

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

(Matthew T. Marley

PARTIES TO DISPUTE: (

(Port Authority Trans-Hudson Corporation

STATEMENT OF CLAIM: "That the Carrier's final decision of August 24, 1984, to impose upon me a suspension consisting of 7 days off from work without pay, for charges of violating rule 7 of the PATH Book of Rules with regard to insubordination.

It is my position that the Carrier failed to recognize any of the evidence provided at the hearings of April 5, 1984, and July 27, 1984, by me and my union representative which consisted of numerous facts pertaining to Safety.

Since the suspension has not yet been enforced, I am hereby appealing the PATH decision and am seeking an award that will reverse the decision and clear my employment record.

In the event the suspension is imposed, I am hereby seeking reimbursement of all pay lost due to such suspension."

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 employes involved in this dispute are respectively carrier and employes 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 November 25, 1983, Claimant was working as Signal Maintainer at Hoboken, New Jersey, under the direction of a Signal Foreman. On that morning the Trainmaster called Signal Foreman at about 10:00 a.m. and directed him to "check out" a reported smoke condition and possible fire in the underground tunnels near Carrier's 14th Street Station in New York City. The record shows that Carrier experiences some 300 reported smoke and fire conditions annually. Many of these reports turn out to be false alarms or minor paper and rag fires; but some of the reports prove to involve major fires, such as one in 1982 which released PCB-laden smoke into the tunnels. The smoke condition

at 14th Street was confirmed and reported to the NYC Transit Authority and the Police and Fire Departments of New York City, each of whom responded by sending a unit to investigate. The Trainmaster also instructed the Signal Foreman, however, to send the Signal Maintainer from 33rd Street to investigate. The Signal Foreman explained that the individual at 33rd Street was unavailable and suggested sending instead Claimant, the Signal Maintainer at Hoboken, New Jersey. The supervisors agreed that Claimant should take a train from Hoboken into 14th Street and look for the cause of the smoke in the tunnel.

The Signal Foreman instructed Claimant by telephone and told him about the smoke report. He then directed him to board a train and go to 14th Street to check it out. Claimant responded in words of substance that firefighting was not part of his signal maintenance job. When the Signal Foreman reissued the directive, emphasizing that it was a direct order, Claimant responded in words of substance: "Responding to smoke conditions or fires is voluntary and I don't want to be involved with this." The Signal Foreman thereupon terminated the conversation, reported to his supervisors that Claimant had refused to follow his orders, and proceeded to 14th Street himself. Upon arrival he learned that the source of the smoke was a small fire which had been extinguished.

Based upon the foregoing Carrier charged Claimant with insubordination, found him guilty, and assessed the appealed discipline. At the hearing, Claimant testified that he refused the direct order because: 1) he feared for his personal health and safety, and 2) he had been informed and otherwise led to believe by Carrier safety officials that responding to smoke/fire reports was a voluntary assignment for signal maintainers.

The burden of persuasion is upon the employee to produce sufficient evidence to warrant application of the well-known safety exception to the old maxim "Obey now and grieve later." The record before us contains no objective evidence indicating that Claimant, at the time he refused the order, was fearful for his safety. There is no showing that he had communicated or explained such concerns to his supervisor. Assuming arguendo that he had such a concern and that it was reasonable he made no mention of until after the fact when he was accused of insubordination. Given the state of the record we cannot justify Claimant's conduct on the basis of the safety exception. There is, however, another peculiar twist to this particular case which compels us to reverse the discipline. According to Claimant's unrefuted testimony he and several other signal employees were told by a Safety Supervisor at a Spring 1983 safety meeting that responding to smoke and/or fire reports was voluntary for signal employees. In addition to Claimant's testimony, he and five other signal employees as well as the General Chairman of the Organization, signed a statement attesting that the Safety Supervisor answered a question from the General Chairman by stating that response to smoke and/or fires was voluntary. While the record does not show the context of the question and answer or what the Safety Supervisor may have actually meant, it is clear that he conveyed an impression to all in attendance that signal employees may or may not respond to smoke and/or fire reports in their discretion. The Safety Supervisor in question, a witness at the investigation, testified on cross-examination that he could not recall whether the question and answer had occurred at the safety meeting.

In addition to the foregoing evidence, Claimant also testified without contradiction that following the Spring 1983 safety meeting and prior to November 25, 1983, signal employees, including himself, on several occasions declined supervisor's instructions to respond to smoke or fire condition reports. Neither Claimant nor any other employee who refused such an order were charged with insubordination until the incident of November 25, 1983.

We are persuaded that on November 25, 1983, Claimant had a reasonable good faith belief, engendered and fostered by statements and actions of Carrier officials, that he had a right to decline Foreman Cotter's order to investigate the 14th Street smoke condition. Whether well-founded or not, Claimant was led to this belief by Safety Officer remarks at the Spring 1983 Safety Meeting and by condonation of such declination subsequently by Carrier supervisors.

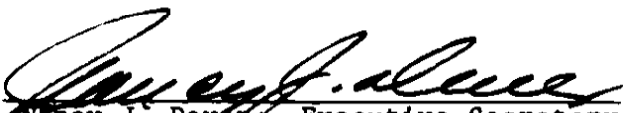
It should be noted that we do not reach nor do we express or imply any opinion on the question whether Carrier may, under applicable contracts, regulations and statutes and upon due notice, require or mandate signal employees like Claimant to respond to future smoke and/or fire condition reports as part of their duties. Nor have we decided whether an express fear for safety in such circumstances would warrant a refusal of such an order. Those issues are not before us for determination in this case. We hold only that in the particular facts and circumstances of this record Carrier was not justified for disciplining Claimant for insubordination after leading him to believe that he was free to refuse such orders with impunity.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1988.