

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen and Oilers
{ The Washington Terminal Company

Dispute: Claim of Employees:

1. That under the current agreement Laborer K. T. Murphy was unjustly dismissed from all service of the Carrier on April 16, 1979 as a result of hearing held on April 9, 1979.
2. That accordingly the Carrier be ordered to make the aforementioned K. Murphy whole by reinstating him to the service of the Carrier with full seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 10% annual interest.
3. That he be reimbursed for all losses sustained because of loss of coverage under Health and Welfare and Life Insurance Agreements during the time he was held out of service.

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.

Claimant, a Laborer at Carrier's Washington Terminal Company with seniority date of January 6, 1978, was charged with the following:

"Violation of WT Co. General Rule 'N' '... being insubordinate ... is prohibited; and 'O', 'No employee shall be absent from duty ... without permission' when, on March 29, 1979, at approximately 12:20 p.m., you were instructed to clean the Diesel Office and then report to the Ready Track and at approximately 12:50 p.m. you had neither cleaned the office nor had reported to the Ready Track, but were observed in the Carmen's Lunchroom at the Car Shop, which was not on your work assignment."

Pursuant to an investigation which was conducted on April 9, 1979, Claimant was adjudged guilty and was dismissed from Carrier's service effective April 16, 1979. Said termination is now the basis of the instant claim.

Claimant's version of the discharge incident was that, as per his usual practice, he had already cleaned the Diesel office earlier on the morning of March 29, 1979, and that at 12:20 p.m. Laborer Supervisor T. R. Jones merely instructed him to report to the Ready Track for further assignment. According to Claimant, when he arrived at the Ready Track no supervisor was available and so he proceeded to search for a pick-up stick (broom handle with a sharpened nail on the end of it) in order to pick up trash, but he was unable to find one. While in the process of searching for a pick-up stick, Claimant entered the Carmen's lunchroom for a drink of water and there he engaged in a conversation for a few minutes with a Mr. DiPietro. At that point, Supervisor Jones and General Foreman O. G. Cone, who were searching for Claimant, entered the lunchroom and confronted Claimant.

The Supervisors' account of this same incident is that at approximately 12:20 p.m. on said date Supervisor Jones instructed Claimant to clean the Roundhouse office and then to report to the Ready Track for further assignment. Thereafter Supervisor Jones informed General Foreman Cone that he had given Claimant the particular assignment. At 12:50 p.m. because the Roundhouse office still had not yet been cleaned and Claimant still had not reported to the Ready Track, Mr. Cone reported the matter to Mr. Jones and the two then began searching for Claimant. While so engaged they entered the Carmen's lunchroom and there they allegedly found Claimant seated at a lunch table with his billfold out and some papers lying on the table in front of him.

Organization's basic position in this dispute is that Carrier's "dismissing of Claimant was an arbitrary, capricious, and unjust action and an abuse of managerial discretion". In support of this contention Organization argues that Claimant's hearing was unfair because Carrier completely failed to prove the charges which had been filed against Claimant (Second Division Awards, 1178, 1304, 1348, 3562, 5313, 5572, 6174, 6419, 6713, 7002, 7172 and 7343); and that Carrier's decision to dismiss Claimant was not based upon the facts of the instant case, but instead was based on Claimant's previous past record which, according to Organization, was not permissible (Award 4684, 11130, 11308, 12815, and 13086).

Carrier's position herein is that there is sufficient evidence in the record to support the charges which have been raised against Claimant; that Claimant's hearing was fairly and properly conducted; that Claimant was given full opportunity to testify in his own behalf and to bring such witnesses which he deemed proper; that at the hearing neither Claimant nor Organization had any comment or criticism regarding the manner in which the hearing was conducted; and that, although there is conflicting testimony in the record, absent a showing that Carrier acted in bad faith or was prompted by any improper motive, Carrier may properly elect to believe its own witnesses and the Board in such situations may not substitute its judgement for that of Carrier.

The Board has carefully read and studied the complete record in this dispute and finds that Carrier's position, as presented, is correct and, therefore, must be supported. The rationale for the aforestated determination is based largely upon the fact that Claimant's testimony regarding several critical aspects of this case is inconsistent and, at times, contradictory. Additionally, Claimant's entire defense in this matter is merely a denial of Carrier's charges, whereas Carrier's evidence is the testimony of the two (2) supervisors whose testimony stands unimpeached and thus constitutes a prima facie case. Furthermore, Claimant's failure to produce evidence and/or witnesses whom he cited in his pleadings, invariably casts a negative light upon Claimant's entire defense.

Related to the foregoing, but certainly a separate consideration in this analysis, is Claimant's unsupported contentions that he did not hear Supervisor Jones assign him to clean the Roundhouse office at 12:20 p.m. on the day in question, and that he did not have to perform this particular assignment because he had completed it earlier that day as a part of his regular assignment. On the one hand Claimant maintains that he did not hear Mr. Jones' instructions to him; and, on the other hand, Claimant also maintains that Mr. Jones' instructions were improper because he (Claimant) has previously performed the disputed work. An analysis of this critical portion of the testimony suggests that Claimant was endeavoring to "cover all bases" in his defense since there is no evidence whatsoever in the record that Claimant's job duties were so narrowly defined that Claimant could not be assigned to perform additional duties even though he may have performed those same duties earlier on his work shift. Indeed, Claimant's own testimony clearly indicated that he had been assigned to perform additional duties other than those regularly assigned to him and that Claimant performed same when so assigned. As the Board views the instant case, Claimant was similarly responsible on March 29, 1979, and to refuse to carry out this assignment or to delay in the performance thereof was an insubordinate act which Claimant engaged in at his own peril.

Having made the foregoing determinations, any further comments concerning Organization's contention regarding Carrier's reference to Claimant's past record at the investigation is now considered to be unnecessary. Carrier's charges against Claimant were supported by substantial evidence and Carrier's reference to Claimant's work record for the sole purpose of determining the appropriate penalty which was to have been assessed, was entirely proper and within Carrier's authority.

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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of February, 1983.