

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35829
Docket No. MW-35908
01-3-99-3-935**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [twenty-five (25) day suspension] imposed upon B&B Mechanic T.C. Arbour for alleged violation of Rules 12 and 13 of the Engineering Department General Rules and Code of Conduct, for insubordination and failure to follow instructions of two (2) supervisors on February 3, 1999, was arbitrary, capricious and an abuse of the Carrier’s discretion.
- (2) The Claimant’s record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”

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 were given due notice of hearing thereon.

T. C. Arbour (Claimant) holds seniority as a Composite Mechanic in the B&B Subdepartment, and was working as such under the supervision of B&B Supervisor M. E. Wienen and B&B Engineer K. L. Ehrenreich when this dispute arose.

Of note, the Department of Transportation (hereinafter referred to as "DOT") requires certain Carrier employees to possess a "DOT Medical Examiner's Certificate." In order to comply with the law, both the Carrier's designated physician and the employee must sign the certificate. On February 3, 1999, Supervisor Wienen was distributing DOT Certificates, which had previously been approved by the Carrier physician. When Wienen directed the Claimant to sign his certificate, Arbour refused, explaining that he had "checked certain boxes on the form" which would disqualify him. The Claimant further stated that he wanted to see the Company doctor prior to signing the document. Supervisor Wienen directed the Claimant to sign the certificate a second time, and again the Claimant refused.

Later that afternoon, Wienen told Arbour that he "needed to sign the card" because it was "required." When the Claimant refused, the Supervisor summoned Engineer Ehrenreich who told the Claimant to sign the card because it was "a requirement of his employment." The Claimant refused, again stating that he had checked "certain boxes," and wanted to see the Company doctor before he signed the certificate. Engineer Ehrenreich repeated his directive, and when the Claimant refused for a fifth time, Ehrenreich removed the Claimant from service and directed him to leave the property "immediately."

On February 4, 1999, the Carrier directed the Claimant to be present at a February 11 fact finding regarding his alleged violation of Rules 12 and 13. Specifically, the Carrier charged the Claimant with "insubordination for failing to comply with a directive given by a company official on Wednesday, February 3, 1999."

On February 18, 1999, the Carrier informed the Claimant that:

"Mr. G. C. LaValley has found you guilty of insubordination for failure to follow instructions from two Supervisors on February 3, 1999. This action violated Rules 12 and 13 of the Engineering Department General Rules and Code of Conduct. Therefore, as discipline you are removed from service for 25 calendar days. Time off since the incident on February 3 will

apply to the 25 days. You are directed to return to work reporting for duty at 7 A.M. on Monday, March 1."

The following day, February 19, the Carrier sent the Claimant the following addendum to the previous day's correspondence:

"Information has come to our attention concerning changes to your physical condition. For this reason you are directed to arrange for a company physical to determine your suitability for service by contacting the DM&IR Claims Department at (218) 628-**. You are further directed to complete this physical prior to your return to service on March 1, 1999."**

The Organization protested the suspension premised upon the pertinent portion of Rule 12 which states that: "Employees must not be careless of the safety of themselves or others." The Claimant, who knew he had high blood pressure, could not, "with a clear conscience," sign the certificate, according to the Organization. The General Chairman noted that the Company doctor had signed his portion of the Claimant's certificate some four months prior to the February 3 incident, and was not aware that the Claimant had developed high blood pressure. The General Chairman further noted that the Claimant stated, at least two times, that he had "checked certain boxes" which would disqualify him, and that he "wanted to see the Company doctor" before he signed the certificate.

Further, the General Chairman contends that the Claimant's request to see the Company doctor was a "clear indication" that the Claimant had medical concerns and, in spite of Ehrenreich's "strong arm attempts," the Claimant was trying to "put safety first." Finally, the General Chairman maintained that it was incumbent upon the Claimant's Supervisors to question the reasoning behind his repeated requests to see the Company doctor, and that both Wienen and Ehrenreich were negligent in not doing so.

The Chief Engineer denied the claim, maintaining that the Claimant was insubordinate when he did not sign the DOT Certificate as directed. The Carrier further maintained that the Claimant was "stubborn" and "evasive" and that his behavior was "indicative of his attitudes and communications with his supervisors."

It is the Carrier's position that the Claimant was insubordinate when he failed to comply with the directives of two Supervisors. Specifically, the Carrier stated that the Claimant "never once indicated that he had a health concern," and that the Claimant made "no attempt to explain his concerns even though he was given five different opportunities during the day." In the circumstances, however, the record evidence does not support the Carrier's position.

The extremely limited grounds upon which an employee may justify an ostensibly insubordinate refusal or failure to obey a supervisory order include an order to perform an illegal or inherently unsafe act. In this case, the record shows that the Claimant explained and justified his request to defer certifying his medical capability of meeting DOT regulations by pointing out that to do so, without clarification of his medical condition, was tantamount to perjury. In these unique circumstances, the continued insistence of his supervisors that he nonetheless sign the DOT Medical Examiner's Certificate was arbitrary and unreasonable. Accordingly, the Carrier's conclusion that the Claimant was insubordinate was in error and the discipline must be rescinded.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of November, 2001.