PUBLIC LAW BOARD NO. 1838

Award No. 67

Case No. 67
Carrier File MW-WS-81-7

Parties to Dispute: Brotherhood of Maintenance of Way Employes and Norfolk and Western Railway Company

Statement of Claim: Claim on behalf of C. P. Prater in which the Organization protests his dismissal and requests that he be reinstated with all rights unimpaired and paid for all time lost until he is returned to work.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Prater, an extra force laborer, with a seniority date of October 30, 1982, was dismissed from all service for the Carrier at approximately 2:55 PM, April 15, 1981, for insubordination. Under date of April 16, 1981, Claimant received from Carrier, as required by the schedule, confirmation, which, in pertinent part, read:

> "You are hereby dismissed from all service with the Norfolk and Western Railway Company. Your dismissal is a result of your direct refusal to perform your duties as section laborer as directed by Roadmaster E. M. Johnson on April 15, 1981, at 2:55 PM, at Walkertown, North Carolina.
>
> Please return all company property now in your possession."

Pursuant to Rule 33 which, in pertinent part, reads:

> "(a) An employe disciplined or dismissed will be advised of the cause for such action in writing. Upon a written request being made to the employe's immediate superior by the employe or his duly accredited representative within ten calendar days from date of advice, the employe shall be given an investigation.
>
> (b) The investigation shall be held within ten calendar days after the receipt of request for same, if practicable, and decision rendered within twenty calendar days after completion of the investigation.
>
> * * *"

Claimant requested, and was granted, a hearing which was held on May 6, 1981. Under date of May 22, 1981, Claimant was notified in pertinent part:

> "A study of the transcript of the formal investigation held in the office of the Agent-Trainmaster, Winston-Salem, North Carolina, at 10:00 a.m., May 6, 1981, reveals that evidence presented at that investigation upholds your dismissal from all service as a Norfolk & Western Railway Company Maintenance of Way Employee for your direct refusal to perform the duties of section laborer as directed by Roadmaster E. M. Johnson on April 15, 1981, at 2:55 PM at Walkertown, North Carolina."

From that determination Claimant appeals.

Organization avers, on behalf of Claimant, that Carrier failed to prove Claimant's culpability for the charge of insubordination; that the supervisor's determination that Claimant was refusing to carry out the normal duties of a laborer was motivated by spite founded upon an intent to revenge some bad feelings that Claimant alleges existed between he and his immediate supervisor.

The circumstances, as reflected in the record, surrounding Claimant's dismissal were that, on april 15, 1981, Roadmaster E. Johnson went to a crossing where the section gang was working at Mile Post R-116.5 in the vicinity of Walkertown, North Carolina. Roadmaster

Johnson, Claimant Prater and Section Foreman Stan Simmons were gathered together in a conversation concerning Claimant's work efforts at the site. Roadmaster Johnson inquired of Claimant how much work he had been doing around the crossing such as pulling of ties, sticking in new timbers and so on. Claimant assertedly responded that he had been tamping ties with a fork and throwing in ballast. When asked specifically about his working with the ties and doing normal section laborers' work, Claimant sought to explain his failure to perform that work by alluding to a problem with his back, responding that he could not do the work because of his back.

Johnson then inquired of Foreman Simmons what response Claimant would give to Simmons when he was instructed to do any kind of heavy lifting or normal section work. Simmons informed Johnson that Claimant would tell him that his back was bothering him and he could not do the job; that was assertedly confirmed by Claimant. Claimant again was directly addressed as to doing normal section laborers work at the crossing and Claimant assertedly stated that

> "...he was not going to do that type of work as far as lifting or just normal section laborers job as far as working the crossing -- pulling in ties or whatever. I asked him, why? He said he was not going to do that. Then he changed his mind. He said could, was able, to do it, but was not. He said he was not going to take the chance of being paralyzed the rest of his life, that he was not going to do any heavy lifting or hard work for Simmons, the company, or me."

Roadmaster Johnson went on to testify that prior to his becoming a roadmaster on that district Claimant allegedly received a back injury which had been causing problems for Claimant and the company for a period of three years, during which time Claimant periodically presented letters from attending physicians saying that Claimant would be limited

to light duty work. Roadmaster Johnson testified that finally the Carrier made arrangements for Claimant to see a specialist in orthopedics.

Assistant Roadmaster Massie testified that on April 1, 1981, he personally transported Claimant to the Lewis-Gale Medical Clinic in Roanoke, Virginia for a consult with Dr. R. H. Fisher, a specialist in orthopedics, that had been arranged for by Dr. George W. Ford, Carrier's Chief Medical Officer.

When ARM Massie arrived with Claimant he informed Claimant to advise the doctor that he wished to talk to the doctor when the examination was over. At the conclusion of the explanation Massie was called back into the examining room with Claimant and the doctor. Dr. Fisher, in Claimant's presence showed Massie Claimant's x-rays stating that he (Dr. Fisher) did not see anything wrong with the x-rays of his back, did not find anything wrong with his back, but had prescribed for Claimant to build up a heel on a shoe approximately a half inch, and to do approximately 75 sit-ups a day which would strengthen his back and would help alleviate a wobble in Claimant's walk that swayed his back back and forth.

Massie asked Dr. Fisher if he found anything that would keep Claimant from doing a day's work as a section man. Dr. Fisher stated "No", indicating that there was a chance of a light strain in his back from a lack of not exercising his back and properly working. Claimant was excused from the room and Massie again asked Dr. Fisher if the doctor saw anything wrong with Claimant's back that would prevent him from doing a regular section man's job. The doctor indicated that Claimant was physically able, if he was willing to, to do this job.

Massie testified that Claimant was in the room during the first portion of the discussion wherein the doctor stated Claimant's fitness to perform the work.

Claimant acknowledged that he had seen Dr. Fisher at the Lewis-Gale Hospital in Roanoke on April 1st, confirmed that the doctor advised him that this backbone was veering to the left, that the muscles on the left side were weak and "...he wanted to get my shoe built up half an inch on the left foot to try to strengthen the muscle on the left side and straighten my backbone up". However, Claimant indicated that the doctor "changed" when Mr. Massie came into the room. Claimant asserted that the doctor asked Mr. Massie if there was anything light for Claimant to do, to which Mr. Massie allegedly replied "No", and Claimant asserts that the doctor became very quiet and he (Claimant) then left.

Claimant denied that Dr. Fisher made any statement to the effect that Claimant could perform any of the normal duties of a section man. However, Claimant did say that the doctor told Claimant to "...take some exercises. Try to do at least 75 to 150 sit-ups a day." Claimant testified that he did not take the doctors advice and did not do the exercises stating that "...I am not able to do it. I try, I do as many as I can, but I am not going...I do not do it every day. It depends on how my back is."

Claimant testified that he had received an injury in 1978, that he was under various doctors care for that injury from 1978 until the present, that he had been taken out of service because of his back injury on several occasions, the longest being a total of 18 months during which time he worked approximately a day and a half. Claimant

testified that he had always been instructed by the doctors to do light duty.

In response to the question of whether or not any doctor ever told Claimant to go back to work, that there was nothing wrong with him, Claimant replied:

> "No sir. Other then...well that Dr. Fisher did say go back to work but he did not say to do the full extent of the job except what Mr. Massie told me after he left the office. He did say...he said..Mr. Massie told me then that Dr. Fisher said I could do all the work."

Claimant testified that he never refused to do any work at any time.

However, Carrier called several other witnesses, some not supervisors, all of whom testified that they heard Claimant in effect state that Claimant wasn't going to do anything for Mr. Johnson, for his supervisor or for his company that would hurt his back for the rest of his life. On cross-examination some of the witnesses basically confirmed their original statement but some added that Claimant did state that he was not refusing the work, only that he was not able to do the work.

Organization elicited from Roadmaster Johnson on cross-examination as well as Claimant's immediate supervisor, Foreman Simmons, that on April 8th Claimant left work at approximately noon time on the pretext of a statement to the effect that Claimant was going to get his heel built up on his boot in compliance with Dr. Fisher's request. Claimant showed up with a note on the morning of the 15th from Dr. Spellman, a Carrier-physician, which, in pertinent part, read:

> "CERTIFICATE TO RETURN TO WORK OR SCHOOL
>
> Mr. Clyde Prater has been under my care from 3-9-81 to _____ and is able to return to work/school on

> 4-15-81. Remarks: Clyde is released to return to work, but should be restricted to very little lifting and none at all if possible.
>
> Dr. /s/ Louis C. Spellman
> Address: Rural Hill, N. C. Date: 4-14-81"

Roadmaster Johnson was informed of the note, and contacted Dr. Ford, Carrier's Chief Medical Examiner. Johnson testified that Dr. Ford told him to ignore Dr. Spellman's note, that Dr. Spellman had sent Dr. Ford the same note. Roadmaster Johnson testified that he relied upon Dr. Ford's authority as the Carrier's Chief Medical Examiner in his disregarding Dr. Ford's note. He testified that Dr. Spellman was not an orthopedic specialist, that he was aware that Dr. Fisher was an orthopedic specialist, and that Dr. Ford had relied upon Dr. Fisher's report. In that regard, Carrier introduced as one of its exhibits a form letter of April 6, 1981, over Dr. George W. Ford's signature addressed to Division Superintendent Bridger, Roanoke, which in pertinent part, read:

> "This is to advise that I have today received report of examination of Mr. Clyde P. Prater, section laborer.
>
> The following has been decided on his case:
>
> He is qualified for work.
>
> Yours truly,
> /s/ George W. Ford, M.D.
> Medical Director"

Additionally, Carrier introduced a follow-up letter of April 24, 1981, addressed to Superintendent Bridger which, in pertinent part read:

> "Mr. Clyde P. Prater, Section Laborer, was qualified to return to work after a negative examination by Dr. Robert W. Edmonds, 8 December 1980. Dr. R. H. Fisher saw the patient in 1979 and felt he was fit for work then, and, in fact, I think he returned to work for a while.

> Dr. Fisher (who is a very competent orthopedist) re-examined Mr. Prater on 2 April 1981 and felt that "he physically can pursue this type work (his own job) and have encouraged him to do so."
>
> With this very thorough report in hand, I have so advised Mr. Prater's supervisor that he should be able to return to his own job without limitations."

As of April 15th, the date of Claimant's discharge, Claimant had not had the heel built up in his boot pursuant to his request to leave the job at noon or April 8th. Claimant testified at his hearing that he had picked up his boots on the morning of the day of his hearing, on May 6, 1981.

The facts surrounding Claimant's dismissal, although denied by Claimant, remain essentially unchallenged: Sometime in 1978 Claimant received a back injury which kept him out of service for an extended period of time, approximately eighteen (18) months. He had recurring complaints about same and, according to his testimony, had been removed from service and/or placed on light-duty status on several occasions during that period of time.

Carrier, faced with a continuing problem, sought to resolve the question of the condition of Claimant's back by sending him to an orthopedic specialist, Dr. Fisher, on April 1st for examination. On April 2, 1981 Dr. Fisher sent Dr. Ford a "...very thorough report..." which was apparently perceived by Dr. Ford on April 6th. Claimant was returned to service without restriction "...qualified for work" on April 6, 1981.

On April 8, 1981 Claimant requested permission to leave work at noon time on the pretext of having a lift built into his heel pursuant to the directions of Dr. Fisher. That was not done on April 15th. Claimant subsequently offered the explanation that he did not want to do

it until after he had seen his own physician. However, on April 9th Claimant went to see Dr. Louis Spellman, apparently complaining of back pain. Dr. Spellman wrote a note on April 14th advising that Claimant could come back to work on the 15th "...but should be restricted to very little lifting and none at all if possible". Dr. Spellman sent that note to Dr. Ford.

Road Foreman Johnson was made aware of the note by Claimant's immediate supervisor, Foreman Simmons. Johnson, Simmons and Claimant had a meeting that was witnessed by several other employees, wherein Claimant categorically stated that "he was not going to do that type of work as far as lifting or just normal section labor's job as far as working the crossing -- pulling in ties whatever" stating that "he could, was able to do it but he was not going to take the chance of being paralyzed the rest of his life, not going to do any heavy lifting or hard work for Simmons, the company, or Mr. Johnson".

On May 6th Claimant gave the following answers to the following questions:

> "Q. Did you tell Mr. Johnson that you were not going to do any type of hard work or heavy lifting that would paralyze you for the rest of your life?
>
> A. No sir. I told Mr. Johnson that I was not able to put in ties and stuff like that that I could not help that my back hurt....
>
> Q. Did you make the statement that you would not do the hard work?
>
> A. No sir, I told him I could not refuse, I would not refuse but that I had the right to sign off to go to the doctor, that I was not able to do it, and if it came down to it that is what I would do just flat refusing no.
>
> Q. Did you say anything to Mr. Johnson that would be similar to the statement that you were not going to do any type of hard work?

A. Nope. Not any type of hard work. I just told him that I was not able to be handling ties and rails and things like that.

Q. Did you make any type statement that would be similar to you could do the work but you would not do it?

A. No, sir, I absolutely did not."

The Board finds that Carrier did not abuse its discretion to determine the issue of credibility concerning the nature and content of Claimant's declarations on April 15th. Claimants denial directly confronts and denies the recollection of virtually all of the witnesses called that were present, or observed and overheard that meeting, including some of Claimant's co-workers. We find nothing in the record that would permit the Board to conclude the Carrier abused its discretion to determine such issues of credibility when there is conflicting testimony. The Board does not sit as a trier of the facts, but is confined to a review of the record. In that regard see Second Division Award No. 6489 (Bergman) which, in pertinent part, held:

"Although the evidence has been discussed, it does not mean that we could substitute our judgment for that of the Carrier. The precedent for this policy is overwhelming in prior Awards. Neither do we sit to do equity. We are an appellate body, in effect, to review the record and consider the contentions of the parties. We look for evidence of prejudgment, abuse of discretion, arbitrary or capricious action which could lead to a reversal on those grounds. We do not resolve conflicts in testimony unless the judgment made may fall into the categories listed above. As indicated, we find substantial evidence to support the conclusion reached."

Organization has argued that Claimant was placed in a conundrum not of his own making when he received the note from Dr. Spellman on April 14th and was relying thereon in making his statement of April 15th.

Carrier obviously concluded, based upon competent medical opinion from Dr. Fisher to Dr. Ford, that Claimant was seeking to cloak himself in the protection of a doctor's note in refusing to do any heavy, normal laborers work on the 15th, based upon his assertion of back pain on the 9th to Dr. Spellman. Carrier concluded that there was no medical justification for such complaints based upon the orthopedic specialist's examination on the 1st and no reported injury from Claimant up to and including the 15th.

The Board is satisfied that Carrier concluded from the conflict in the testimony that Claimant did, in fact, hear the statement by Dr. Fisher, notwithstanding Claimant's denial thereof, that Claimant was capable of performing normal laborer's work made in the presence of ARM Massie and Claimant after the physical examination on the 1st. Claimant was able to recall virtually all of the details of that portion of the conversation that took place in his presence, which corroborated ARM Massie's testimony, except that essential portion dealing with Claimant's fitness for duties.

Whether Claimant did or did not have injuries or a condition justifying his refusal for work is not a question that this Board is empowered to resolve. Nor do we find it a justiciable issue warranting the appointment of a medical board in view of the present record. Claimant was removed from service on the 15th on the charge of insubordination arising from his alleged refusal to perform work. Claimant maintains that he did not refuse the work but that he was unable to do the work (the preponderance of evidence, however, indicates what Claimant really stated on the 15th was that he was able to, but was unwilling to, out of fear of possible permanent injury).

Claimant's hearing was scheduled for, and held, on May 6th. Ample time existed for Claimant to contact any of the physicians that he had testified to and whose advice he asserted he was relying on in the intervening dates for medical support for his contentions. No evidence was ever produced at the hearing by Claimant to the effect that he had an on-going medical condition or of any restriction by his "treating" physicians. Claimant clearly knew and understood what the issue was. Claimant put much relevance upon his association with a Dr. Revere, who Claimant contended was a Professor of Orthopedic Surgeons at Bowman Gray School of Medicine, and a Dr. Wong of the University of Virginia. However, Claimant offered no documentation or evidence of their diagnosis, reports, or conclusions. Neither did Claimant, nor his representatives, ever made any request for a postponement for an opportunity to develop such evidence or documentation.

Some many months after the hearing before the Board, Organization sought to submit copies of depositions of various medical witnesses in a personal injury claim made by Claimant in support of Claimant's testimony at his discipline hearing. Carrier strenuously objected thereto, citing an array of Awards in support of their position that such an ex parte submission exceeds the parameters established by the Railway Labor Act and the recognized practice and procedures in the handling of such claims on the property.

We find ample support for Carrier's position and must agree therewith. In Third Division Award No. 20279, it was held in pertinent part:

> "Claim Carrier violated the Agreement when it dismissed Extra Force Laborer for being absent without permission

> and for being an unsafe employe, that he be restored to service and paid for time lost, denied. The Board stated: '***Not until the handling in the usual manner on the property was exhausted did the Organization raise substantive matters, by letter of May 23, 1973, preliminary to appealing to this Board. In our considered judgment, this belated effort to amend the claim is without legal effect and is in contravention of Section 3, First (i) of the Act which requires handling in the 'usual manner up to and including the chief operating officer'. We are of the further opinion that Section 3, First (i) contemplates that the claim denied by the chief operating officer, on the property, is the claim which 'may be referred' to the Board. (See, in this connection, Award No. 13235, Dorsey.)***In view of what this Board has stated above, we find that the Agreement has not been violated, and the claim must be denied. Nevertheless, even if this Board were to consider the substantive merits of the discharge, the claim must still be denied.'
>
> (Emphasis ours)

We find that Claimants contentions that his removal from service was founded on motives of spite and revenge to be wholly specious. There is no evidence in the record to support Claimant's conclusions that he was the victim of harassment or abuse by his supervisors in the manner in which he was treated or that they were out to "get him" because he took exception to the way in which he was being treated.

In Second Division Award No. 8520 (Vernon), it was held:

> "The general arbitral rule regarding insubordination cases is that employees are bound to 'obey now and grieve later', even if instructions are believed to be contrary to the contract. There is one exception to the 'obey now, grieve later' rule. This might be referred to as the 'safety exception'. It has been previously held that an employee need not comply with orders that are without sufficient regard to the employee's safety as to imperil their life or limb. However, the safety exception cannot be invoked in all situations where compliance with an order would be hazardous to life or limb. It must be recognized that hazard and risk are inherent as a matter of business necessity in many jobs. In cases where risk and hazard are inherent in an employee's position, the safety exception can only be successfully invoked and when the company's order was unreasonably careless and failed to

> take into consideration necessary precautions to limit the inherent danger to a sufficient and reasonable degree. Also, it has been held, when the organization invokes the safety exception, the burden is on them to show that lack of safety was the real reason at the time of refusal..."

We find sufficient justification in this record from which Carrier concluded that Claimant was on notice as to its position concerning his medical condition as of April 1st. Claimant offered no testimony, evidence or documentation that he made any effort after April 1st prior to April 9th to seek support for his apparent conclusion that he was not able to do a section laborers work. We find that Claimant's efforts on the 9th to go to a doctor for alleged back complaints, particularly when viewed against the excuse given to his supervisor, and his failure to complain to his supervisor of any back pain or report any injury on the 9th, to be wholly lacking in credibility, but consistent with Carrier's conclusion that Claimant was using an alleged back injury as a subterfuge to avoid work.

Fourth Division Award No. 1991 (Dolnick) held in pertinent part:

> "It is a well established principle of the Board, that the evaluation of the facts in discharge cases is the responsibility of the Carrier's officers who conduct the hearing and the investigation. Our function is to examine the record, make sure that the Claimant was afforded a fair and impartial hearing under the terms of the Agreement; that there was no predetermined bias or judgment against the Claimant; that there was no abuse of discretion in the imposition of the penalty; and that the punishment fits the crime, i.e., that the discipline was not arbitrary, unreasonable or excessive."

We find that Carrier has fairly met its burden to establish that on April 15th Claimant did, in fact, refuse to carry out his assignment. We cannot conclude from this record that the reasons offered by Claimant

for so refusing were reasonable or warranted in the circumstances. Ample opportunity existed for Claimant to document or support, by competent medical opinion, his reasons for refusing to do regular laborer's work. Claimant chose not to avail himself of that opportunity.

Claimant was ably and aggressively represented throughout his hearing wherein all possible evidence in Claimant's favor was adduced. Notwithstanding, Carrier concluded that Claimant was insubordinate and dismissed him.

Second Division Award No. 4782 (Whiting) held, in pertinent part:

> "The proffered testimony might be relevant to a question as to whether the directions given were proper or reasonable, but such a question does not excuse or justify disobedience to the directions. To hold otherwise would make each employee his own judge of what is reasonable and what work he will perform. No business could be conducted on the basis of such anarchy..."
>
> (Underscoring supplied)

It has too often been held to require further citation in support thereof that insubordination is a dismissible offense. The record is devoid of any circumstances mitigating in Claimant's favor that would warrant an intrusion into the results that occurred on the property. Therefore, we must conclude this claim be denied.

AWARD: Claim denied.

Bryce Hall, Employee Member

J. A. Abbatello, Jr., Carrier Member

A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, March 2, 1984.