

PUBLIC LAW BOARD NO. 1760

Award No. 12

Docket No. MW-STL-76-1

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement

of Claim: Carrier violated the effective Agreement when it dismissed Haywood Cook, April 1, 1976, on unjust and unproven charges. Due to the discrimination on the St. Louis Terminal which Mr. Haywood Cook became a victim, Mr. Cook be reinstated with all rights unimpaired and paid for all time held out of service.

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 February 2, 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, a laborer for some seven years, was working as such with Extra Gang 106, on April 1, 1976. The Gang was engaged in the work of replacement rail on what is known as the "Luther Line," at approximately Mile Post 814. The Gang was advised by their Foreman of their starting time on the morning of April 1, 1976 that due to the volume of work to be accomplished that day, it was more than likely that they would be required to work overtime to complete the project in order to place the track back in service. At noon time said Foreman notified the members of Gang 106 that they would definitely be required to work overtime in order to finish the job. Claimant advised the Foreman that he was refusing to work overtime. Claimant was advised,

at such time (3:30 p.m.), that if he walked off the job he "would not have a job in the morning." Claimant walked off the job and left the remainder of the men to close up the track so that train traffic could be resumed. Claimant was dismissed by Roadmaster Davis, on April 1, 1976, for not being able to work.

The Division engineer received a request from the General Chairman, on April 2, 1976, requesting that a Hearing be held and requesting certain witnesses. The Hearing was held on April 13, 1976 to determine:

"your responsibility for your failure to perform work as instructed by the foreman and roadmaster in connection with emergency situations at miles post 8.4 at approximately 3:30 p.m. April 1, 1976....."

As a result of that investigation, Carrier advised Claimant that:

"as a result of this hearing you are hereby dismissed from service of the Norfolk and Western Railway Company, and your file is closed."

Claimant had a fair hearing.

There was sufficient evidence adduced to support Carrier's conclusion that Claimant had in fact disobeyed the specific instructions of the Roadmaster, as well as the instructions of his Foreman, to work overtime. It is true that Claimant had asked at 7:30 a.m. that he not work overtime. However, his foreman told him, at that time, that overtime would be necessary because of the amount of work that there were 14 sections of rail to be laid. Said Foreman told Claimant at 7:30 a.m. that it was an emergency, that there was going to be overtime and he specifically told Claimant at noon time that he could not leave and he had to work overtime, that if he did not that he would be considered as quitting. The Gang Foreman, on the usual form, reported to the Roadmaster that Claimant had told him he was not going to work any

overtime that day. As a result, the Roadmaster then specifically spoke to Claimant. The Roadmaster informed Claimant that no one could leave at 3:30 p.m. because of the main track being out of service. Claimant gave no reason to the Roadmaster why he wanted to be off other than that he did not want to work any overtime. The Roadmaster told Claimant that if he left he would be quitting.

While true that Claimant's Foreman was not as firm as he should have been, it is clear that Claimant had been placed on notice, when he was told at 7:30 a.m. that he was going to work some overtime that night. Claimant's own witnesses stated that Claimant said that he was not going to work overtime and that he was going to leave that day at 3:30 p.m. It is also true that the Foreman had left one member of his gang off. However, that employee did work some overtime but in any event such arrangement had been made seven (7) days previously. The Roadmaster testified, as did the Foreman, that had arrangement been made in advance they would, in all probability, have permitted Claimant to be off as they had others.

Here, we conclude that it was not a question of whether an employee was being discriminated against but rather it was one involving a direct refusal by an employee to carry out the instructions of his superiors.

We find, as in Third Division Award 11803, that:

"it is a well established principle of this division that a disciplinary action will not be set aside unless the Carrier was arbitrary, indictive or acted in bad faith. It is also the position of this board that we cannot substitute our judgment for the Carrier. (11018, 11324, and 11531) Dolnick; 10642 (Labelle); 10595 and 10596 (Hall); and others.

Here, Carrier was not arbitrary or vindictive and had not acted in bad faith. There is substantial evidence in the record to support the

charge that Claimant was guilty of insubordination. Carrier met the requisite of its burden of proof to support its right to discipline Claimant.

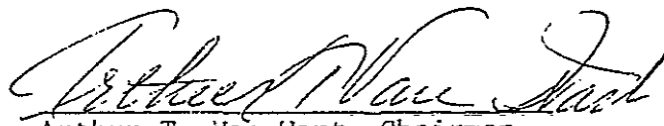
The Board finds circumstances which mitigate the degree of discipline assessed. It will extend the benefit of doubt to Claimant that his conduct in question was neither wilful nor malicious. The probability of misunderstanding may have been strongly influenced by the vacillation of Claimant's Foreman. Therefore Claimant will be reinstated with all his rights unimpaired but without any pay for time out of service subject to his passing the usual return to service examination and that he meet with Carrier's local representative accompanied by the Brotherhood's local representative to review and understand his obligation and duty to protect the requirements of Carrier service, even if that means working overtime, as well as understanding that advance arrangements which include permission therefor should be made when it is necessary to be off or leave work early.

Award: Claim disposed of as per finding.

Order: Carrier is directed to make this Award effective within 45 days of date of issuance shown below.


M. A. Christie, Employee Member


G. C. Edwards, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Falmouth, Massachusetts, May 31, 1979.