PUBLIC LAW BOARD NO. 1838

Award No. 59

Case No. 60
Carrier File MW-ROR-80-2
MW-ROR-80-4
MW-ROR-80-5

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

Statement of Claim: Claim is made to restore Claimants M. R. Scherer, R. A. Beck and C. R. Caudill to service of Norfolk and Western Railway Company with seniority and all other rights unimpaired and pay for all time lost since their dismissal from service on March 17, 1980, citing Rules 33 and 35 in support of this claim.

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.

Claimants were assigned as extra gang laborers on R-4 Rail Gang, at Salem, Virginia. R-4 Rail Gang consisted of seventy-eight (78) employees engaged in the installation of continuous-welded rail. Part of the process for the installation of continuous weld rail is the planing of old railroad ties to receive new tie plates. Carrier utilized the Nordberg Model CZ Adzer in this operation.

The R-4 Rail Gang was assigned three such machines on March 17, 1980, one of which was "new", that is, had been completely rebuilt and repowered and had been delivered to the work site in its original crate. The operators of the Adzer machine received a 5¢ differential for

handling that assignment. The R-4 Gang was just "shaping up" and March 17th was the first day of the operation of the gang. There were no particular assignments made for work activities either by seniority or special skill. The R-4 Rail Gang was under the supervision of R. C. Carbaugh with twenty-three (23) years railroad experience, and nine (9) years experience as an assistant roadmaster.

Supervisor Carbaugh, with the knowledge that Claimant Caudill had previous experience operating the Adzer machine, approached Claimant Caudill, and requested him to operate the Adzer machine. Caudill refused. Supervisor Carbaugh then summarily dismissed Claimant Caudill.

Supervisor Carbaugh then approached Claimant Scherer requesting him to operate the Adzer machine; Claimant Scherer likewise refused, resulting in a summary dismissal by Supervisor Carbaugh.

Next in line was Claimant R. A. Beck who was also requested to operate the Adzer machine and, he too, refused and was dismissed.

Pursuant to Rules 33 and 35 of the applicable schedules a claim was instituted. As a result thereof under date of April 3, 1980 an investigation was held into the dismissals of the Claimants herein. As a result of that hearing under date of April 21, 1980 Engineer of Track G. W. Woods sustained the dismissals. From said determination the Claimants appeal to this Board.

The applicable Schedule Rules, in pertinent part, read:

> "RULE 33 - DISCIPLINE AND GRIEVANCES
>
> (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.

(c) If the charge against the employe is not sustained, it shall be stricken from the record and employe reinstated and paid for the assigned working hours actually lost, less the amount earned from time of suspension until reinstated.

(d) The right of appeal in the usual manner is accorded under provisions of Rule 35.

(e) At the investigation or on appeal an employe may be represented by one or more 'duly accredited representatives' as that term is defined in this Agreement.

(f) An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for in this Rule 33 if written request is made to his immediate superior within ten calendar days of cause of complaint. This rule does not apply to grievances in connection with time claims, which must be submitted and progressed in accordance with the provisions of Rule 35.

Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will be neither a shutdown by the employer nor a suspension of work by the employes.

RULE 35 - TIME LIMIT ON CLAIMS

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved to the officer of the Carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty days from the date same if filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or

waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in Paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act, It is understood, however, that the parties may by agreement in any particular case extent this nine months' period herein referred to.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule is not intended to deny the right of the Organization party hereto to file and prosecute claims and grievances for and on behalf of the employes it represents.

(f) This rule is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine months of the date of the decision of the highest officer of the Carrier.

(g) This rule shall not apply to requests for leniency."

Organization advances the appeal not on the grounds that there is a factual issue over Claimants apparent insubordination but rather, that

Claimants fall within a recognized exception to the requirement to carry out all proper and lawful instructions of supervisors. Organization clearly acknowledges that the record discloses Claimant's ready admittance to their refusal to operate the Adzer machine. Organization stresses that Claimants were acting under an imminent fear for their health and safety if they would have been required to operate the Adzer machine, since all three Claimants clearly indicate, and the record so supports, previous injuries resulting from the operation of that type of machine. Organization contends that to have requested the men to operate said machine is a violation of Carrier's own Safety Rules, to wit - Rule 1 in the Carrier's Safety Rule Book, which in pertinent part reads:

> "...Safety is of the first importance in the discharge of duties..."

Organization contends that it would be violative of the essential principle of the safety mandates to require a man who is in fear of reinjury to operate an Adzer machine because of its alleged propensity to inflict injuries on the operator.

In support thereof Organization offers the decision of Public Law Board No. 1844, resulting in Award No. 6 (Eischen), which, Organization contends, dealt with an exception to the mandate that all employees are required to carry out the reasonable and proper orders of their immediate supervisors. That claim involved a refusal of the Claimant therein to operate a company truck over a portion of a state highway because the Claimant did not hold the appropriate chauffeur's license. The Board, in assessing the merits of that claim, discussed the two

recognized exceptions to the general rule, which may justify a refusal by an employee which would otherwise be considered an insubordinate act, to wit - (1) a reasonable apprehension that the act ordered would expose a claimant to imminent danger to his well-being, and (2) a reasonable belief that the act ordered would be illegal. In sustaining the claim the Board found that as a fact that the Claimant did not hold the appropriate license required to operate the truck in question over a public highway and such act would have been violative of a state law and, consequently, was an inappropriate order for the supervisor.

The record before us discloses that on March 17, 1980 Claimants were part of a continuous weld rail gang which had just begun a start up operation at Salem, Virginia. The supervisor in charge sequentially requested the three Claimants herein to operate the Adzer machine. All three Claimants had prior experience on the machine, all three Claimants had prior injury on the machine.

The machine in question was a "new", rebuilt, repowered Adzer machine in an "as new" condition. The supervisor in question testified that the machine had never been worked, had been uncrated right at the job site, that all the safety devices on the machine were intact and in operating condition, that the proper foot protection and leg protection devices were readily available and used by the subsequent operators, that dust masks and goggles were readily available, that hard hats were available, and that the subsequent operators never did receive any reportable injuries from the handling of the Adzer machine.

Supervisor Carbaugh testified that the leg guards available for the protection of the operator consisted of a metal shin guard-type of

protector, in two pieces, running from above the kneecap down to the ankle and then covering the entire foot all the way around the whole foot. Further, Carbaugh testified that the Adzer machine is equipped with a steel guard that was designed to protect an employee from the discharge of material from underneath the machine, describing the device to be approximately a two foot guard that slides along the edge of the ties and on the ballast, approximately eight inches wide and two foot long.

Supervisor Carbaugh testified that he subsequently learned that the reason that all three men refused to operate the machine was that all of them had previously received injury, and feared reinjury if they were required to operate the Adzer.

The Claimants testified that in the operation of the Adzer machine, which consisted of a planing or "scraping" of the ties to even the surface to receive new tie-plates, it is often the case that rocks and old pieces of spikes or "deadheads", are hurled out at high speed from underneath the Adzer bits which often times result in injury to the feet or legs of the operator, despite the wearing of protective gear, which all three men believed to be inadequate.

Claimant Scherer testified that some time in August of 1977 he experienced the same or similar problem with Supervisor Carbaugh concerning the operation of the Adzer machine and that he had <u>not</u> <u>been</u> required to operate the machine since his injury in August of 1977. Claimant Caudill and Claimant Beck both testified that as a result of the previous injuries which resulted in one case in an off-time for

approximately three weeks as a result of a fractured foot received while operating the Adzer machine. They were fearful of reinjury.

Each readily admitted that they had refused to operate the machine, testifying that they were afforded scant opportunity by Supervisor Carbaugh to explain why they refused.

Supervisor Carbaugh acknowledged that he had a prior "understanding" with Claimant Scherer. That "understanding" was amplified at the hearing before this Board when the Local Chairman advised, without exception or objection from Carrier, that he (the Local Chairman) and Claimant Scherer, after Claimant's injury which resulted in a two and a half month lay-off while recuperating from his injuries, approached Supervisor Carbaugh and reached an understanding that Claimant would not be required to operate the Adzer machine because of the serious, potentially crippling injury which could result if Claimant reinjured his foot.

Carrier, in seeking to sustain its position and uphold the discipline stressed that Claimants herein readily admitted their insubordinate act in refusing to operate the machine. Carrier contends that Claimants have failed to carry the burden to establish a record that would support the recognized exception to the requirement to carry out proper and lawful orders. In support thereof Carrier cites Second Division Award No. 8520 (Vernon), which held in pertinent part:

> "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. Inasmuch as it was clearly established that climbing towers and the inherent danger involved was part of the claimants' normal duties, the burden is on the organization to show a disregard on the company's part for the necessary safety precautions when they issued the order to climb the light tower.
> ***"
>
> (Emphasis added)

Additionally, Carrier offered Third Division Award No. 21059 (McBrearty), which in pertinent part held:

> "The Board finds that it is not the Claimant's right to substitute his judgment for that of his foreman...the Claimant should have grieved such action, but not take it upon himself to be insubordinate. The rule of thumb here is, "Work now, grieve later.' The work place is not a debating society, where employes may challenge the orders of management through insubordinate action. Whenever employes 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. (Awards 20770, 20769, 20651, 20102, 18563, 18128, 17153, 16948, 16704, 16347, 16286, 16074, 15828, 14273, and 14067)."
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> (Underscoring supplied)

The matter before this Board is the appeal of a discipline action by Carrier. It has been too often stated to need citation in support thereof that the authority of the Board in such discipline matters is limited to the transcript of the procedure below to determine whether or not Claimant was afforded his full and fair procedural rights granted under the schedule, to determine the adequacy and sufficiency of proof

offered in support of the charges made, and to determine whether or not Carrier acted arbitrarily, capriciously or excessively in administering discipline.

Claimants appeared at the hearing before the Board and offered their statements to the effect that were they confronted with the same situation again they would equally refuse to operate the Adzer machine because of their belief that they would be reinjured as a result thereof. Such statements are outside of the scope of the evidence before the Board, but nonetheless, are received by the Board in considering possible mitigating circumstances.

The Board finds that Claimants were in fact afforded a fair and impartial hearing, free from procedural defect. There was ample evidence, including the admissions of Claimants, to support the conclusion that Claimants were, in fact, insubordinate in refusing to operate the Adzer machine. Claimants sought to raise an affirmative defense to the insubordination by seeking shelter in a recognized exception to their respective obligations to carry out the directives of their supervisor. Each Claimant repeatedly stated their imminent fear of reinjury. However, attendant therewith is the obligation to advance some affirmative proof to show that there existed a lack of safety or sufficient protection that created an imminent danger to their health or safety. To meet that burden Organization submitted a letter from M. D. Scott, a mechanic who had working experience with the Adzer machine and stated his observations to be that the Adzer machine was a hazardous machine to both the operator and fellow employers, an opinion that was

shared by a number of other mechanics. That letter also contained the notation from a fellow mechanic, J. E. Williams to the effect that,

> "...I consider it a dangerous job but have no idea how to correct it..."

an opinion and observation shared by six other mechanics.

Under the circumstances herein the Board finds that Claimants have failed to carry the necessary burden to establish lack of safety precautions as sufficient justification for failing to carry out an appropriate directive of their immediate supervisor.

The Board finds that the R-4 Gang was just starting up, a condition that could best be described as somewhat chaotic, due to the necessity of starting the operating procedures for the gang, handing out assignments, getting the machinery in its appropriate and proper order and making the necessary assignments to operate that machinery. There is no question that all of the Claimants had suffered previous injury in operating the machine, nonetheless there are few assignments on the rail gang that do not have some inherent danger in them.

Maintenance of Way work is inherently a hazardous occupation. If, in fact, the Adzer machine is a poorly designed, hazardous machine then Claimants are left to pursue a civil remedy against the manufacturer thereof in a different jurisdiction. The particular machine in question was a new machine. The adequacy of the design and/or existence of safety devices is not an issue before this Board.

None of the Claimants involved had any prior working experience with that particular machine, consequently, it is impossible for the Board to conclude that the machine that they refused to operate was an inherently dangerous machine due to a deterioration of the safety

devices or equipment provided, since there was no attendant work experience by anyone at the time of their refusal to accept the assignment given. The record does disclose testimony to the fact that there were no reportable injuries from March 17th until the date of the hearing, even though the machine was being operated by inexperienced operators. Said operators are given a pay differential in recognition of the fact that they are required to accept additional responsibilities. The adequacy thereof is not a matter for this Board.

We ineluctably conclude that Claimants Caudill and Beck failed to meet the necessary burden to show that there existed a lack of safety creating an imminent danger to their health or well-being. There exists no cause within the record to permit the Board to change or alter the discipline administered. Insubordination is a most serious offense and a dischargeable one. See, amongst others, Second Division Award 3568 (Carey), which, in pertinent part, held:

> "***the charge of insubordination was established and*** there is no basis for the complaint that the carrier acted arbitrarily or capriciously in dismissing claimant from service. The evidence shows that the claimant refused to comply with a proper request of his supervisor and that he walked off the job without permission***"
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> (Emphasis added)

However, this Award should in no way estop Carrier from considering Claimants for restoration to service on a leniency basis, particularly in the circumstances of this case.

Claimant Scherer, however, sits in a different posture.

It is admitted by Supervisor Carbaugh, and not denied by Carrier, that since August of 1977 Claimant Scherer, by a prior arrangement between Carbaugh and Claimant's Local Chairman, was excused from any

requirement to operate the Adzer machine because of the potential of receiving a permanent, crippling injury. There is nothing in the record to indicate any change in such arrangement. Consequently, we find that Carbaugh should not have required Claimant Scherer to operate said Adzer machine. It is clear to the Board from the transcript that Supervisor Carbaugh was prepared to test the response of all seventy-eight (78) men, if necessary. Notwithstanding, Claimant Scherer by prior understanding with the same supervisor was excepted from that assignment. Consequently, his case warrants a distinction from that of Claimants Caudill and Beck. Claimant Scherer should be restored to service with full benefits pursuant to Rule 33 (c).

AWARD: Claim disposed of as per findings.

ORDER Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

A. D. Arnett, Employee Member

E. N. Jacobs, Jr., Carrier Member

A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, May 3, 1982.