

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26771
THIRD DIVISION Docket No. MW-26595
88-3-85-3-341

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (Consolidated Rail Corporation

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

(1) The thirty (30) days of suspension imposed upon Vehicle Operator F. J. Brown for alleged insubordination at approximately 3:30 P.M. on April 13, 1984 was arbitrary, capricious and without just and sufficient cause (System Docket CR-886D).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS :

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On April 13, 1984, Claimant was completing his 7:00 AM to 3:30 PM shift when he was ordered by the Track Supervisor to drive his truck to Greenwich to perform emergency overtime work. There was no argument and the Claimant refused alleging illness. The Track Supervisor ordered the Claimant to his office to corroborate his illness. The Claimant instead left, returning later for a physician's evaluation.

A Hearing was held on May 9, 1984, to determine Claimant's responsibility, if any, in connection with refusal to obey two orders; first to perform emergency work and second to present himself at the office for medical assessment. The Claimant was found guilty and by notice of May 24, 1984, he was assessed a thirty (30) day suspension.

It is the Carrier's position, supported in the record, that the Supervisor had no information from Claimant's Foreman that he was ill or unable to work overtime. The Carrier maintains that the Claimant was ordered to work and initially refused. Even further, the Claimant was given another direct order and refused in the presence of the Lieutenant. Only after he twice refused did he state that he was sick. He was ordered to wait so that he could be taken to the company doctor to determine the degree of his illness. The Claimant did not obey the directive, but instead left.

Claimant stated that he had been sick all week and had notified his Foreman that morning that he could not work overtime. Claimant further testified that he immediately indicated to the Track Supervisor that he could not work overtime because of illness and that the Track Supervisor "was belligerent." His refusal to work was not accepted. He tried to call his union official and was prohibited from doing so. After further argument he left the building to phone for advice, rather than go directly to the Supervisor's office as directed. After the call he returned specifically to go to the doctor with the Track Supervisor which was then refused. His own doctor saw him later in the day and the record indicates that he had a fever and fatigue.

With respect to the first incident the record fails to show sufficient substantial evidence to warrant conclusion that the Claimant was guilty of insubordination. The Carrier argues that his illness was a belated excuse to justify his refusal to work overtime. There is conflicting evidence as to the nature of the conversations between the Supervisor and the Claimant. Lieutenant Leech, who was the only other witness to testify, states that the Claimant first refused and subsequently gave illness as a reason. However, in response to the Claimant's question, his testimony evidences a reverse sequence.

Claimant: "...at the very start of the occurrence of argument or whatever, do you remember me telling him straight out in plain words that I was not refusing to work, that I couldn't work because I was sick and exhausted? I wasn't refusing to work. I told him I wanted to go to the doctor."

Mr. Leech: "Yes, you did say that."

After a full consideration of the record, the Board finds insufficient evidence to adequately support the charge of insubordination. The burden of proof in all discipline cases rests with the Carrier. The record is neither sufficient to substantiate that Claimant first refused to work overtime and later used illness as an excuse, nor to substantiate a lack of illness. The evidence that he had been sick that week is unrefuted, and the doctor's note indicates that the Claimant was treated for fever and fatigue. Certainly the Carrier's need for him to work was clear, but the right to decline due to illness was justifiable.

With regard to the second incident the record substantiates the Carrier's charge. The Claimant admits that he first left and later returned. The Organization argues that the Claimant's actions were justifiable given the behavior of Supervisor Maniscalco which was clearly argumentative and a contributing factor in the Claimant's actions.

A review of the record indicates that the Claimant did not act in an appropriate manner. The Claimant was by his own admission argumentative. The evidence of an argument is clear with the Claimant an active participant. Under the circumstances this Board cannot find Claimant's refusal appropriate. The central issue of conflict was the Claimant's contention of illness. His refusal to confirm that illness by accompanying the Supervisor failed to resolve the issue. The order was reasonable under the circumstances. The Claimant should have immediately obeyed the order and sought advice later.

This Board finds that the Carrier has failed to sustain its charge of insubordination in refusal to perform emergency work. It further finds that Carrier has sustained the charge that Claimant failed to follow a direct order to accompany the Supervisor to the office for purposes of determining his medical condition. Given the record of this case the Board finds the discipline excessive and reduces the Claimant's thirty (30) days suspension to fifteen (15) days, with Agreement supported compensation for lost wages.

A W A R D

Claim sustained as indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of January 1988.