

NATIONAL RAILROAD **ADJUSTMENT** BOARD

**THIRD** DIVISION

Award Number 21291  
Docket Number MW-21372

Irwin M. **Lieberman**, Referee

**PARTIES TO DISPUTE:** ( (Brotherhood of Maintenance of Way **Employees**  
(Norfolk and Western Railway Company (Western Region)

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

(1) The dismissal of Roosevelt **Comage** on May 6, 1974 was without just and sufficient cause and on the basis of unproven charges (System File **MW-DEC-74-20**).

(2) Claimant Roosevelt **Comage** shall now be paid for all time lost and be afforded the **privileges** of Rule **20(g)**.

**OPINION OF BOARD:** Claimant in this dispute was dismissed for insubordination. The **insubordination** alleged by Carrier involved two elements: using profane language to his supervisor and refusing to go to the Company doctor on the day in question.

The record of the investigation indicates that the entire incident **is** closely related to an injury sustained by Claimant while **working**, several days earlier. Specifically, the transcript reveals that Claimant was asked to return to the Carrier's doctor under somewhat strange circumstances on the day in question. He testified that he had just been to the doctor but was asked to return with the Assistant Supervisor. There is no question but that he was recalcitrant at that juncture even though **his** testimony indicates that he was told by Track Supervisor Christy that he had to take a complete physical and not merely be checked for the injury.

It is quite clear that no testimony by Claimant was credited by Carrier, even though not rebutted. For example, Claimant testified that the Assistant Supervisor had called him a "black bastard" just before he had said that **Assistant** Supervisor Still was a "**no** good son of a bitch". **This** was apparently ignored by Carrier. While it is true that **while** this Board, in handling discipline cases cannot weigh evidence, resolve conflicts in testimony or pass on the credibility of witnesses, it has the responsibility **to** ensure not only the fairness of the hearing but that there was substantial evidence to support Carrier's conclusion of guilt.

In this dispute, there is no question but that Claimant did not follow instructions of his superiors to go to the Carrier doctor on the day in question, regardless of his reasons or the irrationality of the

request. At the same time the allegedly disrespectful and vulgar remarks addressed to Mr. Still apparently followed at least as **insulting** and **vulgar** language employed by Still. Furthermore, the language used by Claimant did **not** substantially exceed **common** "shop talk" whereas the Supervisor's **comment included** a racial slur. The language used in Award 18439 is singularly appropriate in this case:

"Since an **employee** cannot be held to a higher standard than his superior, we find that **Claimant's** remarks could not be reasonably construed as being disrespectful. Thus, he was not insubordinate ...."

Thus, **we must conclude** that the transcript provided a **basis** for Carrier determining that Claimant was guilty of **insubordination** only in **that** he did not comply with the **instruction to go** to the doctor, and he was **not** guilty of insubordination **in** any other respect. For this infraction the **discipline** imposed by Carrier was patently inappropriate and may be regarded as arbitrary. In view of Claimant's work record we **view** the appropriate discipline to be a lengthy suspension. For that reason we shall direct that Carrier reinstate Claimant, with all rights unimpaired, but with no pay for **time** lost.

**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 Agreement was violated in that the discipline was inappropriate.

A W A R D

Claim sustained to the extent indicated in the **Opinion**,

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, **Illinois**, this 12th day of **November** 1976.