

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31010
Docket No. MW-30998
95-3-92-3-946

The Third Division consisted of regular members and in addition Referee Dennis E. Minni when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Denver and Rio Grande Western Railroad Company

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

- (1) The dismissal of Section Laborer M. A. Contreras for alleged "... insubordination by your failure to follow instructions issued by Section Foreman Travers at approximately 9:30 A.M., Tuesday, September 10, 1991" was arbitrary, capricious and without just and sufficient cause (System File D-91-27/MW-05-92).
- (2) The Claimant shall be returned to service with seniority and all other rights unimpaired and 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 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.

Claimant served as a section gang laborer with the Carrier for twelve years. His dismissal stemmed from an incident which took place on September 10, 1991 in the South Denver interlocking where two section crews had been amalgamated to expedite a time-sensitive track maintenance project.

The Claimant was regularly supervised by Mr. Eulogio Chavez, an employee with similar tenure as Mr. Contreras and was recently promoted to foreman by the Carrier. Mr. Chavez' crew was assigned to work with the crew supervised by Mr. J. Travers, (known respectively as "South Denver" and "North Denver") by Roadmaster J. L. Vialpando. The Roadmaster's uncontroverted testimony was that the project required expedition and his expectation was that Mr. Chavez would learn from collaborating with the more experienced Mr. Travers.

All parties agree that the principals knew and understood that Mr. Travers was a Foreman for the Carrier and his authority was equal to Mr. Chavez, and subordinate to Mr. Vialpando.

The crews commenced work at 8:30 AM. After approximately an hour of observation Mr. Travers approached the Claimant and instructed him to remove rail plates.

The demeanor of both men, the "order" and the alleged "insubordinate" response by the Claimant are inapposite in the record but reliable evidence establishes that Mr. Chavez was asked to participate in the conversation between Claimant and Mr. Travers. Foreman Chavez directed Claimant to comply with the instruction.

The result of the incident was that the Claimant opted to go home ill and the Carrier officials saw to it that he was given a ride to the station house after the Roadmaster was summoned and arrived on the scene to confer with all the participants.

Recognizing that it bears the burden of proof in a discipline case, the Carrier emphasizes that its determination of insubordinate conduct was not the result of a "set-up" or vendetta designed to compromise Mr. Contreras' employment. It is admitted and established that the Claimant knew Mr. Travers was a Foreman and had worked for him with his section crew. The request to knock off the loose plates with the hammer was within the claimant's job description and also represented an accommodation to his physical condition in that Travers only directed that the "loose" plates be dislodged in order to speed up the project.

The balance of the testimony establishes that it was the Claimant who decided to balk at a reasonable order, then seek to be excused from the balance of his shift. By any observation he choose in a deliberate fashion to avoid the directive issued by Mr. Travers. This is insubordinate conduct, it damaged the operation on the shift, caused both Foremen and the Roadmaster to cease other duties and respond to Claimant's argument.

This conduct has been established by a wide measure of the proof to be insubordinate. Cases between this Organization and Carrier have upheld discharge for insubordination. This case should not be determined differently as the Carrier has met its burden of proof.

The Organization argues that three things inure to its viewpoint being correct in behalf of reinstating the Claimant.

First, Claimant did not receive a fair and impartial hearing per Rule 29.

Second, because the Carrier has failed to prove the charges against the Claimant they cannot stand.

Third, the discipline imposed was arbitrary, capricious, harsh and excessive. Thus it must be reversed.

The Organization asserts that the nature of Travers' conduct supports the view that he instigated Contreras' leaving by his mean demeanor, loud voice and drew upon the past where these men had an established "personality conflict". This led to the stress which necessitated that he take off the rest of the shift in order to ease the neck and back pain he was experiencing. All Claimant contributed to the incident was his "inarticulate responses" to Travers' questioning of what Chavez had originally directed the Claimant to perform.

Further, this case is like Third Division Award 21291 where a supervisor resorted to "inflammatory, bullying verbal bombast" against an employee. Also, Travers impeached himself to the extent that none of his testimony should be credited.

There was a safety factor at play here and the supervisors attempted to override it except for Mr. Chavez, who directed the Claimant in accordance with his physical abilities.

Use of the prior record of the Claimant was not warranted and constituted an unfair bias against Mr. Contreras. It should not be used against him in this case because it has no relation to this incident or the proof of what is alleged.

The allegation that a fair hearing was not afforded the Claimant is not supported by this record. There was notice of the hearing furnished and the Claimant attended, representation by the General Chairman (who also had a continuation granted) and Mr. Calderon was present as a witness. This complies with procedural due process and Rule 29.

As for the claim that the charge was unproven, we find the testimony of Foreman Chavez to be determinative of the issue of insubordination. Mr. Travers summoned Mr. Chavez over to where he and the Claimant were conversing. According to Chavez it was to hear Claimant's response to Travers' direction that he knock off the loose plates instead of letting Chavez do it or remaining back with Calderon. In Chavez' own words, Travers was seeking to have Claimant "do the job a little better". Chavez confirmed that the Claimant told Travers he was not his foreman.

Chavez' attempts to defuse the situation by handing off the hammer to the Claimant and bidding him to do what Travers directed is further evidence that Claimant was insubordinate. Otherwise, Chavez would not have felt compelled to have him conform in the interest of keeping the peace.

We conclude that Travers was not unduly caustic and desirous of inflaming the Claimant. There was no proof of any special "light duty" assignment applicable to Claimant which would justify leaving the crew at his choice of time or particular duties such as remaining with Mr. Calderon or not swinging the hammer. It is not harsh and inequitable to expect an employee, cleared to return to work by the medical section, to be able to perform all duties of his or her position. Carving out certain functions such as Mr. Chavez did may be commendable in the human relations sense, but cannot permanently amend the specified duties of a position. In fact, Travers also gave Claimant less than the heaviest work to perform when he asked for only the "loose" plates to be dislodged by the Claimant. If he was trying to drive the Claimant beyond his physical limitations he could have insisted that he do what Chavez had been doing. Claiming either injury or sick leave was tantamount to refusing to work. One must consider the ramifications of Claimant's choice of conduct if the argument is he was not insubordinate by taking time off when he did. The Carrier could have required him to be medically sanctioned for return to work. Or he could face discipline for overuse of sick leave, etc. The point is he cannot indefinitely select his hours and/or chores even if foremen agree to give him special consideration. He works for the Carrier, not for himself or any supervisor in the final analysis.

These facts fall far short of the type of "verbal bombast" cited in the case relied on by the Organization. Travers' demeanor and words are consistent with a reasonable exercise of supervisory powers and they do not form a predicate for overturning the disciplinary determination made by the carrier.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.