Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9250
Docket No. 8418
2-ICG-SMW-'82

The Second Division consisted of the regular members and in addition Referee George E. Larney, when award was rendered.

Parties to Dispute: (A.F.L.-C.I.O. Sheet Metal Workers' International Association
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. That the Illinois Central Gulf Railroad Company violated the controlling agreement, particularly Rule 39 when they improperly and unjustly dismissed Sheet Metal Worker R. I. Meeks from service, effective March 31, 1978, as result of an investigation held March 29, 1978.

2. That accordingly the Illinois Central Gulf Railroad Company be ordered to:

   a. Restore Mr. Meeks, claimant, to service, all seniority rights unimpaired.
   b. Compensate the claimant for all time lost.
   c. Make claimant whole for all vacation rights.
   d. Reimburse the claimant and/or dependents for all medical expenses incurred while employee was unjustly held out of service.
   e. Pay claimant's estate whatever benefits the claimant has accrued with regard to group life insurance for all time claimant was improperly held out of service.
   f. Pay claimant for all contractual holidays.
   g. Pay claimants for all contractual sick days.
   h. Pay claimant for all jury duty attendance.
   i. Pay claimant premium on GA 5000 dental plan.
   j. Restore all other rights or benefits and clear claimant's 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 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.

The Claimant, Ricky I. Meeks, a member of the Sheet Metal Workers' Craft, first entered the Carrier's service on October 19, 1971. The record reflects that on date of October 29, 1974, Claimant was certified as a Pipefitter.

The instant case arises as a result of two (2) separately initiated claims, one filed directly by the Claimant, represented by private counsel and one filed on behalf of the Claimant by the Organization. As both claims involve the same fact situation and in a central way the very same core issue, it was the Board's determination to consolidate the two claims for the purpose of rendering a unified award.

The genesis of the instant case dates back to events which occurred on November 5, 1975, resulting in the Claimant's dismissal from service effective December 19, 1975, for alleged insubordination. A grievance contesting this dismissal was initiated and subsequently progressed before this Board. The events as set forth by the record in Docket No. 7329 and recounted by us in Award 7437 are as follows:

> "In the instant case, Claimant was a Pipefitter with approximately four (4) years' service, working at Carrier's Paducah Shops on the 3:40 PM to 12:00 AM shift. On November 5, 1975, the Claimant, along with Pipefitter O. L. Bush, was assigned by his immediate supervisor, J.L. Smiley, to apply stainless steel grills to a heater car in the Tank Shop.
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> During the course of this operation, Foreman Smiley encountered difficulty in determining the proper pieces of grill to apply to the heater car, and therefore brought in General Locomotive Foreman J. C. Lockett for assistance.
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> Foreman Smiley left shortly thereafter, and in the course of trying to properly fit pieces of grill on the heater car under the supervision of Foreman Lockett, Claimant refused to follow an order of Foreman Lockett, stating that his immediate Foreman, J.L. Smiley, would have to order him to do it.
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> After Foreman Smiley was brought back on the scene, Claimant still refused to carry out the order of Foreman Lockett, insisting that Foreman Smiley should be the one to give the order. When Foreman Lockett then informed Claimant that Claimant would be advised as to when and where to appear for a formal investigation on the charge of refusing a direct order, Claimant admittedly advised Foreman Lockett that "the best thing he could do is just to get away from me before I knocked his damn teeth out."
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> Claimant alleges that he "begged" Foreman Smiley to tell him what to do, but Smiley said nothing, and Foreman Lockett "kept butting in",

"whereupon Claimant "got mad and lost his temper."

Insubordination cases commonly appear in one of two forms. One type is the willful refusal or failure to carry out a direct order, instruction or company rule. The other is a personal altercation between employee and supervisor, often involving shouting matches, profane or abusive words, and actual or threatened violence. The instant case involves elements of both forms of insubordination.

However, a close reading of the record in the instant case also reveals that there were some mitigating circumstances involved in Grievant's actions.

The record before us reveals that more heat than light was generated by both parties in their handling of events on the night of November 5, 1975."

We sustained the claim in part finding the Carrier's decision to dismiss Claimant not reasonably consistent with the seriousness of the proven offense. We held there was no substantial evidence that the November 5, 1975 incident was anything more than a first offense and a single episode of misconduct and that even though Claimant's action was of itself sufficiently serious to merit stern disciplinary action, it did not merit discharge. Accordingly, on January 6, 1978, we issued the Award wherein we ordered that the Claimant be reinstated with his seniority rights intact, but without any back pay and directed the Carrier to institute and make effective this ruling on or before February 6, 1978.

The record reflects that Carrier's handling of Claimant's reinstatement led to the filing of another claim which was ultimately progressed before us for consideration. In Docket No. 8279, the Organization on behalf of the Claimant alleged Carrier had improperly withheld Claimant from service past the effective date for reinstatement of February 6, 1978 as ordered by our Board. The events surrounding this situation led to Carrier dismissing Claimant a second time. In Award 8538, we recounted the prevailing facts and circumstances as follows:

"On December 19, 1975, after formal investigation, Claimant was discharged by Carrier. By our Award No. 7437 issued on January 6, 1978, we ordered Claimant restored to duty with seniority rights intact but without back pay. In line with Carrier's policy that any employee out of service for six months or more must pass a physical examination before reinstatement, Mr. Meeks was given an examination by a company doctor, W. B. Haley, M.D., on January 24, 1978. While out of service, Claimant was involved in an accident in which he suffered a shoulder separation, and the examination on January 24 revealed that he could not lift his left arm above his shoulder height. Because of such fact, he held to be disqualified for his duties as a sheet metal worker. The findings of Dr. Haley were forwarded to Chief Medical Officer Thomas H. Davison, who on February 21, 1978, confirmed Mr. Meeks' disqualification '...permanently for the unrestricted duties of Pipefitter' with comments: 'Permanent restriction--no overhead work with left arm--restricted left shoulder motion". Upon receipt of Doctor Davison's ruling as to his disqualification, Mr. Meeks, on March 6, 1978, mailed to Carrier's

"Director of Personnel R. G. Richter a statement from Dr. R. B. Miller, an orthopedist, that in his opinion Claimant was physically qualified to return to work without restriction on activity. This certificate was forwarded to Dr. Davison, who directed that Dr. Haley re-examine Mr. Meeks. Dr. Haley again examined Claimant on March 13, 1978, and found that Claimant had full range of motion in his left shoulder, though with some discomfort in the extreme ranges. He approved Claimant's return to work, as did Dr. Davison.

On March 15, 1978, Claimant was advised by telephone that he could return to work. Claimant responded with the advice that he would report for the second shift that day. He reported to work as he had indicated he would. Upon reporting for duty, Mr. Meeks advised his foreman that he wanted to displace the employee who was working the job he held when he was fired. The foreman called Mr. Richter, who advised that Claimant would not be permitted to displace on his old position. Mr. Meeks stated that if he could not do so he was going home. The general foreman then called Mr. Richter to verify the ruling. Mr. Richter told the general foreman to tell Claimant to work an unassigned position that day and that the next morning he and Claimant's local chairman would decide whether or not Claimant had a roll coming under Rule 22 (which prescribes under what circumstances a returning employee 'shall return to his regular position'). Mr. Meeks declined to work under such circumstances and left the property. After formal investigation, we was again discharged; however, the issue of such discharge is not before us in this proceeding.

The matter began its return to this Division on April 4, 1978, with a letter from Sheet Metal Workers' Local Chairman Don Buchanan to Director of Personnel R. G. Richter stating that the Union on behalf of the Claimant 'wishes to file grievance and present time claim' against Carrier. Mr. Buchanan accused Carrier of 'delaying tactics' to avoid implementing Award No. 7437. The letter further stated that on March 15, 1978, Carrier had violated Rule 22 of the Agreement in refusing to allow Claimant to return to his former position. A 'continuing time claim, dating back to and beginning February 6, 1978', was asserted. A negative response, the validity of which we shall hereafter consider, was made by Mr. Richter on May 24, 1978. The matter was subsequently and duly progressed to this tribunal for adjudication.

Based on a review of the above record, we held the following in Award No. 8538:

"The first issue is whether or not Carrier was justified in requiring Claimant to be examined by a company physician prior to reinstatement to service. We know of no award holding to the contrary. None is cited by the Organization. Our awards 5641 (Ritter) and 7089 (Twomey) support Carrier's position.

Did Carrier exercise such right in good faith? The Organization takes the position that Carrier engaged in 'medical maneuvering' and delaying tactics to avoid implementation of Award 7437. Our order accompanying such award stated, 'The Illinois Central Gulf Railroad Company is hereby

"'ordered to make effective Award No. 7437...on or before the 6th day of February, 1978.' The examination by Dr. Haley took place on January 24, with reasonable promptness, we hold. However, we find unreasonable the delay until February 21 to notify Claimant of his disqualification. Under the circumstances, this decision should have been made and communicated to Claimant by February 6, thus allowing Carrier 13 days to process the report through its Chief Medical Officer. There is no showing as to when Claimant received Dr. Davison's notice of disqualification dated February 21; in the absence of such showing we will assume that such was received on February 23. Fourteen days later Claimant mailed Dr. Miller's certificate to Mr. Richter. Seven days later, within a reasonable time, in our opinion, Dr. Haley confirmed Dr. Miller's findings, and Claimant was offered return to duty the next day. Assuming that Carrier notified Mr. Meeks on February 6 of his disqualification, and applying the same timetable as actually unfolded after February 23, and assuming that Mr. Meeks' condition was the same on such date as on March 15, we find that Claimant should have been offered return to duty as of February 28, 1978. Thus, Carrier's inordinate delay deprived Claimant of the opportunity to work eleven work days between and including the dates of February 28 and March 14.

In our reasoning, we accord to Carrier good faith but charge it with unreasonable delay, and because of such delay assume Claimant's fitness for duty though proof of such is not in the record.

A third issue is whether or not Carrier properly denied the original claim. It is the position of Petitioner that Mr. Richter's letter of May 24, 1978, simply denied the grievance without denying the accompanying time claim. The Committee's position is destroyed by Local Chairman Buchanan's appeal of Mr. Richter's denial, in which Mr. Buchanan states:

> 'This refers to your letter of May 24, 1978, declining our grievance and continuing time claim we filed April 4, 1978, in behalf of R. I. Meeks.' (Emphasis added)

Obviously, Mr. Buchanan understood the effect of Mr. Richter's letter of denial.

The final issue raised by the submissions of the parties concerns Rule 22, it being the Organization's position that we should, in this proceeding, now order Mr. Meeks restored to duty because Carrier refused to allow him to return to his regular position held at the time of his discharge on December 19, 1975. Rule 22, and the interpretation thereof, read as follows:

'ABSENCE FROM WORK

> RULE 22. When the requirements of the service will permit, employees,on written request, will be granted leave of absence for a limited time, with privilege of renewal. An

"'employee absent on leave who engages in other employment will lose his seniority unless special provision shall have been made in writing therefor with the proper official and committee representing his craft.

Interpretation of Rule 22
(Effective 7-1-1963)

An employee reporting for duty after leave of absence, vacation sickness, disability, or suspension, or for any other legitimate cause, shall return to his regular position and may within five (5) working days exercise seniority to any position in any craft or class in which he holds seniority, bulletined during his absence. If during his absence, his regular position has been abolished, or filled by a senior employee in the exercise of seniority, he may within five (5) working days after reporting for duty exercise seniority.

This agreement will become effective July 1, 1963, and the service by either party of a thirty-day written notice of cancellation shall act automatically to terminate this agreement at the end of the thirty-day period.'

While there are numerous references in Petitioner's brief to Claimant being unjustly held out of service prior to the effective date of Award 7437, the award clearly gave effect to a disciplinary suspension of Claimant during the period from December 19, 1975, to February 6, 1978. Thus, we hold that Rule 22 as interpreted by the parties was indeed applicable ('An employee reporting for duty after...suspension...") when Mr. Meeks returned to duty on March 15, 1978. Nevertheless, we have no authority, right or reason to order Claimant restored to duty as of any date. In refusing to accept reinstatement on his own terms, however correct, Mr. Meeks violated a cardinal rule (comply now, grieve later) and took himself out of service."

On date of December 10, 1980, we issued the Award wherein we declared the Grievant's claim for reinstatement is denied, but we sustained the claim relative to the eleven (11) days pay lost due to being improperly withheld from service as a result of the delay in administering the physical examination.

However, prior to the issuance date of Award 8538, the Claimant and the Organization both initiated grievances contesting his second dismissal effective as of March 31, 1978. These two (2) actions constitute the subject issue now before us.

At the outset, Carrier advances the argument that the issue of Claimant's second dismissal is beyond this Board's jurisdiction on the grounds of res judicata, that is, that this matter was adjudicated and disposed of by the Board in its Award 8538 cited above in its entirety. In support of its position, Carrier relies on several representative Second and Third Division Awards; 2nd Div. Nos. 4874 and 5[illegible], 3rd Div. Nos. 6935, 20455, and 20714. Of these Awards, the Third Division in Award 6935 held the following:

> "If as we maintain, our awards are final and binding, there must be an end some time to one and the same dispute or we settle nothing, and invite endless controversy instead. The pending claims, having been once adjudicated, are now barred from further Board consideration, and must be denied on jurisdictional grounds."

While we affirm what we said in Award 6935, we must take exception with Carrier's contention our Award 8538 settled the matter of Claimant's dismissal. As we read the Award we note we specifically stated the issue of Claimant's second dismissal was not before us. Quoted hereinbelow we said:

> "After formal investigation, he was again discharged; however, the issue of such discharge is not before us in this proceeding."

In conjunction with this holding and consistent with it, we further expressed the view that:

> "Nevertheless, we have no authority, right or reason to order Claimant restored to duty as of any date."

Accordingly, in recognition of our lack of authority to restore Claimant to duty based on the fact his discharge per se was not before us in Award No. 8538, we found the Claimant's claim for reinstatement had to be denied. It follows therefore that the instant two (2) claims comprising the case at bar are properly before us for consideration and resolution on the merits.

It is our determination that the crux of the matter rests on whether or not Claimant had fully been restored to Carrier's employ at the time he left the Company premises after being apprised he would not be assigned to his former job position on March 15, 1978. Relative to this determination we find critical the fact Claimant had been medically certified to return to duty, had been notified by Carrier to return to work, albeit on very short notice and not in writing, had in fact reported to his work area, but most significantly had not punched his time card to officially clock-in. In not clocking in, we find Claimant had only partially been restored to Carrier's employ, as his status had not been one of an employe of the Carrier in the previous two (2) plus years. It matters not then as to why Claimant left or for what reason he gave to the Carrier for so doing. In this sense what we said in Award 8538 is held to be true here and that is, Claimant, by choosing not to perform the unassigned position on March 15, 1978, and further, of his own volition, choosing thereafter to protest the terms of his reinstatement, simply withheld himself from service.

Additionally our review of Rule 22 persuades us that the language embodied therein is clear and unambigious, to wit, Carrier erred when it attempted to reinstate the Claimant to a position other than his former regular position. However, we find Carrier is not liable for any back pay or other compensatory benefits which may have been applicable under other circumstances because the Claimant from March 15, 1978 and thereafter, was not in the ordinary and usual sense an employee of the Carrier.

We trust that over the period of these nearly seven (7) years, Claimant

has acquired a greater degree of maturity than that which he obviously lacked back in 1975, when he engaged in insubordinate acts toward supervision. Furthermore, if Claimant chooses to accept reinstatement to his former position, he must also accept the fact he is but one among the workforce, that he must perform his job satisfactorily and follow reasonable orders from his superiors and that above all, he must accept the fact that he is not the Chairman nor the President of the Railroad.

Based on the foregoing findings, we direct the Carrier to reinstate the Claimant according to its policies and consistent with the procedures of the Controlling Agreement effective April 1,1935. We caution the Carrier to afford Claimant all the rights he is entitled to receive in the process of his reinstatement and thereafter for as long as he shall continue to be employed. We shall indeed take a very dim view of any further claim which might progress to the Board in the future that is related to any impediment by Carrier in effecting the Claimant's reinstatement.

Claimant is to be reinstated with his seniority rights intact, but without any back pay.

A W A R D

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Braech
Rosemarie Braech - Adminstrative Assistant

Dated at Chicago, Illinois, this 28th day of July, 1982.

DISSENT OF CARRIER MEMBERS
TO AWARDS 9250 AND 9251
DOCKETS 8418 AND 8554-I
(Referee Larney)

The "Findings" of the Majority in these Awards, in particular the "reasoning" of the author, are totally baseless and undisputedly without foundation in reason or fact. The Referee, in order to dispense his own brand of industrial justice, completely abdicated his responsibility to address the specific issues before him as required by the mandates of the Railway Labor Act, as amended.

The gravamen of each dispute was whether the investigation afforded the Claimant on March 29, 1978 was fair and impartial, whether the evidence adduced at the investigation established Claimant's guilt of the charges, and whether the discipline of dismissal assessed on March 31, 1978 as a result thereof was appropriate. The Referee addressed none of these salient issues but rather concocted a scenario in order to justify his reinstatement of the Claimant to service.

While ignoring the crux of the cases, the Referee at page 7 of the Awards stated the following:

> "In not clocking in we find Claimant had only partially been restored to Carrier's employ, as his status had not been one of an employee of the Carrier in the previous two (2) years...."

The Referee arrived at this tortured maverick conclusion despite the fact that in the sentence previous to this, he stated that Claimant had been medically qualified to return to duty, had been notified to report for duty and did in fact report to work. Somehow, the Referee felt that Claimant could not be fully restored to service until he physically punched his timecard. This type of stilted reasoning is tantamount to stating that a woman is only half pregnant.

Not satisfied with this unwarranted conclusion, the Referee

further exacerbates the situation by stating the following:

> "It matters not then as to why Claimant left or for what reason he gave to the Carrier for so doing."

This statement clearly demonstrates the Referee's predilection to ignore the operative facts in these cases and to fashion his own version of the events to justify his misplaced resolution of the dispute.

What makes these decisions even more extraordinary is that at no point in the handling of these disputes, from their inception on the property to their discussion in panel before the Referee, was the theory set forth that Claimant had only been partially restored to service due to the mere fact that he had not clocked in. This idea was completely fabricated in the Referee's own mind. It is obvious that the Referee failed to follow the principle long established by this Board that the Board is limited in its determination to the facts and arguments of record and may not consider matters extraneous to such record. While this type of action may at least be explainable in a neophyte to railroad arbitration proceedings, it is totally inexcusable in a Referee who has previously sat on this Board and who purportedly knows the procedures and principles which have been enunciated.

In addition to his errant decision to reinstate the Claimant, the Referee found it necessary to instruct and lecture the Carrier as to how they should manage and direct their workforce, in particular, Claimant Meeks. Such dictum certainly has no justifiable place in these Awards and clearly is beyond the purview and jurisdiction of the Board.

While many more pages could be written concerning the impropriety of these Awards, suffice it to say that they do not express a well-reasoned examination of the issues and are palpably erroneous and totally inconsistent with sound arbitral judgment.

Hence, we dissent.

J. M. Fagnani

D. M. Lefkow

J. E. Mason

J. R. O'Connell

P. V. Varga