

Award No. 14067
Docket No. MW-15262

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
SEABOARD AIR LINE RAILROAD COMPANY**

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

(1) The dismissal of Section Laborer Hansel Torrence, Jr. from the service at 2:00 P. M. on January 17, 1964 for allegedly "refusing to help finish some ties that were out of track and ties that were being taken out because of rain" was without just and sufficient cause and on the basis of unproven charges. (Carrier's File PD-T G-10-2.)

(2) The claimant be reinstated to service with seniority, vacation and all other rights unimpaired; that he be reimbursed for all wage loss suffered and that his record be cleared as per Rule 6(a) of the effective Agreement.

OPINION OF BOARD: The Claimant was employed as a laborer on a maintenance gang assigned to replace switch ties in main line turnout at Jacksonville, Florida. It rained so hard during the entire morning that the crew was constrained to remain under shelter. Finally, the rain subsided, whereupon the gang proceeded to replace the ties. At approximately 2:00 P. M., the rain started anew, and the Claimant suggested to the foreman that the entire gang be permitted to suspend work temporarily. This request was rejected.

The Claimant then requested permission to go to the truck in order to get out of the rain. Permission was refused, whereupon he discontinued work and sought shelter in the covered truck. At that time, an eleven foot switch tie was out of the track and several unspiked ties in the track. The gang continued working until the tie was reset, including spiking all ties, whereupon the foreman directed them to discontinue work and seek shelter in the truck.

As soon as the intense rain abated, the Claimant sought to resume work with the rest of the gang, but was prevented by the foreman. Instead, he was handed a PR-2 form, removing him from service for refusal to work.

Thereafter, the Claimant filed a request for hearing, and at the conclusion thereof, the foreman's action was affirmed.

Two allegations were submitted by the Organization in support of its claim that the foreman discriminated against the Claimant by terminating him. The first was based on the charge that the Claimant informed the foreman that he was ill when he requested permission to go to the truck; and the second, that two other members of the gang upon their request were given permission to seek shelter, due to illness.

The record reveals a direct conflict in testimony with regard to the Claimant's contention that he informed the foreman that he was ill when he requested permission to seek shelter in the truck. The foreman and his apprentice both deny that the Claimant stated at the time he made his request that he was ill. On the other hand, one of the laborers testified that he heard the Claimant say, while passing by, that he had to get out of the rain because he was sick. Thus, from the record we are asked to accept the fact that the foreman should have heard the statement with regard to the Claimant's illness. However, we are loathe to indulge in such a presumption. Had the Claimant directly informed the foreman that he was ill and then his request had been denied, we would have been confronted with a different situation.

It is, therefore, the opinion of this Board that the evidence does not support a charge of discrimination against the foreman. In order to absolve the Claimant from insubordination, we should not be forced to conjecture whether he was ill or whether that condition was actually communicated to his foreman.

In the face of the contradictory denial by both the foreman and apprentice foreman plus the absence of recent medical treatment, leads us to the conclusion that the Organization has failed to carry the burden by a fair preponderance of sufficient probative testimony, so as to warrant a reversal of the Carrier's action.

Furthermore, the second contention raised by the Organization that the foreman permitted two other laborers to seek shelter due to illness, actually negates the charge of discrimination. It would unnecessarily burden this opinion were we to discuss this in detail; hence, this claim is summarily denied.

The rule is well established that an employe is required to carry out his assigned duties, even where he feels aggrieved. He is forbidden to resort to self-help, but is free to process his grievance via the established grievance machinery. He cannot refrain from performing his assignment with impunity. The corollary to this rule, couched as an exception, grants an employe the right to abstain from executing an assignment when confronted by an immediate danger to himself, property, or the public. Such immediate danger to his safety, if proven, exempts an employe from performing the task. However, in the instant dispute, the only alleged evidence of illness by the Claimant was to the effect that he had taken some medicine for a cold, previously procured by his wife.

In view of the posture of this case, we would not be warranted in disturbing the Carrier's action.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 30th day of December 1965.