

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21291
Docket Number MW-21372

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Norfolk and Western Railway Company (Western Region)

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

(1) The dismissal of Roosevelt Comage on May 6, 1974 was without just and sufficient cause and on the basis of unproven charges (System File MW-DEC-74-20).

(2) Claimant Roosevelt Comage shall now be paid for all time lost and be afforded the privileges of Rule 20(g).

OPINION OF BOARD: Claimant in this dispute was dismissed for insubordination. The insubordination alleged by Carrier involved two elements: using profane language to his supervisor and refusing to go to the Company doctor on the day in question.

The record of the investigation indicates that the entire incident is closely related to an injury sustained by Claimant while working, several days earlier. Specifically, the transcript reveals that Claimant was asked to return to the Carrier's doctor under somewhat strange circumstances on the day in question. He testified that he had just been to the doctor but was asked to return with the Assistant Supervisor. There is no question but that he was recalcitrant at that juncture even though his testimony indicates that he was told by Track Supervisor Christy that he had to take a complete physical and not merely be checked for the injury.

It is quite clear that no testimony by Claimant was credited by Carrier, even though not rebutted. For example, Claimant testified that the Assistant Supervisor had called him a "black bastard" just before he had said that Assistant Supervisor Still was a "no good son of a bitch". This was apparently ignored by Carrier. While it is true that while this Board, in handling discipline cases cannot weigh evidence, resolve conflicts in testimony or pass on the credibility of witnesses, it has the responsibility to ensure not only the fairness of the hearing but that there was substantial evidence to support Carrier's conclusion of guilt.

In this dispute, there is no question but that Claimant did not follow instructions of his superiors to go to the Carrier doctor on the day in question, regardless of his reasons or the irrationality of the

request. At the same time the allegedly disrespectful and vulgar remarks addressed to Mr. Still apparently followed at least as insulting and vulgar language employed by Still. Furthermore, the language used by Claimant did not substantially exceed common "shop talk" whereas the Supervisor's comment included a racial slur. The language used in Award 18439 is singularly appropriate in this case:

"Since an employee cannot be held to a higher standard than his superior, we find that Claimant's remarks could not be reasonably construed as being disrespectful. Thus, he was not insubordinate"

Thus, we must conclude that the transcript provided a basis for Carrier determining that Claimant was guilty of insubordination only in that he did not comply with the instruction to go to the doctor, and he was not guilty of insubordination in any other respect. For this infraction the discipline imposed by Carrier was patently inappropriate and may be regarded as arbitrary. In view of Claimant's work record we view the appropriate discipline to be a lengthy suspension. For that reason we shall direct that Carrier reinstate Claimant, with all rights unimpaired, but with no pay for time lost.

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 Employee involved in this dispute are respectively Carrier and Employee 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 violated in that the discipline was inappropriate.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1976.