

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Extra Gang Laborer Rufino DeLaCruz from service on January 8, 1963 [sic] for alleged "refusal to comply with the General Notice of the General Rules and Regulations of the Southern Pacific Company" was without just and sufficient cause and on the basis of unproven charges. (Carrier's File 011-181 (D)).

(2) The claimant be reinstated to service with seniority, vacation and all other rights unimpaired; the charge be stricken from the record and that reimbursement be made for his net wage loss as per Rule 29 of the effective Agreement.

OPINION OF BOARD: Extra Gang Laborer Rufino DeLaCruz, employed since 1947, was suspended from service on January 8, 1964 and dismissed on April 13, 1964. He requests reinstatement, reimbursement, restoration of all rights and clearing of his record.

On December 30, 1963 Claimant and others were working along Carrier's right-of-way when a train collided with a push car, injuring two Laborers. On January 8, 1964 Roadmaster B. G. Barnum called Claimant and Laborers F. V. Mejia and R. G. Ventura to his office for the purpose of delivering a letter of admonishment (dated January 7, 1964) signed by Superintendent J. H. Long and obtaining a signed acknowledgment. Extra Gang Foreman A. C. Gomez, at Barnum's request, served as interpreter at this meeting. Ventura signed his letter but DeLaCruz and Mejia would not sign. All the letters were worded identically and stated in relevant part:

"... your failure to observe the movement of Train No. 830 in this particular instance constitutes a violation of those portions of Rule 'M' of the General Rules and Regulations of the Southern Pacific Company reading as follows:

'M. Employees must exercise care to avoid injury to themselves or others. ...

They must expect the movement of trains, engines or cars at any time, on any track, in either direction.

Carelessness by employes of the safety of themselves or others will not be condoned.'

A copy of this letter is being attached to your personal record and wish to advise you that if in the future you are a party to such actions as referred to herein I will have no recourse but to remove you from the service of Southern Pacific Company.

Kindly acknowledge receipt and understanding on attached copy of this letter, date, and return for my file."

During the course of this January 8 conference, Claimant and Mejia are alleged to have said that they had no responsibility for observing Carrier's rules, that such rules did not apply to them, and that they would not comply with any rules. Roadmaster Barnum thereupon suspended them from service.

Later that day Barnum reported his actions to his superiors. In a written memo summarizing the discussion, he noted in part:

"... Both of these men stated they were not required to comply with the rules, but were only required to comply with the instructions of their foreman and assistant foreman. . . . Because of the attitude of these two men I instructed them at this time, January 8, 1964, that they were being removed from service pending final decision from the Superintendent and that they would be kept out of service for their violation of the second and third paragraphs of the rules under General Notice on Page 10 of the Maintenance of Way Book of Rules. These two men are ringleaders of the troubles on Extra Gang No. 1. . . ."

By letter dated January 13, 1964 Superintendent Long removed Claimant from service (Mejia was also dismissed), stating in part:

"You advised the aforementioned parties that as a track laborer you had no responsibility and that the application of these rules did not pertain to you, that the rules were the responsibility of the foreman and assistant foreman. You further advised that you would not comply with any rules.

For your refusal to comply with the General Notice of the General Rules and Regulations of the Southern Pacific Company, reading as follows:

'Obedience to the rules is essential to safety and is required.

To enter or remain in the service is an assurance of willingness to obey the rules.'"

Claimant and Mejia requested and were granted a hearing which was conducted on February 6, 7, 24 and 27, 1964. On April 13 Superintendent Long sustained his earlier decision. This action was timely protested and appealed. At an August 11, 1964 conference Assistant General Manager S. B. Burton

offered to reinstate Claimant on a leniency basis. This offer was rejected and, on August 12, Burton confirmed prior denials of Claimant's grievance, stating in part, that DeLaCruz's "arrogant position" and "undisguised contempt for authority is going to be met with just so much discipline as the occasion calls for, and separation from service is . . . the only assessment equatable with the offense." On September 16, 1964 the claim in the instant case was submitted to the Board. (The record does not reveal the disposition of Mejia's case.)

At the outset Petitioner argues that Claimant was not accorded a fair and impartial hearing "because of the prejudiced manner in which the hearing was conducted." Significantly, however, this charge was not voiced at the investigation nor was it made during the appeals procedure. Moreover, a careful reading of the 112 page transcript of the investigation shows that Claimant (1) received timely notice and was informed of the nature of the charge, (2) was afforded the right to be represented, and (3) was given the opportunity to present witnesses, and to question his accuser and other witnesses. Under these circumstances Petitioner's charge regarding the hearing cannot be sustained.

There remains, then, the question whether Claimant was dismissed "without just and sufficient cause and on the basis of unproved charges."

Testimony concerning the January 8, 1964 meeting was given at the investigation by Roadmaster Barnum, Gang Foreman Gomez, and Extra Gang Laborers DeLaCruz, Mejia and J. A. Chagalla. Mexican Labor Clerk R. Rivera acted as Interpreter, Mr. Barnum described the incident in these words:

" . . . One of the letters . . . was handed to them by myself and the copy read to the min Spanish by Mr. Gomez. Mr. Ventura acknowledged receipt of his letter, taking the original and departing. Mr. Mejia and Mr. Delacruz said they were not going to acknowledge receipt of their letters as they were not responsible for any accident and it was up to the foreman and assistant foreman to look out for them, that they had never been required to comply with any rules and that they were not going to start complying with them now. At this time I called Track Supervisor W. R. Davison into the office . . . and read them the second and third General Rules on page 10 from the Book of Rules, then had Foreman Gomez translate these rules into Spanish to Mr. Mejia and Mr. Delacruz, and also told them . . . that these are the same rules posted in Spanish and English in each of the tool houses. Mr. Mejia did most of the talking for the two, but even after going over these rules three different times with Foreman Gomez translating . . . they still stated that they would not comply with these rules or any other rules and it was solely up to the foreman and assistant foreman to look after them. . . ."

Asked if he could understand their answers to Interpreter Gomez, Barnum replied:

"Yes, that was easy to understand, because they would say 'no, no, no, no' they would not comply."

Mr. Gomez testified that, after hearing him translate the January 7 admonishment letter, the two Laborers "would not sign the duplicate until somebody else would read it to them, somebody of their own choice, and Mr.

Gonzales was mentioned as the one they wanted to read it for them before they would sign." Gomez then told them, at Barnum's instructions, that "they were not required to sign, but that he would put on the letter what their attitude was and they did not want to sign it, that it would also go on the record . . ." But, Gomez recalled, the men "still stated they would not sign the duplicate until—I do not know if they said Mr. Gonzales, but I am sure he was wanted to ok it before they signed it." Following this, Gonzales stated:

"Mr. Barnum told me to tell them, to bring it to their attention, about this paper that we always had in our tool house for a number of years and he also told me to tell them about the Book of Rules. Well, I told them that and they said that they were not covered by those rules, that all the years they worked they did not have any responsibility, that was the Foreman's and Assistant Foreman's job to observe those rules. This lasted quite a while, repeating, and Mr. Barnum kept asking them and he told me to tell them about the accident—that it was a different matter, that it was over with, that he was asking them was something else and stated to them that they are required to obey those rules, that was those two or three rules about their safety, was what letter refers to, that they are supposed to obey, and they said 'no' still. I told them in Spanish two or three times, anyway, maybe more. I tried to make them see it was not a matter of the accident any more but they still said they are not supposed to obey these rules and then he, Mr. Barnum, told them they were out of service and I told them. . . . 'now he is taking you out of service for your refusal to obey the rules from now on' . . . When it was over with they went out, but one thing I remember was Mr. Delacruz said he knew those papers were there all the time but why were they trying to enforce this thing now, why all the fuss because of the accident. I told him the rules were always there it was their job to enforce them, it was up to them whether they wanted to or not."

DeLaCruz testified that, to the best of his knowledge, the entire conversation in Roadmaster Barnum's office pertained to the letter of admonishment. He believes he was fired for refusing to sign or acknowledge that letter. He was most concerned with the warning in the communication about being taken out of service after the next accident. It was because of that phrase that he asked for time "so we could have better information regarding the letter." Mr. Barnum said it was too late and if he and Mejia didn't sign they would be put out of service. DeLaCruz denied that he ever advised Barnum he would not comply with the rules or that the rules did not apply to him. In fact, he stated, he had always endeavored to conduct himself in accordance with these rules.

In evaluating this and other testimony it must be recalled that Claimant was fired for refusing to comply with certain obedience rules. More precisely, he was dismissed, not because of any actual disobedience, but, rather, for a statement of attitude and an expression of unwillingness to obey Carrier's safety rules.

The importance of having employes comply with safety regulations is so apparent that it needs no elaboration here. And the record does reveal certain statements (or negative responses) by DeLaCruz that, taken alone, might be interpreted as a defiance of authority. But, when these statements are con-

sidered in the context of the entire conversation, the events leading up to the discussion and Claimant's prior record, it becomes clear that the conclusion drawn by Carrier was unwarranted and not based on an objective evaluation of the entire transcript. The following factors are significant:

DeLaCruz speaks and understands very little English. The entire discussion with Barnum, consequently, was carried on through an interpreter (his superior). Undoubtedly certain thoughts or precise statements were lost in the translation.

The contents of the letter of admonishment and Barnum's efforts to obtain Claimant's signature influenced all the succeeding events. The critical importance of this factor is reflected, in part at least, in the circumstances under which the meeting started. At the outset, three laborers were called into Barnum's office: P. Ventura, Mejia and DeLaCruz. Barnum handed each an identical letter of admonishment (in English) and Gomez translated one into Spanish. Ventura immediately signed his and departed. But DeLaCruz and Mejia would not sign because, they insisted, they were not responsible for any accident. There then ensued a discussion of why they would not sign, their request for Gonzales or someone to advise them and read the letter to them, etc. When an impasse on this point was reached, Barnum changed the subject to the Book of Rules. Note, however, that Ventura was permitted to leave as soon as he signed (acknowledged) his admonishment letter. The other two laborers were not released by Barnum when they refused to sign. And, while Ventura was not queried on whether he subscribed to the Book of Rules, the other two men were questioned at some length. The reason for Claimant's belief that his failure to sign was inextricably connected with subsequent developments thus becomes apparent.

Further confusion as to the nature and subject of the discussion is reflected in the use of the term "responsibility." Thus, in the early part of the meeting Claimant emphasized that he was not responsible for the December 30 accident. Later on, however, he was reminded of his general responsibility to obey the rules (testimony of Gomez). Mejia testified, additionally, that he understood the letter to mean that "we were responsible in this accident" and he did not feel in any way responsible. He understood Gomez to say that "automatically on a future accident we would be out of service because we would be the only guilty ones and responsible for the accident." That was why a request was made for time to consult the Local Chairman.

While Barnum testified that the request for more time to consider came after he had removed DeLaCruz and Mejia from service, witnesses Gomez, Chagalla, Mejia and DeLaCruz all stated that this request was made during the discussion of the admonishment letter. It seems quite evident — and this is at the heart of the case — that, had this request been granted, no disciplinary action against Claimant would have been necessary. This conclusion is more than speculation. It is buttressed by additional facts in the record showing that in his seventeen years of service DeLaCruz had not been disciplined, nor had he ever defied authority, refused to obey instructions, or exhibited a blatant disregard of safety rules. His uncontroverted testimony at the hearing was that he had always endeavored to conduct himself in accordance with the safety rules.

Returning, then, to Claimant's insistence at the January 8 meeting that he would not accept responsibility for the accident by signing the letter and, generally was not responsible for maintaining the rules, it is our conclusion

that the circumstances under which he took this position were sufficiently confusing so as to have foreclosed a final determination at the time concerning his real intent — particularly in view of his long record of good service.

Granting that some legitimate doubt on this score existed, it is highly significant that at the hearing, where all the facts were disclosed, DeLaCruz answered affirmatively and unequivocally when asked, "Do you understand that it is your responsibility to comply with the General Rules and Regulations as posted?" In light of this answer, the absence of any past disobedience or refusal to obey instructions, and the confusing nature of the January 8 discussion, we must hold that Carrier's post-hearing conclusion that DeLaCruz was unworthy of continued employment represented an unreasonable and arbitrary exercise of discretion. Carrier was placed on notice, at this juncture, that DeLaCruz was fully prepared to comply with its rules.

In view of the above analysis, the claim concerning dismissal will be sustained in full, and the requested remedy will be granted, except that back pay will be limited to the period since April 13, 1964.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement has been violated.

AWARD

Claim sustained. Back pay, to be paid in accordance with Rule 29, is limited to the period since April 13, 1964.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of November 1965.