

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21564
Docket Number MW-21689

Robert W. Smedley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Louisville and Nashville Railroad Company

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

(1) The dismissal of Track Repairman Sam Patmon was without just and sufficient cause 2nd on the basis of unproven and disproven charges (System File D-105855; E-306-6/1-23 (33)).

(2) **The** claimant's record shall **be cleared of the** charge; he shall be reinstated to service and paid for any time lost - all in conformance with the provisions of the first paragraph of Agreement Rule 27(f)."

OPINION OF BOARD: On charge of insubordination, Claimant, a track repairman, was dismissed from the service after hearing held January 23, 1975. The events were on Saturday, January 11, 1975, around 1:30 a.m. The crew had worked all day Friday and on through past midnight, some 17 hours, in bad weather, on a derailment.

As viewed most favorably for the carrier, the facts are as follows: There was a serious quarrel where Claimant was told to "pick up that damn hammer and spike" and he responded, "I only take orders from Green" and "I'll spike you both to the rail." Various **expletives** were conveyed, mostly by Claimant. No physical threat was shown. Claimant lagged in work some one-half hour "with his hands in his pockets" after the confrontation, but then worked. He says he was holding a light and couldn't be expected to do that and spike at the same time. The person who first griped about his not working was another worker of the same rank.

In discharging claimant, the carrier also took into consideration the fact that claimant was absent from work the following Monday, January 13, 1975. He reported in January 14, and said he was sick, and the carrier makes a point that he should have reported before. But claimant states "...my foreman has co phone. We have no phones at our regular work location. By this that means that I have to get out of bed sick, drive on the job, try to locate a supervisor in the track department to report in sick."

Rule 12(h) of the Agreement provides:

"An employe shall not forfeit his seniority rights if he is off without leave of absence because of personal illness or injury, serious illness or death in his immediate family, or a similar emergency; but he should request leave of absence in advance if at all possible, and, in any event, he should notify his foreman or other superior officer as soon as possible as to his reason for being off, and request leave of absence, and he may be required to furnish acceptable proof as to his reason for being off without proper leave."

We cannot find cause for the discipline in Claimant's absence on January 13.

In the proceeding below, the Union relied heavily on Rule 27(b), which provides in part:

" Decision will be rendered within 30 days from the date investigation is completed."

The hearing was held on January 23, 1975, and the decision letter was dated February 21, 1975. It was personally delivered to Claimant on February 22nd. Thirty days expired February 22, the rule being that the first day is excluded from the count and the last day is included. Third Division Award No. 21541. Despite reliance on this argument below, we deem it important that this cause be determined- on its merits.

We inquire whether there was substantial evidence to support the discharge, whether a fair investigation took place and whether the penalty was arbitrary or capricious.

Insubordination is defiance of authority. There is no doubt that even momentary insubordination, clearly shown, justifies discipline, including discharge. We do not weigh conflicting evidence, judge credibility or substitute our judgment for that of the carrier, if substantial evidence supports the decision.

Cur recitation of the facts assumes the carrier's version as true. Thus, we do not weigh conflicts of evidence or judge credibility in testing that evidence for sufficiency. Claimant was the subject of a heated exchange at 1:30 a.m. after 17 hours of work. He responded verbally to challenges made to him. The language was not out of the ordinary for a railroad gang. He sulked for a half hour after it happened. But he did not show any real intention of putting down authority. In fact, he went back to work spiking rail.

Considering all of the circumstances, including the late hour, long hours and bad weather, we do not consider a flare of tempers such as this to be substantial evidence of insubordination.

Yet this is a very close case. Claimant's usual foreman wasn't at work. He was assigned by Assistant Roadmaster Green to work with foreman Black. During the incident, he told Black, "I only take orders from Green." This was a serious infraction, not to be tolerated. Claimant entered carrier's service August 3, 1973, and had been in its employ some one year and one-half when he was dismissed.

Only the extenuating circumstances surrounding the precise event give us any cause whatsoever to mitigate the punishment. We cannot justify an award of back pay or benefits, but will restore claimant to service with seniority.

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

The agreement was violated.

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 31st day of May 1977.