

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30896
Docket No. MW-31599
95-3-93-3-604

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees)
(
(Southern Pacific Transportation Company
((Western Lines)

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

1. The discipline imposed upon Track Foreman D. Wood for alleged ' . . . insubordination towards Track Supervisor R. E. Abbott, on May 14, 15, and 16, 1992, while you were working as a track foreman on Extra Gang 52, at Cottage Grove, Oregon.' was arbitrary, capricious, an abuse of the Carrier's discretion and on the basis of unproven charges (Carrier's File MWD92-18 SPW).
2. As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered during the period he was withheld from service."

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 employee 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.

A review of the Submissions of the Parties to this dispute, reveals the Claimant was notified by letter dated May 22, 1992, to be present at a formal Investigation to determine his responsibility in violating the following Rules of the Chief Engineers Instructions for the Maintenance of Way and Structures, those portions reading:

"Rule A: Safety is of the first importance in the discharge of duty. Obedience to the Rules is essential to safety and to remaining in service. The service demands the faithful, intelligent and courteous discharge of duty."

"Rule D: Employees must cooperate and assist in carrying out the Rules and instructions, and must promptly report to the proper officer any violation of the Rules or instructions, any condition or practice which may imperil the safety of trains, passengers or employees, and any misconduct or negligence affecting the interest of the Company."

"Rule 607: CONDUCT: Employees must not be:
(1) Careless of the safety of themselves or others;
(2) Negligent;
(3) Insubordinate;
(4) Dishonest;
(5) Immoral; or
(6) Quarrelsome.

Any act of hostility, misconduct or willful disregard or negligence affecting the interests of the Company is sufficient cause for dismissal and must be reported.

Indifference to duty, or to the performance of duty will not be condoned.

Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other. Boisterous, profane or vulgar language is(sic) forbidden."

"Rule 1.2.3.1: Foremen report to and receive instructions from the Roadmaster (or assistant roadmaster) and/or track supervisor. They are in charge of and are responsible for the safe condition of the tracks, roadway and right of way where they are assigned to work, and for the safe, proper and economical use of labor and material in the maintenance thereof.

Assistant foremen must see that employees under them properly and safely perform their duties, and will assist in work of their gangs. They must keep the records and make the prescribed reports of the time of their men, and of the receipt, distribution and use of materials furnished them."

"Rule 1.2.3.3: Foremen must see that employees under them properly and safely perform their duties, and will assist in work of their gangs. They must keep the records and make the prescribed reports of the time of their men, and of the receipt, distribution and use of materials furnished them."

The hearing was held on June 9, 1992, at the Plant Manager's office, Eugene, Oregon.

The charges stemmed from incidents which occurred on Thursday, May 14, 15, and 16, 1992.

On that particular Thursday, the Claimant's Track Supervisor, R. Abbott, received a report concerning broken rail in the vicinity of Springfield. At the conclusion of the call he called the Claimant who was the Foreman at Cottage Grove and told him about the broken rail. The Claimant asked the Supervisor what he expected him to do about it since he did not have sufficient help. He then hung up the phone.

The Track Supervisor then contacted his immediate Supervisor, Roadmaster G. A. Lafon. After he reiterated the conversation he had with the Claimant, he asked the Roadmaster what he wanted him to do. The Roadmaster suggested he call other employees and proceed to repair the rail, which he did.

The following day, the Claimant asked Abbott for a tally of the hours the men had worked repairing the rail. Abbott in turn asked the Claimant why he had reacted the way he did the previous evening. The Claimant responded by pushing away from his desk, shaking a finger at Abbott and telling him to leave the room. Again Abbott called the Roadmaster, who asked both men to get on the phone. When the events of the previous evening were discussed the Claimant told the Roadmaster, he was willing to do the rail repairs when called, but, he did not have the phone numbers of his crew. He further indicated that Abbott was supposed to call him back with the numbers, but never called back. In fact, he stated no one called him. The Roadmaster, knowing he had attempted to call the Claimant, but had received no answer, asked the Claimant if he was certain no one had called him after his initial conversation with Abbott the night before. Again the Claimant denied receiving any return calls. When the Roadmaster told the Claimant he had personally tried to call and got the answering machine, the Claimant explained he was probably in bed at the time and could not hear the phone.

The call seemed to resolve the problem. The Claimant indicated he had felt neglected on overtime in the past and would be willing to do overtime if he had the phone numbers for his crew.

The next day, Saturday, May 16, 1992, Abbott again tried to call the Claimant as a result of another rail breakage at MP 635.7 on the Siskiyou line. When the phone was answered and Abbott spoke, the Claimant again hung up without saying another word. When he was told about this, the Roadmaster called the Claimant and his wife answered the phone. When she found out it was the Roadmaster and not Abbott, she called her husband to the phone. The Claimant followed the directive of his Roadmaster, called a crew and went to repair the rail.

The Carrier issued the charge letter the following Friday, May 22, 1992.

The Organization points out that the Claimant has 20 years of satisfactory service with the Company. During this time he has established and holds seniority as a Track Foreman. He works Monday through Friday, 7:00 A.M. to 3:30 P.M., with Saturday and Sunday as his rest days.

During the week in question the Claimant's regular Supervisor, Roadmaster Smith, was on vacation. Roadmaster Lafon was serving in relief of Smith. Track Supervisor Abbott customarily had not called the Claimant for overtime service. Instead he called the Claimant's laborers to perform the work. The Carrier sanctioned this arrangement.

Not only was the Claimant short of man power during the week in question, there was a documented personality conflict between the Claimant and the Track Supervisor. As a result, Roadmaster Smith never asked Abbott to call the Claimant. He normally contacted him personally when there was work to be done. Abbott was aware of this fact, but, still insisted on calling the Claimant at home despite being told by both the Claimant and the Claimant's wife never to call the house. In view of this fact, Abbott should have known better than to approach the Claimant on the morning of May 16, 1992, especially in light of the fact the Claimant was off the clock and working on his own time.

That aside, the Carrier has charged the Claimant with insubordination on three consecutive days, May 14, 15, and 16, 1992. The record clearly demonstrates that the Claimant was never insubordinate on any of those days. When he was told to do something he never refused.

The Claimant, frustrated by a lack of manpower on May 14, 1992, expressed that problem to Abbott on the phone. He had no intention of being disrespectful, but Abbott may have misconstrued the Claimant's declared shortage of manpower and his apparent frustration as insubordination. This was supposition on Mr. Abbott's part. The Claimant never refused to do his work, but, expressed the necessity to have the men to perform the task. Abbott never called back. Furthermore, the Claimant was never told or paid to remain by the phone after Abbott's initial call. In this regard, the Carrier is in error by its suggestion that its charge of insubordination is substantiated by the fact the Claimant never answered the phone when Roadmaster Lafon called later that same evening.

Likewise, the Claimant was not insubordinate to Abbott on May 15, 1992. When the Claimant asked the Track Supervisor to leave him alone and get out of his office, it must be noted the Claimant was on his own time. He had only asked Abbott for the time sheets for his crew in order to complete his work. He had not begun his tour of duty. The Claimant's behavior was the direct result of Abbott's challenge.

As to May 16, 1992, the Claimant and his wife made it clear Abbott was not to call their house. Despite this admonition, Abbott insisted on calling knowing full well it would aggravate the Claimant. Still the Claimant did not refuse to comply with an order. In fact, when Roadmaster Lafon called and advised him of the broken rail, he immediately gathered his men and proceeded to do the job.

As dictated by First Division Award 20471, the burden of proof rests with the Carrier in discipline cases. As reported in Award 14479, this award held:

"It is firmly settled in the law of labor relations that, in discipline cases, the burden of proof squarely rests upon the employer convincingly to demonstrate that an employe is guilty of the offense upon which his disciplinary penalty is based. Mere suspicion is insufficient to take the place of such proof. This principle is so well established and so universally accepted in the industrial relations world as to require no detailed discussion."

And also in Award 15582:

"According to Carrier's argument in its Ex Parte Submission, we should not upset its decision that Claimant was guilty of the Rule violation unless we have conclusive proof that the decision was arbitrary, capricious or unreasonable. This is not a correct statement of the situation. In discipline cases the burden is on Carrier to prove that the guilty verdict is adequately supported by evidence: unless Carrier's determination of Claimant's guilt is supported by a preponderance of weighty evidence, we will not support a guilty verdict. It is the penalty which we would be reluctant to alter without proof that it is arbitrary, capricious, unreasonable or unjust - in discipline cases it is in the area of penalty that we are reluctant to substitute our judgment for Carrier's."

The Carrier has not met its burden in this case. Even if they had, the discipline issued was unreasonable and excessive.

The Carrier contends the conflict between the Track Supervisor and the Claimant did not excuse the Claimant from his duty as a Foreman to call out his men and repair the broken rail. Instead he reacted in a hostile manner toward Mr. Abbott, a clear violation of Rule 607, which provides: "Any act of hostility. . .affecting the interests of the Company is sufficient cause for dismissal."

His explanation of why he did not hear the phone when Roadmaster Lafon called on May 14, 1992 is far fetched at best. If he truly was ready and willing to work and waiting for a return call, he would have been more accessible. His actions clearly belie his testimony and constitute insubordination.

Insubordination has always been considered a serious Rule violation subject to dismissal. In Third Division Award 24320, the Board denied a claim for reinstatement and stated:

"In respect to the quantum of discipline, this Board has held many times that insubordination of this nature is grounds for dismissal. As it was stated in Third Division Award 21059: 'The rule of thumb here is, "work now grieve later." The work place is not a debating society where employees may challenge the orders of management through insubordinate action. Whenever employees refuse to follow a proper order of supervision, the Carrier is placed in a position where it must immediately take steps to eliminate such insubordination, or else the insubordination will create havoc throughout the work gang. Consequently, it is well established that dismissal is not inappropriate in cases of insubordination.' (See also Award Nos. 200770, 20769, 20651, 20102, 18563, 18128, 17153, and others)"

Public Law Board 3469, also held:

". . .However sympathetic we may be to Claimant's personally felt sense of outrage, nonetheless he had a duty to comply with the lawful and proper instructions of his supervisor, absent any reasonable indication that compliance therewith would present a clear and present danger to his health or welfare. . . .Claimant's duty was to comply with the instruction and file an appropriate grievance if he felt one was required."

Since the Claimant's actions warranted dismissal, the discipline issued was not unreasonable, arbitrary or capricious. Therefore, the discipline should not be disturbed.

In determining the outcome of this case, the Board has not only considered the actions of the Claimant, but, the role he is expected to play as a Foreman. When an employee seeks employment from an employer, s/he does not do so with the idea that s/he will be able to selectively perform work for certain supervisors while refusing to work for or communicate with others. Personality conflicts occur all too frequently. They do not, however, provide a reason for any employee to ignore a legitimate order from a supervisor nor do they provide an excuse to an employee who simply refuses to hear the direct order. Employees are paid to follow directives of their immediate supervisors when and however those directives are conveyed. If the directives are a violation of the employee's contractual rights and do not present a clear and present danger to the employee and are not, unlawful, the employee must obey the directive and then pursue his/her contractual remedies. Any other situation would result in an unproductive work force.

Foremen, especially are expected to realize the necessity of being able to work with those who are placed in positions of authority. Individuals promoted into this position bear a greater responsibility in ascertaining and carrying out orders than other employees simply by the nature of their supervisory responsibilities.

Despite the fact that in this case there is evidence the Carrier may have accommodated the Claimant in the past by having the Roadmaster contact him instead of Abbott, there is nothing which requires the status quo. On the contrary, the Claimant should be put on notice that he is to respond to all supervisors not just those with whom he has no personal conflicts. Moreover, there was nothing in the record to demonstrate that the Track Supervisor had behaved in such a manner he should be ignored or challenged by the Claimant. The evidence does not show that his discussions or directives were in any way provocative or insensitive. Furthermore, there was no explanation by the Claimant for his refusal to accept the Track Supervisor's calls except possibly an alleged history of being ignored for overtime work. Even in this regard, if the allegations were true, the Claimant should have sought redress through the Organization and the contract.

There is nothing which requires the Claimant to like his supervisors, but, he does have to work with them. He has to be prepared to follow their instructions.

The Claimant did not obviously disregard a direct order. However, there is sufficient evidence he intentionally made himself unavailable to receive the order from the supervisor knowing full well it was coming. That is unacceptable.

Since the initial dismissal issued to the Claimant was reduced to a three month suspension, the Board is unwilling to disturb the penalty. The Board finds no mitigating circumstances which would encourage further reduction.

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 10th day of May 1995.