Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9251
SECOND DIVISION Docket No. 8554-I
2-ICG-I-'82

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

Parties to Dispute: (Ricky I. Meeks, Claimant
(
(Illinois Central Gulf Railroad, Carrier

Dispute: Claim of Employes:

On January 6, 1978, the National Railroad Adjustment Board ordered the Carrier to reinstate the Claimant to service with his seniority rights intact by February 6, 1978 (Ex. 1). The Carrier allegedly complied with the reinstatement order on March 15, 1978. On March 31, 1978, the Claimant was dismissed from the Carrier's service for falsifying his reason for not working on March 15, 1978 and for being absent without permission (Ex. 2).

It is the position of the Claimant that the Carrier has failed to comply with the reinstatement order of January 6, 1978, and that the dismissal dated March 31, 1978, is unjust and in violation of Rules 22 and 39 of the parties collective bargaining agreement.

Therefore, the Claimant requests that the Board order that he be reinstated with seniority rights unimpaired, that he be compensated for all wages lost since January 6, 1978, that he be granted displacement rights pursuant to the parties' agreement, and for any and all other relief the Board should deem just and equitable.

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 were given due notice of hearing thereon.

"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

"'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

> "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