

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(New Orleans Public Belt Railroad

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

(1) The dismissal of Painter, J. Hoodenpyle for alleged '... insubordination, in violation of General Order 220, numbered Paragraph 1.' was on the basis of unproven charges, arbitrary, and without just and sufficient cause.

(2) The claimant's record shall be cleared of the charge leveled against him, he shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered because of the violation referred to in Part (1) hereof."

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 employees 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 Friday, September 20, 1985, Claimant was working along with another Painter under the general supervision of the Assistant to the Bridge Supervisor. Shortly after lunch time that day, the Supervisor had an encounter with Claimant which led him to terminate Claimant for alleged insubordination. Claimant requested a Hearing on this dismissal and Hearing was scheduled with due notice for October 8, 1985. Claimant did not appear for that Hearing so, at the request of his Representative, another Hearing was scheduled for October 29, 1985. Claimant was given due notice of the re-scheduled Hearing and warned that if he did not appear the Hearing would go forward anyway. Claimant did not appear for the second scheduled Hearing and Carrier proceeded in absentia.

Claimant failed to appear at the Hearing at his peril. We find no procedural defect or denial of required process in Carrier's proceeding in absentia in these circumstances.

At the Hearing, the Supervisor testified on direct and cross examination, in pertinent part, as follows:

Direct Examination

Mr. Childress: "Would you explain for the record the circumstances which caused you to dismiss Joseph Hoodenpyle from the employ of the Public Belt?

Mr. Estay: When I went on the West Side to check on Mr. Hoodenpyle and Mr. Wilkerson, I asked Mr. Wilkerson where Mr. Hoodenpyle was. Mr. Wilkerson told me that Mr. Hoodenpyle went to the bathroom. I took off from there and saw Mr. Hoodenpyle just dragging down the road, like he had an hour or two hours to come back to work. So I drove up and picked up Mr. Hoodenpyle on the way back to work location I asked Mr. Hoodenpyle at what time did he go to the restroom. And he said that it was 5 or 10 minutes on his time. I asked him if he was sure. And he said well maybe 5 minutes. When I brought him back I told him to get rid of that pad he had on the scaffold, because it is unsafe. So when he got out of the truck he slammed the door and he looked back at me with a awkward look. I asked him if he had any problems. Then Mr. Wilkerson started jumping and hollering on the scaffold, saying don't get mad, don't get mad because he can fire you. I asked him if there was any problem and he didn't say anything so I drove off. I fired him because of his attitude and because of the way he slammed the door, almost breaking the door on the truck.

\* \* \*

Mr. Childress: When did you next see Mr. Hoodenpyle?

Mr. Estay: That evening at the Administration Bldg. when I asked Mr. Hoodenpyle to stay after work.

Mr. Childress: Did he stay?

Mr. Estay: Yes he stayed after work.

Mr. Childress: Did you have a discussion with Mr. Hoodenpyle then?

Mr. Estay: I started to have a discussion with Mr. Hoodenpyle, while we were having a discussion with a few others. Mr. Wilkerson was hollering you don't hear right. The next thing I knew Mr. Wilkerson and Mr. Hoodenpyle took off. So I did not get a chance to talk to Mr. Hoodenpyle.

Mr. Childress: Did you dismiss two people that day?

Mr. Estay: Yes, I dismissed two people that day.

\* \* \*

Cross Examination

\* \* \*

Mr. Solares: What is your definition of the word insubordination, Mr. Estay?

Mr. Estay: Talking back to you, hollering.

Mr. Solares: Did Mr. Hoodenpyle talk back to you on September 20, 1985?

Mr. Estay: No, but he had a bad attitude, by slamming the door and his frown on his face. You can tell when a man is mad by looking at his face.

Mr. Solares: Did he make any type of derogatory remarks to you?

Mr. Estay: No, he did not make any remarks to me.

Mr. Solares: Did you make any remarks to Mr. Hoodenpyle?

Mr. Estay: No.

Mr. Solares: Didn't you ask him if he was mad?

Mr. Estay: Yes I asked him if he was mad, because he slammed the door.

Mr. Solares: And what was his reply?

Mr. Estay: He didn't say anything.

Mr. Solares: When you instructed Mr. Hoodenpyle to remove the pad from the scaffold, did Mr. Hoodenpyle comply with your instructions?

Mr. Estay: I left before he climbed up. I don't know if he removed it or not.

Mr. Solares: Did he say that he would not remove the pad from the scaffold?

Mr. Estay: No, but he was still mad. He had that mad look on his face.

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Mr. Solares: Isn't it a fact Mr. Estay, you took your frustrations out in regards to an altercation you had with Mr. Wilkerson and in turn fired Mr. Hoodenpyle?

Mr. Estay: No.

Mr. Solares: On the evening of September 20, 1985, did you ask Mr. Hoodenpyle to remain after work hours?

Mr. Estay: Yes.

Mr. Solares: What was your reason for requesting Mr. Hoodenpyle to remain?

Mr. Estay: I wanted to talk to Mr. Hoodenpyle about the incident that happened on the West Side.

Mr. Solares: Did Mr. Hoodenpyle remain on the property as you requested?

Mr. Estay: Right, he did.

Mr. Solares: Did you speak to him in regard to the incident that allegedly occurred?

Mr. Estay: No, when I started to talk to him about it he stayed for a few minutes then he and Mr. Wilkerson left.

Mr. Solares: What time was it exactly when Mr. Hoodenpyle left?

Mr. Estay: A few minutes after knock off time.

Mr. Solares: Was Mr. Hoodenpyle compensated for overtime on September 20th.?

Mr. Estay: No.

Mr. Solares: What made you decide to dismiss Mr. Hoodenpyle from service on the evening of September 20, 1985 after asking him to remain?

Mr. Estay: When I went to talk to Mr. Hoodenpyle about his problem he did not give me the impression that he wanted to talk about it. He just kept looking around at the other people. And when they left, he left too.

Mr. Solares: You say he gave you the impression, did he tell you he did not want to hear what you had to say?

Mr. Estay: He did not tell me, but he was looking around....

Mr. Solares: Then the answer would be no, right?

Mr. Estay: As soon as the other people left, he left, he did not give me any explanation.

Mr. Solares: Is he compelled to remain after work without compensation?

Mr. Estay: No."

\* \* \*

After considering the foregoing testimony, Carrier upheld the charge of insubordination and finalized the dismissal of Claimant. The final termination letter dated November 13, 1985, over the signature of the Engineering and Maintenance Director, reads in pertinent part as follows:

"I have reviewed the transcript of hearing conducted 9:30 A.M., Tuesday, October 29, 1985, and find evidence and testimony contained therein, that Assistant to the Bridge Supervisor J.A. Estay, believed without doubt that by your conduct, actions, and expressions, that you were insubordinate, as result of verbal reprimand addressed to you by Mr. Estay concerning your lackadaisical attitude in returning to your assigned work duties after the noon meal period and your use of a padded seat rest on the non-skid surface of work scaffold being utilized near Bent 173 W of the West Approach to the Huey P. Long Bridge. At 4:30 P.M., you were asked to remain at the Administration Building by Mr. Estay to discuss the above incident, which you complied with but became involved in an incident between Painter Clarence Wilkerson and Mr. Estay and left Company's Property with Mr. Wilkerson, which was an additional act of insubordination leaving Mr. Estay no alternative but to access the ultimate disciplinary action of dismissal."

Careful review of the record persuades us beyond doubt that this disciplinary action must be overturned. Even in a legitimate Hearing in absentia, Carrier must, nonetheless, carry its burden of proof of the charges against an accused employee. There is not one iota of probative evidence that Claimant was insubordinate to the Supervisor on September 20, 1985. At worst, the record shows that the Supervisor felt Claimant had an "attitude problem" because he made an angry face and slammed the truck door when he was chastised by the Supervisor. This does not constitute insubordination per se. The record shows no refusal to obey an order and no overt disrespect or disregard of supervisory instructions. Nor does Claimant's behavior during the later conversation show any persuasive evidence of insubordination.

In the circumstances, to discharge an employee for insubordination on the evidence adduced on this record was a gross abuse of managerial discretion which must be reversed as arbitrary, unreasonable and capricious conduct by management.

We find the following decision by the Board in Second Division Award 10048 directly on point:

"Webster's New World Dictionary (1970) defines 'insubordinate' as: 'not submitting to authority; disobedient.' The record does not disclose Claimant refused to obey an order of his superior officer. The Claimant was charged with insubordination, NOT with being churlish, surly, impolite, scornful or gruff. There is no evidence even from Carrier's own foreman that Claimant refused to obey the order or directions he received, and therefore, the Board is persuaded by all the evidence and record before it, that while Claimant was neither civil nor tactful, the charge of insubordination was not established." (Emphasis added)

See also Third Division Awards 13240 and 17228.

Claimant shall be reinstated and compensated in accordance with Rule 16(f) of the controlling Agreement.

#### A W A R D

Claim sustained in accordance with the Findings.

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Award No. 27866  
Docket No. MW-27220  
89-3-86-3-635

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.