

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 Employees
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(New Orleans Public Belt Railroad Company

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

(1) The dismissal of Painter C. Wilkerson for alleged '... Continuous Insubordination, Quarrelsome, and Vicious, in violation of General Order 220, numbered paragraph 1.' was without just and sufficient cause, arbitrary, on the basis of unproven charges and violation of the Agreement.

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his 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 employe 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.

During the month of September 1985, Claimant was working as a Painter on a Bridge Gang under the overall supervision of Dudley Estay, brother of Assistant to the Bridge Supervisor, Jerry Estay. According to the record, Jerry Estay had sent his brother to supervise the other employees on the Gang.

On September 4, 1985, Dudley Estay complained to his brother that Claimant was being "insubordinate" by refusing to follow his instructions to paint a certain part of the Huey P. Long Bridge. Jerry Estay brought Claimant and Dudley Estay back to the Administration Building, and interviewed them in the presence of his supervisor, Bridge Supervisor J. G. Cantrell. During that conversation Claimant, accused the Estay brothers and Cantrell, of racial

prejudice against him. At that point, Cantrell told Claimant that he was dismissed for the rest of the day. Cantrell backed down, however, after Jerry Estay reported that the facts he had found indicated Claimant had good reason not to work where Dudley Estay had placed him. Apparently, Jerry Estay determined that Claimant had moved from his assigned work area because another Painter had begun working at a point directly above him on the bridge and, as he worked, the other employee dropped sand and paint upon Claimant. Having heard this explanation, the Supervisors found insufficient proof that Claimant had been insubordinate, determined that no discipline was warranted, and directed Claimant to return to work. Apparently, Claimant had already changed to street clothes after being "dismissed" and he objected verbally to being ordered back to work, but he did return to work as directed.

Two days later on the morning of September 6, 1985, Claimant hurt his leg on the job. He reported the injury to Jerry Estay, who sent him to a physician for an examination. Claimant returned with a "no-climbing" note and Jerry Estay assigned him to work on the ground. In the early afternoon that day it started to rain and Claimant returned to the dressing room. At about 1:15 P.M. Jerry Estay instructed Claimant to punch out for the day at 1:30 P.M. Claimant did not comply with that order, and refused to do so until the other Bridge Gang employees reported back to the shop and also punched out. After several minutes of such discussion, Jerry Estay called in another employee as a witness and ordered Claimant to punch out immediately or face discipline for insubordination. At that point in time Claimant punched out, at approximately 1:49 P.M., and no disciplinary action was taken.

Two weeks later on September 20, 1985, Jerry Estay encountered Claimant and another Painter at the job location. Some of the circumstances of that encounter are described in the companion case Third Division Award 27866. Jerry Estay determined that Claimant and the other Painter were sitting on homemade pads, instructed Claimant that the pads were unsafe, and told him to throw them to the ground. Claimant threw down his own pad but declined to throw the other employee's down, stating that it was personal property. Supervisor Estay made no further order to throw down the second pad and took no action against Claimant at that time.

At approximately 3:30 P.M. on September 20, 1985, Jerry Estay received a telephone report from his brother Dudley Estay, that Claimant was at the East Approach "causing a ruckus." Dudley told his brother further that he "did not want Wilkerson around any more." Jerry Estay went to the East Approach and interviewed his brother concerning the confrontation between Claimant and Dudley Estay.

At approximately 3:45 P.M. Jerry Estay encountered Claimant at the time clock as he and several other employees were punching out. Jerry Estay asked Claimant and some of the other employees to stay past quitting time to discuss the incident which occurred that day. Claimant declined, stating in words or substance: "If you have something to say, say it now because after 4:00 p.m. I am on my own time." At that point, Estay turned to Cantrell and said in words or substance: "Fire him, Joe." Cantrell apparently indicated assent, whereupon Estay told Claimant he was dismissed from service.

Under date of September 23, 1985, Jerry Estay notified Claimant in writing that he was discharged for being "continuously insubordinate, quarrelsome and vicious." By letter of September 23, 1985, Claimant requested a Hearing under Rule 16. On September 25, 1985, Carrier notified Claimant of a Hearing date into formal charges of violation of General Order No. 220, Paragraph 1 "account Continuous Insubordination, Quarrelsome and Vicious." Some ten days later on October 4, 1985, Carrier issued an amended Notice of Hearing, reading in pertinent part as follows:

"Preliminary investigation of the 'Continuous Insubordination' charge, contained in your dismissal notice of September 25, 1985, reveals that the charge arises from four (4) separate instances of insubordination to Assistant to the Bridge Supervisor, J. A. Estay. 1.) During discussion of your failure to work as directed by Bridgeman Dudley Estay on September 4, 1985; 2.) Your refusal to punch out at 1:30 P.M., on September 6, 1985, as directed; 3.) Your refusal to throw Painter Hoodenpyle's rear pad down from scaffold, near West Abutment, as directed, on September 20, 1985; and 4.) Your outburst at the timeclock at or about 4:00 P.M. in the Administration Building on September 20, 1985. The 'Quarrelsome and Vicious' charge arises from your actions, words and conduct on the Bridge truck at or near the temporary dressing room (building) adjacent to the East Approach to the Huey P. Long Bridge near the East Traffic Circle at approximately 3:35 P.M., Friday, September 20, 1985. Please be prepared to discuss these charges at the Hearing scheduled for 9:30 A.M., Tuesday, October 8, 1985."

After reviewing this entire record we find, as a starting point, that Carrier violated Rule 16(a) to the extent it took evidence at the October 8, 1985, Hearing into alleged acts of insubordination on September 4 and September 6, 1985. The Organization's representative repeatedly objected at the Hearing to all such testimony about those dates, pointing out that Rule 16(a) required Carrier to take disciplinary action against Claimant within ten days of the alleged insubordinate acts on September 4 and September 6, 1985. Instead, Claimant was discharged September 20, 1985, and not notified until October 4, 1985, that his alleged actions on September 4 and 6, 1985, were part of the reasons. Carrier thereby violated Rule 16(a) by taking such evidence in these proceedings. It compounded that error by finding Claimant guilty of insubordination on September 4, 1985, because even the inadmissible evidence shows plainly that he was not insubordinate on that date. Based upon the foregoing, Carrier's findings that Claimant was guilty of insubordination on September 4 and September 6, 1985, are invalid and must be set aside.

Turning to the timely charges of insubordination, quarrelsome and vicious behavior on September 20, 1985, Carrier has failed to carry its burden of proof. Jerry Estay did not witness any of Claimant's alleged misconduct at the East Approach but based his conclusion entirely upon hearsay reports from his brother Dudley Estay and several other employee witnesses. All of the witnesses, except Dudley Estay, however, made written statements and testified that there was long-standing "bad blood" between Dudley Estay and Claimant, that Dudley Estay even went out of his way to provoke a confrontation with Claimant at the East Approach, and Dudley Estay twice challenged Claimant to fight with him. Claimant did not issue or accept any such challenge and responded to Dudley Estay with insulting gestures. Dudley then called his brother and reported that Claimant was "making a ruckus" and demanded that he be removed from the property.

Apparently out of misguided brotherly loyalty or perhaps frustration with his own previous unpleasant encounters with Claimant, Jerry Estay accepted his brother's version that Claimant had been "insubordinate, quarrelsome and vicious" at the East Approach, even though all of the other record evidence was to the contrary. Against this setting, Assistant Supervisor Estay and Supervisor Cantrell clearly over-reacted by imposing the punishment of termination when Claimant refused to stay after hours on his own time to discuss the situation.


There is plenty of evidence on this record that Claimant was less than a model employee during his few years of service, including a prior disciplinary suspension for insubordination in 1981. Clearly, he was rude to his Supervisor on September 20, 1985, but this was not without provocation and there was not sufficient evidence to show that he was "insubordinate, quarrelsome or vicious." If responsible Carrier officials had acted in a timely fashion with progressive discipline in response to some of Claimant's disrespectful behavior in the past, this case may have turned out differently. Instead they gave every outward appearance of condoning disrespectful behavior, then "laid behind the log" and nurtured injured feelings until they became so frustrated they discharged Claimant on the basis of flimsy or nonexistent evidence of insubordinate behavior on September 20, 1985. We do not condone Claimant's attitude or disrespect but, in all of the circumstances, we are compelled to find that this Claim must be sustained. Carrier simply abused its discretion and discharged Claimant without sufficient cause on September 20, 1985. Any compensation of Claimant, hereunder, shall be offset by outside earnings in accordance with Rule 16(f).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Over - Executive Secretary

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