

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

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

(1) The discipline imposed upon Track Patrolman William M. Dove for '... alleged continued failure to follow instructions issued by Asst. Roadmaster, resulting in insubordination ***' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-89-29/MW-20-89).

(2) The Claimant shall be reinstated to his former position with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for wage loss suffered in accordance with Rule 29(d)."

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.

At the time of the incident in question, Claimant was working as a Track Patrolman and was headquartered at Pinecliffe, Colorado. On July 27, 1989, Claimant was instructed by the Assistant Roadmaster to assist a section Foreman installing an oiler at East Rollins, Colorado. Claimant refused to perform that work, stating that it was not his job. When the Assistant Roadmaster informed Claimant that he was to perform the work as assigned or go home, Claimant got into his truck and left the property.

By letter of July 29, 1989, Claimant was notified as follows:

"Formal investigation will be held at 1:00 P.M., Thursday, August 3, 1989, in the Superintendent's Conference Room, North Yard, 901 W. 48th Avenue, Denver, Colorado to determine facts and place responsibility, if any, in connection with Mr. W.M. Dove alleged continued failure to follow instructions issued by Asst. Roadmaster, resulting in insubordination. The most recent alleged failure to follow instructions being thursday, July 27, 1989 at approximately 7:30 A.M., at Pinecliffe, Colorado."

Hearing was held as scheduled, and on August 10, 1989, Claimant was notified of his dismissal from Carrier's service.

On September 19, 1989, while the Organization's appeal of Claimant's discipline was still in process, Carrier offered Claimant a leniency reinstatement with seniority unimpaired, but without pay for time out of service. The conditions of that reinstatement were that Claimant would return as a section laborer only, and "no further action or claim [would] be processed." Claimant declined Carrier's offer and the Organization submitted a Claim on his behalf on September 20, 1989. The Claim was ultimately appealed up to and including the Director of Personnel and Labor Relations. A conference was held between the Parties on the property on April 4, 1990, after which the matter remained unresolved. Accordingly, it is properly before this Board for adjudication.

On November 28, 1989, Carrier notified Claimant that it was unilaterally reinstating him to service with seniority unimpaired, but without back pay, effective December 1, 1989. Claimant accepted Carrier's offer, but requested that he not be required to report until after the holiday, and subsequently returned to service on January 23, 1989. Thus, actual time of the suspension served by Claimant was approximately four months (from August 10, 1989 to December 1, 1989).

The Organization initially maintains that Claimant was not afforded a fair and impartial investigation. Specifically, it alleges that the notice of charges was not sufficiently precise for Claimant to understand what offense he was being charged with. Further, the Division Superintendent, who had not been present at the Hearing rendered the decision following the investigation. Accordingly, Claimant was deprived of his right to due process.

A careful review of the record before the Board yields no evidence to support the Organization's procedural objection. The notice of Hearing was sufficiently specific to enable Claimant and his Representative to formulate an informed defense. Moreover, in light of Claimant's admission at the Hearing that he refused to perform the work as assigned, there is no reason to

find the Superintendent's conclusions, based upon his review of the transcript, in violation of Claimant's contractual due process rights.

With respect to the merits of its Claim, the Organization insists that Carrier's assessment of discipline was predicated upon prior actions for which Claimant was neither disciplined nor officially reprimanded. In addition, Carrier has failed to consider Claimant's motivations in refusing to perform the work assigned him by the Assistant Roadmaster -- to wit: 1) Claimant believed the assignment was punitive; 2) Claimant believed he was being assigned to assist a foreman in performing track laborers' work; 3) a track laborer was being assigned the work of assisting a machine operator. Thus, the Organization urges that Carrier's assessment of discipline was excessive, arbitrary and capricious and should be overturned, and that Claimant should receive full compensation for all time lost.

For its part, Carrier notes that failure to follow instructions constitutes insubordination, per se, and, in the absence of a legitimate concern about the safety or legality of complying with an order, an employee is obliged to "obey now and grieve later." Moreover, Carrier notes that in view of Claimant's previous discipline record, the discipline assessed was not excessive. Accordingly, the grievance should be denied.

In reviewing the record before us, the Board finds that Claimant clearly refused a direct order to perform work. Notwithstanding the Organization's protestations of mitigating factors, this Board continues to adhere to the well established principle that it is an employee's responsibility to "obey now and grieve later" unless he is in genuine fear for his safety or compliance would constitute an illegal act. Therefore, in the absence of a showing that the discipline was excessive or represented disparate treatment, the Board finds no basis for modifying Carrier's assessment of discipline.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.