Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13080
Docket No. 12914
96-2-94-2-64

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

PARTIES TO DISPUTE: (System Council No. 6 - International
(Brotherhood of Firemen and Oilers
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"(1) That under the current and controlling agreement, Firemen and Oiler T. Reusch, ID No. 188927, was unjustly suspended from service on July 3, 1993 through August 8, 1993.

(2) That accordingly, Firemen and Oiler T. Reusch be made whole for all lost time, with seniority rights unimpaired, the payment of 10% interest rate added thereto, and his personal record be expunged of any reference to this discipline."

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 were given due notice of hearing thereon.

Claimant established his seniority date of October 19, 1990. On July 2, 1993 Claimant was working a second shift Laborer's position at the Queensgate Locomotive Shop located in Cincinnati, Ohio.

On that day, he was primarily servicing locomotives so that they could be returned to duty. Prior to the end of his shift, he was instructed by Pit Foreman L. Brown and General Foreman W. F. Dawson to work four hours overtime.

The Claimant refused on the basis that he was tired and testified at the Investigation that in addition to being tired he was suffering from heat exhaustion. As a result of Claimant's refusal to work overtime on July 2, 1993 he was removed from service the following day.

A Hearing into the matter was originally scheduled for July 14, 1993, but was postponed at the request of the Organization. The Hearing was rescheduled and finally held on July 20, 1993.

On August 6, 1993, the Carrier determined that the Claimant was indeed guilty of insubordination as established at the Investigation held on July 20, 1993. As a result, it assessed the discipline of suspension (time held out of service) and ordered the Claimant to report to duty on August 9, 1993.

The Claimant reported as instructed. It was also established at the Hearing that the Claimant was generally a cooperative employee and had regularly worked overtime assignments when requested to do so. In short, the Claimant appeared to be a cooperative employee with no prior record of discipline.

The Organization appealed the Claimant's 37-day suspension based upon four arguments.

First, the Claimant was disciplined in violation of the Agreement. Second, the Claimant was denied a fair and impartial Investigation. Third, the Carrier had not sufficiently proved its case. And fourth, that the discipline assessed (37-day suspension) for refusing four hours of overtime was arbitrary, capricious and an abuse of managerial discretion.

First the Organization argues that an employee cannot be suspended or dismissed without a fair and impartial Hearing before a designated Carrier officer as required by Article 1-Disciple, Section 1. The Organization argues that the Carrier, in essence, jumped the gun by removing the Claimant from service on July 3, 1993, rather than waiting until a formal determination was made as a result of the July 20, 1993 Investigation.

The Organization's second thrust would have us believe that the Claimant did not receive a fair and impartial Investigation. As evidence of the Carrier's bias, the Organization argues that its cross-examination of a crucial witness was curtailed, thereby denying the Claimant his due process rights under the Agreement.

Next, the Organization argues that the Carrier did not prove that Claimant was insubordinate because it hastily pulled him out of service prior to allowing him to comply with the order. According to the Organization's theory, the Claimant was presented with two options; either work the overtime as ordered or obtain a doctor's note justifying an absence. The Organization argues that the Claimant was never allowed to provide a doctor's note, nor did the Carrier ever request one after removing the Claimant from service. Therefore, the Organization argues, the Carrier failed its burden of proving that the Claimant was insubordinate as charged.

Finally, the Organization argues that the discipline of a 37-day suspension assessed against an employee with a good service record is excessive. In ancillary arguments, the Organization also suggested that the Claimant was well within his rights to refuse the Carrier's overtime request because the Claimant felt that he could not safely perform the duties of fueling and sanding locomotives, which requires extensive climbing and manual work.

Therefore, the Organization urges the Board to sustain the claim.

The Carrier argues that the Claimant received a full and fair Investigation and that the Organization's supposed evidence of Hearing Officer bias merely surrounded the Hearing Officer's attempt to limit the Organization's inquiry into irrelevant matters. According to the Carrier, the issue being investigated was whether the Claimant refused a direct order to work overtime on July 2, 1993 and, therefore, any other line of inquiry was irrelevant.

The Carrier also argues that it clearly established that the Claimant was insubordinate through his own testimony and through the testimony of the two Supervisors, all of whom testified that the Claimant was ordered to work four hours overtime on July 2, 1993. Therefore, the Carrier argues that it proved that the Claimant was, in fact, insubordinate.

The Carrier notes that the Claimant's sudden concern with his own safety and concern about possible heat exhaustion was an afterthought because it was never mentioned during the conversations with the Claimant on July 2, 1993. According to the testimony of Foreman L. Brown, the Claimant merely stated that he was tired, a fact which Foreman Brown suggested could apply to everyone working in the Cincinati facility on that day.

The Carrier also argues in favor of the discipline assessed by suggesting that insubordination is a serious offense which, in most cases, can lead to dismissal. The Carrier argues that it took into consideration Claimant's good work record when it decided merely to assess a 37-day suspension, rather than the ultimate penalty of dismissal.

Therefore, the Carrier urges the Board to deny this claim.

We extensively reviewed the record presented by the parties, including the transcript of the Hearing, and find that the Claimant was afforded a full and fair Investigation. The Carrier correctly characterized the activities of the Hearing Officer as attempting to limit the cross-examination of the Local Chairman to issues relevant to the Investigation. Moreover, the collateral matters that the Local Chairman attempted to address, namely an inquiry into the availability of other employees to work the overtime assignment that night was irrelevant to the inquiry of whether the Claimant refused a direct order. Therefore, we find that the Carrier did afford the Claimant a full, fair Investigation as required by the Agreement.

Next, we find that the Carrier complied with the terms of the Agreement when it removed the Claimant from service on July 3, 1993 prior to holding a formal Investigation. While the Organization's argument has appeal that, the Claimant was removed from service prior to the Hearing, despite the fact that he posed no threat or detriment to the Carrier, we cannot agree with the Organization's contention that it was a violation of the Agreement.

While Section 1 of Article I Discipline provides that no employee shall be suspended or dismissed prior to an impartial Hearing, it goes on to suggest that suspension in proper cases pending a Hearing which shall be prompt shall not be deemed a violation of this Rule. Unfortunately, for the Organization, the Agreement Rule establishes no criteria to determine whether a charge of insubordination is a proper cause for suspending an employee prior to a Hearing. An appellate tribunal, with no power to write the parties' Agreement, cannot find that the Carrier erred when it summarily removed an allegedly insubordinate employee from service prior to an Investigation.

Next, we find that the Carrier satisfied its burden of proving that the Claimant was insubordinate. The Organization impliedly argues that Claimant may have been more properly charged with wilful disobedience rather than insubordination. Wilful disobedience arguably could mean refusing to follow a direct order, while insubordination could be characterized as a more continuous mutinous type of activity exhibited by a particular employee.

Insubordination, at times, has also been defined as an employee refusing a direct order from a supervisor who is entitled to give such an order. This is the definition that we adopt in deciding that the Claimant was insubordinate on July 3, 1993 when he refused a direct order to work overtime.

Also, the Organization failed to establish that the Claimant was physically incapable of following the order on the date in question. Merely being tired, unfortunately, is an insufficient excuse to refuse a direct order to work overtime as required by the Agreement.

Finally, we must assess whether the 37-day suspension was an arbitrary and capricious amount of discipline assessed in excess of managerial discretion. In this case, we believe it is. Here, we have an employee who regularly reports to work, does not take sick days and regularly agrees to work overtime as requested by the Carrier. As established on the record, the Claimant does not appear to be a wilfully disobedient employee. Rather, the employee's employment record established the fact that he is a cooperative and diligent employee who regularly complies with management's directives.

As a result, we believe that a 37-day suspension is excessive given his good record and given the fact that it is a one-time occurrence.

Therefore, because we believe that the 37-day suspension was excessive we will reduce Claimant's penalty for insubordination to a two-week suspension. We will order the Carrier to compensate the Claimant for the remaining 27 days of his suspension, exclusive of any rest days that would have been appropriate for his assignment.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1996.