

Public Law Board No. 2363

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Seaboard System Railroad (L & N RR)

STATEMENT
OF
CLAIM:

1. The dismissal of J. L. Mitchell for alleged insubordination on September 27, 1983 and being insubordinate on October 5, 1983 was without just cause.
2. Claimant Mitchell is entitled to reinstatement with seniority and other rights unimpaired and compensation for all wage loss suffered.

FINDINGS:

Carrier's decision to dismiss claimant, an assistant foreman with about four years overall service, is based on two incidents, one in September 1983 involving Assistant Roadmaster Williams and the second on October 5, 1983, involving Foreman Mattison.

In the first incident, it was discovered that the spike puller assigned to claimant's gang would not roll due to a defective wheel. A siding 1/2 mile away could have been used as the place to set out the machine. Mr. Williams testified that

he instructed claimant to set out the machine at that siding; his testimony was corroborated in essential details by Machine Operator, James Taylor.

Instead, the spike puller was dragged some six miles to the camp at claimant's instructions, although the nearby siding was passed twice during the gang's work day.

Claimant and two other members of the gang testified that Mr. Williams had not specified setting the machine at the nearby siding at Nenemoosha, but had merely said "to go to the hole." While in his testimony, Mr. Taylor stated that Mr. Williams' instructions were to "put it in the hole" when "we get up there to the switch." The switch was at Nenemoosha.

In any event, Carrier's findings are supported by substantial credible evidence, even though that evidence may be controverted. Accordingly, under the well established principles and practices governing this appellate board, we will not set aside Carrier's findings as to the first incident. In the light of the situation and distances involved and all the testimony, Carrier's conclusion that claimant was insubordinate when he had the machine dragged six miles to the camp is not unreasonable or without valid basis in the record.

Carrier's findings as to the October 5th occurrence is supported by testimony of Foreman Mattison. That testimony is definite, unambiguous and detailed. It is to the following effect:

Mr. Mattison asked claimant why the spiker was so far behind and was told they were having mechanical trouble. When Mr. Mattison asked him if he had gotten the mechanic,

claimant replied that that was not part of his job. Mr. Mattison then stated that it was part of his job and instructed one of the gang to go up and help the rail lifter. Claimant countermanded the order and when Mr. Mattison instructed him to work with the rail lifter and get it caught up, claimant began to curse Mr. Mattison and direct extremely foul epithets at him. Mr. Mattison repeated his instructions to claimant and the latter "came right at me hollering, swinging his arms and when he got close to me he jumped right into my face so close his forehead hit my nose, still hollering and spitting."

Mr. Mattison then relieved claimant from duty pending investigation. Claimant at first refused to leave the property until a Special Agent came to the scene. After about 45 minutes, he did leave.

Claimant's testimony was that Mr. Mattison had been "scowling" at him with "a threatening face" and using profanity that morning, particularly when he was giving instructions and raising questions regarding the rail lifter. He testified that he had performed a good deal of work in a conscientious manner. He testified that he used his hands "in an explanatory position" to explain that he was tired of "him scowling me about the job." Claimant denied physically touching Mr. Mattison or throwing a punch at him. He testified that he left the property after being relieved as soon as his request for a letter setting forth the charges was complied with by Mr. Mattison.

It is well settled that it is not this Board's province to resolve credibility issues. We are an appellate board and have no occasion to observe the witnesses' demeanor and to

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hear them testify.

We have reviewed the entire record with care and perceive no basis for setting aside Carrier's findings or reversing its decision to dismiss claimant. They are supported by substantial though controverted evidence. There is no indication that Mr. Mattison ever gave even the appearance of using force. It is not denied that at an angry moment claimant did approach Mr. Mattison in an aggressive manner. At any rate, we will not substitute our judgment for that of Carrier.

It was proper for Carrier to consider, in determining the measure of discipline, that claimant had been dismissed in 1981 for "being profane and uncivil" toward Asst. Roadmaster Carr; the discipline was subsequently reduced to 90 days suspension on a leniency basis.

AWARD: Claim denied.

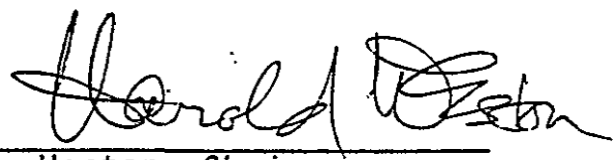
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B. M. W. E.

Adopted at Jacksonville, Florida, November 6, 1984.

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O. M. BERGE
PRESIDENT



Harold M. Weston, Chairman



Carrier Member



Employee Member