

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24657  
Docket Number NW-25052

. **Tedford E. Schoonover**, Referee

(Brotherhood of Maintenance of Way **Employes**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

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

(1) The fifty (50) demerits imposed upon Machine Operator **W. H. Avery** for alleged insubordination on June 24, 1981 was arbitrary, without just and sufficient cause and on the basis of unproven charges (System. Docket 733).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, the charge leveled against him shall be cleared from his record and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: This claim arose out of an incident on June 24, 1981, when Mr. Avery was assigned to operate a back hoe in **flooding** and spreading stone on the Raritan Branch line to correct an alignment problem. Luring the early part of the day a foreman and two laborers were assigned to assist in the work. At about 10:30 AM, however, Supervisor **Rogers** came by and instructed Claimant to continue with the work alone because he had to take the other men for **work** on another job. Claimant objected to the removal of all of the men contending at least one should remain because it was not safe to work by himself. In explanation, he added that if the back hoe tipped having another **man** nearby would help in getting assistance in case of injury. He pointed out that another **employe** had been killed in a similar situation a year or so ago. Feeling the operation presented a danger of tipping over he had set the out riggers as a preventive measure.

There was a misunderstanding between Claimant and the Supervisor; the Claimant charged danger of tipping in using the back hoe to make shoulders whereas Supervisor Rogers **told him** simply to flood the track with stone and the shoulders would form themselves. Their discussion continued to the point where Claimant said he would not work alone. The Supervisor insisted the work presented no special danger and was the same as Claimant had been doing all morning. On being told by Claimant he would not work alone Supervisor advised he had a choice to either do the work as assigned or be taken out of service. Claimant insisted on his position, was taken to Plainfield and relieved from duty.

Subsequently the Claimant received formal notice from the Carrier to attend a hearing on July 7, 1981 on the following charge:

**"Alleged** insubordination in that you failed to follow a direct order given to you by acting supervisor, B. Rogers, and T. Mingolla, on Wednesday, June 24, 1981 at approximately 10:30 AM, wherein you were ordered to **run** back hoe at the Raritan Branch putting stone on track, by **yourself.**"

There was no dispute as to Claimant receiving proper notice or that the hearing was fair and impartial. Following the hearing Claimant was assessed 50 demerits which, added to 75 demerits already on his record, made a total of 125. Under Carrier's demerit discipline system an accumulation of 100 demerits is sufficient for dismissal. Claimant was, therefore, dismissed from service effective August 7, 1981. The dismissal action was appealed in the usual manner to the highest officer of the Carrier, as required by the law, prior to being submitted to this Division.

Following the refusal by Claimant to operate the back hoe as assigned, Supervisor Rogers assigned another employe to operate the machine as instructed and the work proceeded without mishap. It was established during the hearing that if the back hoe was **operated** within the gage of the track spreading stone as it went along it made its own firm footing and there was no danger of tipping. Whereas Claimant stated an employe had been killed previously doing this kind of work Supervisor Rogers, who was present when the fatal accident occurred, stated the circumstances were somewhat different.

The evidence supports a conclusion that the acute danger alleged by **Claimant** did not exist under the instructions given by his Supervisor to flood the track with stone. Claimant's mistaken impression and his fear arising out of the fatal accident to a fellow employe caused his overreaction. That his perception of the danger was exaggerated is indicated by the fact his fellow employe went ahead with the work without mishap. There is a long line of precedent decisions exonerating **employes** for refusal to obey orders where there is a clear and present danger to their safety. In this case, however, such circumstances were not present. Had Claimant been ordered to make shoulders the danger might have been as he described but his orders were to simply flood and spread the stone. He had been working all morning doing the **same** kind of work without a problem. The employe assigned to relieve him proceeded **with** the work and stated it did not present any special danger.

As reasoned by Referee **Yeager** in First Division Award 16595 the right of an employe to refuse to obey orders may not be exercised except where, under known and observable conditions, sound judgment would lead to reasonable apprehension that obedience would lead to undue peril to persons **or** property or other disastrous consequences. Disobedience in situations short of such conditions **must** be regarded as insubordination. Disobedience to rightful instructions of superiors has generally been regarded as insubordination and a breach of the contract of employment by the employe.

The evidence does not support a finding that the Supervisor's instructions subjected Claimant to any improper hazard. As stated by Referee Weston in Second Division Award 5167:

"... The correct procedure was for Claimants to comply with Rice's instructions and thereafter, if they desired to do so, test their validity through the orderly channels for the grievance machinery. Any contrary procedure that would permit each **employee** to determine whether or not a supervisor's instructions are proper **would** make for chaos and cannot be sanctioned. ..."

The fact remains that the evidence clearly supports a finding that Claimant was guilty of insubordination by his refusal to obey a direct order from his Supervisor. Insubordination is a serious offense and severe disciplinary **measures** are usually warranted. In this case, however, we feel mitigating factors call for a reassessment of the dismissal action.

In the first place, it must be recognized that there was a real basis for Claimant's fears if, for no other reason, than another workman had been killed while operating a back hoe under similar conditions. We also question the **dismissal** action resulting from the accumulation of demerits. In the circumstances it is the determination of this Division that the assessment of 50 demerits was excessive. We find, therefore, that a suspension from service for the period since he was removed from service was proper, and further, that he be returned to service without impairment of seniority but without compensation for time lost while this claim has been under adjudication. We feel that such action relates his offense to the circumstances of the case and is a more just and reasonable determination than the demerit method.

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 **Employee** involved in this dispute are respectively Carrier and **Employee** 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 was excessive.

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Claim sustained in part in accordance with above.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984

