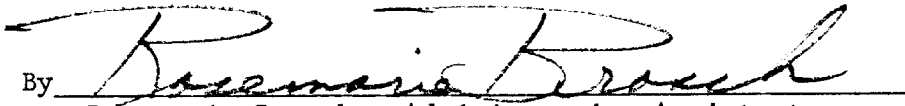
Notwithstanding the above, however, Carrier, in evaluating the degree of discipline to be administered in the instant matter erred by taking into consideration Claimant's prior disciplinary record in a totally separate employment relationship with Carrier. Having accepted Claimant as a new employee, and without proper foundation for the contention that said reemployment was a conditional matter, any further considerations beyond those set forth in the parties' controlling collective bargaining agreement were improper and clearly exceeded the scope of Carrier's managerial authority. Accordingly, Claimant's termination will be rescinded, and a penalty will be directed which befits the severity of Claimant's proven offense as well as the extent of Claimant's disciplinary record for the period of February 24, 1979 to August 20, 1979.

A W A R D

Claimant shall be returned to service with all normally accrued rights and benefits restored, but without back pay.

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.