

PUBLIC LAW BOARD NO. 1838

Award No. 75

Case No. 75

Carrier File MW-LP-81-1

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement of Claim Former employee C. E. Jones, 1453 Alsace Avenue, Norfolk, Va. 23509, was dismissed account of allegedly violating Safety Rule 1213 and insubordination to Assistant Foreman, J. L. Lowe on November 26, 1980. Employees request Mr. Jones be paid for any and all time lost, his seniority, vacation rights and other rights unimpaired beginning November 28, 1980.

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.

On November 26, 1980, Claimant was working on the east end of Carrier's Barney Yard, repairing derail damage to the southside tracks. Claimant section gang was working overtime under the supervision of Section Foremen McLean and J. L. Lowe. During the course of the repairs, Claimant and another employee, W. L. Walker, came upon some spikes that were difficult to remove. Claimant picked up a claw bar and instructed Laborer Walker to strike the claw bar driving the claw-portion into the head of the spike to get a better grip thereon.

Foreman Lowe advised Claimant that that action would be in violation of Safety Rule 1213 and not to do it. Due to poor visibility Foreman Lowe stepped away from the area looking for light; the sound of

a spike maul striking a claw bar caused him to turn around whereupon he observed Walker striking the claw bar which was being held by Claimant Jones.

Foreman Lowe again instructed Claimant to cease and desist whereupon Claimant is alleged to have cussed out Foreman Lowe.

As a result of that incident Claimant was removed from service the following day for allegedly violating Safety Rule 1213 and for insubordination. Upon request of Claimant's representative an investigation was scheduled. Under date of December 5, 1980, Claimant was notified to appear for an investigation to be held, on December 11, 1980,

"...concerning your dismissal from the services of the Norfolk and Western Railway Company as a result of your direct violation of Safety Rule No. 1213 and insubordination to Assistant Foreman J. L. Lowe at approximately 5:30 PM November 26, 1980."

The investigation was postponed and subsequently held on January 9th. As a result thereof Claimant's dismissal from service was reaffirmed.

Organization advances appeal on three fronts: (1) Carrier failed to establish by credible evidence Claimant's culpability for Safety Rule Violation 1213 and (2) the offensive tone and language used by Claimant was not directed at Assistant Section Foreman J. L. Lowe and (3) the discipline rendered was excessive.

A review of the transcript discloses that Claimant was ably and aggressively represented throughout, that he was afforded ample opportunity to confront and cross-examine his accusers, that he was afforded the right to call witnesses in his own behalf, and, in fact, did so.

We find sufficient credible evidence was adduced at the hearing to support Carrier's conclusions. Section Foreman J. T. McLean testified that he observed Claimant Jones take a claw bar, place the foot to the head of a spike and instruct another employee to strike it; he overheard the instruction not to hit the safety claw bar, that it was a violation of safety rules and, he heard Claimant cuss Assistant Foreman Lowe.

Assistant Foreman J. L. Lowe testified that he issued the instruction to Claimant not to misuse the claw bar; notwithstanding, he observed Claimant do so, and he heard Claimant use language which Assistant Foreman Lowe took to be offensive and directed at him personally. There was testimony from other witnesses which corroborated the observations and testimony of the two Carrier witnesses.

In his own defense Claimant offered testimony that it was a fairly common practice to use foul and offensive language out on the section, that he did not intend anything personal in the remarks that he made, nor were they intended for Assistant Foreman Lowe. Claimant freely admitted his misuse of the tool in direct contravention to the safety rule, but sought to explain it away by offering testimony that the spike had welded itself by corrosion to the plate and it was necessary to break it free in the manner that he did. Claimant offered the explanation that he wasn't "hot at anybody", that he was just joking with Assistant Foreman Lowe, and that it was common practice to use such rough language.

Carrier chose to rely upon the testimony of its witness to conclude that Claimant did, in fact, intend the language in a personal and insubordinate manner towards his supervisor.

Safety Rule 1213 in pertinent part reads:


"Claw bars must not be struck with other tools."

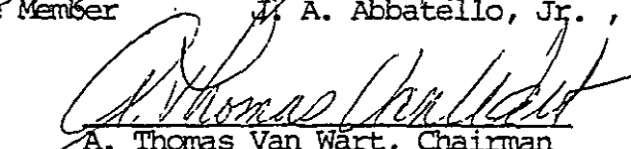
Claimant admitted his familiarity with the rule and admitted his violation thereof. In assessing the ultimate discipline Carrier took into consideration that Claimant had been dismissed in 1976 for being absent without permission but was restored on a leniency basis; Claimant was also dismissed in 1977, again for being absent without permission, and, was again reinstated on a leniency basis. In 1978 Claimant was issued a warning for being absent without permission. Claimant challenged the accuracy of Carrier's record, contending that he had not been dismissed and reinstated as set forth in Carrier's records.

A review of those records by Carrier confirmed the information as set forth above. In view of the record that Claimant himself established, we cannot conclude therefrom that Carrier in any way abused its discretion in levying the ultimate penalty of dismissal. Insubordination in and of itself would be a dismissible offense. Here Carrier chose to sever its relationship with Claimant based upon its conclusion that he was not responsible enough to comply with its rules. Therefore, we must conclude the claim be denied.

AWARD: Claim denied.

  
Bryce Hall, Employee Member

  
J. A. Abbateello, Jr., Carrier Member

  
A. Thomas Van Wart, Chairman  
and Neutral Member