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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **23315**
Docket Number **MW-23238**

Rodney E. Dennis, Referee

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employes
(**Terminal** Railroad Association of St. Louis

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

(1) The discipline assessed **Trackman** Cornelius Goss for alleged insubordination was without just and sufficient cause, on the basis of unproven and disproven charges and in violation of **the** Agreement (System File TRRA **1978-44**).

(2) **Trackman** Cornelius Goss shall be compensated for all wage loss suffered."

OPINION OF BOARD:

Claimant is a track laborer who, at the **time** of the incident, was assigned to Gang **#9**. **He was** engaged in replacing rails at Wiggins **#2** yard. Foreman Hollis was in charge of the gang. Claimant and the foreman apparently **became** involved in **an** exchange over how some jobs would be performed and whether claimant would perform certain tasks.

The foreman, thinking that claimant's words and actions constituted insubordination, took him out of service. At about **11:00** a.m. on **November** 3, 1978, the **foreman** had claimant escorted from company property by Carrier's Police Department.

Carrier, thereafter, by letter dated **November 7, 1978**, **informed** claimant that he was being charged with insubordination and that a hearing into the **matter** would be held. The hearing was conducted on **November** 16, 1978. A review of the record of that hearing reveals that claimant was granted all procedural and substantive rights required by agreement. At the conclusion of the hearing, Carrier found claimant guilty of insubordination and assessed as a penalty a **30-day sus-**pension.

The organization is arguing that claimant did not refuse to comply with an order of his foreman. He may have been slow in performing his duties, but he was not insubordinate.

Carrier alleges that claimant did refuse to comply with his foreman's orders. He was uncooperative and obstructive in his attitude about his work. Insubordination is a dischargeable offense and claimant should feel fortunate that he was only given a 30-day suspension for his behavior.

We have carefully reviewed the entire record of this case and **must** conclude that claimant's behavior was, in fact, insubordinate and that he **should** be subject to discipline for these action@. **Claimant**, by his own testimony did say that he refused to follow orders. He also said that since he wentually did **what he was told**, he did, in the final analysis, follow orders. Therefore, he was not insubordinate.

The **Organization** picked up on this **point** and argued throughout that claimant worked too slowly for hi@ foreman; he was not insubordinate. This argument is strained and **cannot** prevail. The record reveals that claimant's behavior **made** it difficult for his foreman to direct him. It also rweals that a number of witnesses at **the** hearing testified that claimant did refuse to follow certain orders.

Because of its appellate function, this Board finds itself in the position of supporting a decision that it **may** not have made had it been the original trier of the facts. There is no question that the record points out that the **foreman** was "baiting" the claimant into saying that he refused to follow his directions. When giving an order, he asked him repeatedly if he was refusing that order. **This** certainly is not standard management procedure **and** the Board think@ that Carrier should not condone it. The problem here, **however**, is that claimant rose to the bait **and** did refuse to follow order@. His behavior was insubordinate and he should be **disciplined**. The question is, however, should claimant **be** assessed a **30-day** suspension when, in fact, it is clear that claimant **was**, to a degree, provoked and when it is also clear that the foremen's story does not hold up on all points?

The **foreman** alleges that claimant refused to **remove** the gauge rod when he was ordered to do so. The record does not support this accusation. The foreman clearly stated **in** the record that claimant did not refuse to remove the gauge **rod**. Given this admission **and** the fact that the foreman questioned claimant persistently about whether he intended to follow his orders, it is this Board's opinion that **claimant** should not be assessed a **30-day** suspension.

The foreman's hands were not clean in this instance. But neither is the claimant fully exonerated. Given the shortcomings of both people **and** the fact that Carrier failed to **prove** claimant guilty of insubordination on the gauge rod incident, this Board believes that Carrier can **make** its point with claimant by **assessing** a far less severe penalty than the one imposed. **Based** on the whole record, it **is** the judgment of this Board that Carrier was arbitrary in its assessment of a **30-day** suspension. The Board directs that **this** suspension be reduced to a suspension of five working day@.

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 wet the dispute involved herein; and

That the **discipline** was excessive.

A W A R D

Claim sustained in **accordance** with the **Opinion**.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at **Chicago**, Illinois, this **19th** day of **June 1981**.

DISSENT OF CARRIER MEMBERS
TO
AWARD 23315, (DOCKET MW-23238)
' (Referee Dennis)

The record in this dispute substantiated that Claimant was insubordinate and was slow in performing assigned work. The Majority at Page 2 of the Award concurs in the Carrier's conclusion in this regard. The Award should have stopped there as the conclusion had been reached that the charges were substantiated and Carrier had sufficient cause for assessing discipline.

However, the Majority seems to have given great weight to the bare assertion in the transcript by Claimant and one of six (6) witnesses called to testify that the foreman was riding Claimant. Despite the weight of evidence otherwise, there was no material examples presented to support such allegation.

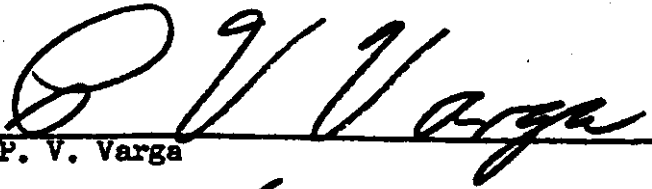
While the foreman may not be blameless, he is certainly not responsible for 83% of the situation. Yet that is the disposition made in this case when the record clearly supports the fact that Claimant did refuse to follow proper instructions.


The circumstances involved were considered in assessing only a 30-day suspension for such a serious infraction. Yet the Majority has simply concluded that the discipline assessed was not reasonable.

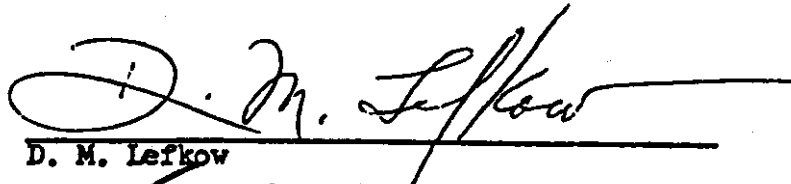
In Second Division Award 8223 (Roukis) it was stated:

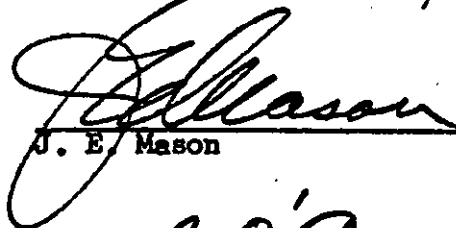
"This Board has consistently held as a matter of judicial policy that insubordination in whatever guise or form is just unacceptable in the railroad industry."

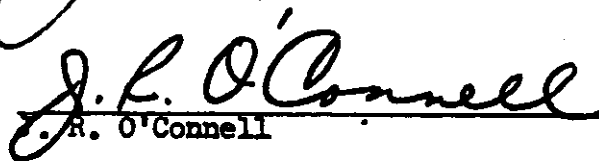
Because the Majority here has dispensed personal justice, we must dissent.


P. V. Varga


W. F. Euker


D. M. Lefkow


J. E. Mason


J. R. O'Connell

