

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **19797**
Docket Number **MW-20004**

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Norfolk and Western Railway Company (**former W&LE** District)

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

(1) The dismissal of Assistant Extra Gang Foreman W. J. Johnson, Jr. from service for alleged 'refusal to follow instructions and insubordination' was without just and sufficient cause and on the basis of unproven charges (System File MW-BRS-71-108).

(2) Assistant Extra Gang Foreman W.J. Johnson, Jr. be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered in accordance with Rule 22(e).

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier for "refusal to follow instructions and insubordination."

A thorough review of the Transcript of the investigation reveals a **dispute concerning the** chronology of events on the day in question. The **Claimant's** Supervisor, Mackinaw, testified that on July 23, 1971 he advised the Claimant to "**fall** back to the rear of the **gang** and assist the other Assistant Foreman." The Claimant, according to Mackinaw, replied that "Ray **was** back there", at which time the Supervisor told the Claimant to "go to the **rear**" and help Ray. At that point, Mackinaw states that the Claimant threw to the ground a tool which he had been using, and he uttered a profane word. The Supervisor insists that **at** that point in time, he relieved the Claimant of duties pending an investigation. Further, **according** to the Supervisor, upon being relieved of duties, Claimant asserted that "when he left he may take half the gang with him."

Mackinaw states that **at no time** did he use profanity in his discussion with the Claimant, and that there were other employees around the scene at the time of the incident.

Although Claimant confirms portions of Mackinaw's testimony, he is equally insistent that the events transpired in a different sequence. The Claimant states that when Mackinaw told him to report to the rear, he requested permission to finish the job he was performing because "Ray was back there", and because he was close to completion of his task. According to Claimant, at that time the Supervisor started using foul language toward Claimant and accused Claimant of having refused to report to the rear. The Claimant denies that he refused; but was merely informing the Supervisor that there was another employee "in the rear." Claimant states that when Mackinaw continued to use foul language toward him, he, himself, finally uttered a four-letter word, turned around and started toward the rear. After he had proceeded twenty to twenty-five feet toward the rear work area, the Supervisor advised him that he was fired and to leave the railroad property.

One witness to the incident was called to testify. David Griffith, a laborer who worked with the Claimant on the day in question, confirmed that Mackinaw told Claimant to report "to the rear" and that Claimant said something about another **Assistant** Foreman already being in that area. At that point, according to Griffith, the conversation became "a Little heated" and the Claimant threw down the stomper which he had been using and started to walk to the rear. After Claimant started walking toward the rear, according to Griffith, the **Supervisor** told the Claimant to "get off" of the railroad property. Although Griffith was unable to state that he heard Mackinaw use any abusive language or curse, he did insist that "I thought that when he /Claimant/ threw down the stomper and he turned around, he was walking back toward the back when he was fired."

This Board has fully considered the precedents presented to it for its guidance, and is well aware of the line of determinations which hold that a Carrier's decision both as to the question of guilt and the quantum of discipline **should** not be disturbed when they are supported by substantial evidence in the record, even though the reviewing **Board** might have made a contrary determination had it decided the issue in the first instance. At the same time, the **Board** is authorized to review the testimony and evidence and to test the substance of the evidence in each fact dispute of each individual case.

There is a normal reluctance to sustain a guilt finding on unsubstantiated evidence of a sole witness or upon uncorroborated testimony, and the Board has so held in the past. In **thecase** under review, we do not state that the evidence submitted by the Supervisor was either unsubstantiated or uncorroborated. Certainly, Griffith and the Claimant himself, concede that in the main, the testimony of the **Supervisor** was, in fact, accurate. However, the Claimant and Griffith depart from the Supervisor in an area of testimony which the Board feels is crucial to a determination of the charge of "refusal to follow instructions." The Claimant insists, and Griffith confirms, that after the Claimant threw down the tool with which he was working, he physically started for the "rear area" prior to the Supervisor advising him that he was relieved from service. While the Supervisor and Claimant were assumedly engaged in a heated discussion, Griffith was an innocent bystander. His recollection of the chronology of events cannot be overlooked. His testimony, which confirms Claimant's **statements**, must be coupled with the fact that the Transcript of the investigation fails to indicate that the Claimant ever verbally refused to follow the instruction. On balance, the Board is of the view that the evidence of record is not "substantial", in this case, to sustain the charge that the Claimant "refused to follow instructions" on the day in question.

But this is not to say that the Claimant was not insubordinate. Without attempting to resolve the question of who used "obscene" language in the first instance and the degree of "profanity" used, the evidence of record does substantiate the allegation that the Claimant exhibited a degree of insubordination in his actions and activities, including throwing the stomping tool to the ground and making certain statements regarding taking "half of the gang with him" in the presence of at least one other employee. Accordingly, the Board finds that the Carrier did sustain its burden, and proved, by **substan-**

tial evidence, a degree of insubordination on the part of the Claimant.

It is within the province of this Board to determine if the degree of discipline imposed was reasonably related to the seriousness of the proved offense. Upon a review of the entire Transcript (and recognizing that the Board has found that the Carrier did not sustain its burden of establishing a "refusal to follow instructions") the Board is of the view that the discipline of permanent discharge was not reasonably related to the seriousness of the offense which the evidence supports. This is not to say that in a given case an insubordination, even without a refusal to follow orders, could not sustain a punishment of permanent discharge; but upon a review of the entire record in the case under consideration, the Board is of the view that the punishment was excessive.

The Claimant will be restored to service with seniority and other rights unimpaired, but without compensation for time out of service.

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;

That 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 discipline imposed was excessive.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST :


Executive Secretary

Dated at Chicago, Illinois this **21st** day of **May** 1973.