

PUBLIC LAW BOARD NO. 3445

Award No.: 58

Case No.: 58

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM

P. H. Dewberry was charged for failing to comply allegedly with direct instructions issued by Assistant Track Supervisor L. C. Williams at or near Krannert, GA on Friday, February 19, 1988. Claim was filed by the Employee up to and including the highest designated officer denying that Claimant had violated any instructions.

General Chairman handled the case up to and including the highest designated officer who denied the same.

FINDINGS

Claimant entered the Carrier's service on March 8, 1976.

By letter dated February 26, 1988, Claimant was notified to attend a formal investigation on charges that he had failed to comply with direct instructions from a superior. The formal investigation was conducted on March 4, 1988. By letter dated March 18, 1988, Claimant was dismissed based on evidence adduced at the investigation.

The question to be resolved in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

On February 19, 1988, Claimant was instructed to rock switches by Track Supervisor Taylor at Krannert Yard. At first, no loader was available to load the necessary rock for Claimant. When Assistant Track Supervisor L.C. Williams contacted Taylor, it was learned that a loader might be available later in the day. By about 11:00 a.m., it became apparent that no loader would be available and, after some delays, precipitated by mechanical problems in telephone communication, Williams instructed Claimant to oil switches at Krannert Yard and Howard Yard (some 3/4 mile away from Krannert). Claimant and R. L. Camp, with whom he was working, could not find the proper broom with which to oil the switches. Claimant and Camp then returned to Dalton, where they had begun the work day and, having completed 40 hours that week, went home.

The position of the Organization is that Claimant was dismissed without just cause. The Organization maintains that the Carrier has not met its burden of proof in showing that Claimant did not comply with instructions. Further, the Organization contends that whatever Claimant may have failed to do was the result of conflicting instructions from his various superiors. The Organization also contends that because it could not present a notarized statement from Camp and because the Carrier coached its witnesses, Claimant did not receive a fair and impartial investigation.

The position of the Carrier is that Claimant was properly dismissed.

The Carrier cites various testimony at the investigation to show that Williams told Claimant to oil the switches at Krannert Yard and Howard Yard, and that Claimant failed to comply with those instructions. The Carrier contends, by implication, that Claimant's instructions were changed in the course of the morning and he should have followed his new instructions to oil the switches. The Carrier also maintains that Claimant's contentions are not believable because on the date of the incident, he said he could not oil the switches because he did not have a broom to do so, while at the investigation, his reason was that he had not been instructed to do so. Finally, the Carrier contends that failure to comply with instructions is a serious violation justifying dismissal and that Claimant should have done the work as instructed and grieved later.

After review of the entire record, the Board finds that Claimant was dismissed without just cause and should be reinstated with seniority unimpaired, and with full back pay for time lost.

The Carrier has not presented substantial credible evidence in the record to prove that Claimant failed to comply with instructions. The evidence shows that Claimant had at least two sets of instructions and that his ability to carry out the oiling instructions was hampered by the lack of the proper broom with which to conduct the operation. Moreover, there is no evidence that Claimant refused an order or that he was warned that if he refused that he was subject to dismissal. Claimant appears to have not conducted the oiling operation for reasons of confusion and lack of

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capacity, not because he was insubordinate.

AWARD

Claimant is reinstated with seniority unimpaired, and with back pay for all time lost.

Nicholas Pumas
Neutral Member

LT Miller Jr - DISSENT
Carrier Member ATTACHED

Bayne L. Hall
Organization Member

Date: Oct. 10, 1989

CARRIER'S DISSENT
TO
AWARD 58 OF PUBLIC LAW BOARD 3445

By its Award, the Majority overturned the dismissal of an employee charged with failure to comply with direct instructions of an assistant supervisor on the grounds that "Claimant appears to have not conducted the oiling operation for reasons of confusion and lack of capacity, not because he was insubordinate." However, the testimony in the investigation developed substantial evidence to the contrary, and the Majority erred in sustaining the claim.

With regard to the claimant's alleged "confusion" as to his instructions, the assistant supervisor was steadfast in his testimony that during a telephone conversation, he repeatedly instructed claimant to oil the switches (Transcript at pages 4, 5, 6). This account is supported by the foreman who was with claimant at the time of that telephone conversation; the foreman testified that claimant commented after he hung up that "[the assistant supervisor] said to find a bucket and oil the switches out here in the yard. [Claimant] said I don't think I'll find a bucket" (page 22). This testimony conclusively proves not only that claimant understood what he was to do, but that he intended to deliberately disobey those instructions. It is also important to note that although claimant took a very active role in his own defense, and extensively questioned the foreman (pages 23-25 and 29-32), he never disputed the foreman's testimony on this specific point - in fact, he did not even question him about it.

The Majority's finding that claimant lacked the capacity to perform the assigned task is mistaken. First, claimant did, on the day of the incident, attempt to defend his failure based on an allegation that he could not find a broom (pages 4, 13). Even if one were to ignore the fact that, as indicated by the assistant supervisor (pages 5-6), a broom is not required to oil switches, the record reflects that claimant did not stress this point in the investigation (instead he alleged he was never issued instructions and did not have a bucket) and the Organization did not even mention any lack of a broom in the appeal process. If the point is so minor to be ignored in the handling on the property, it certainly should not be determinative in the disposition of the case.

Claimant's failure to comply with the instructions was not due to confusion or incapacity. All the excuses he offered were simply afterthoughts to cloud his decision not to comply with specific work instructions. The transcript reveals that the claimant did not like the work instruction he was given and had no intention of following it. There is no confusion in that fact. Our dissent is appropriate, therefore.


Carrier Member