

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

CONSOLIDATED RAIL CORPORATION

DOCKET NO. 439

STATEMENT OF CLAIM:

- a) The Carrier violated the Rules Agreement, effective December 16, 1945, as amended, particularly Rules 5-A-1, 5-E-1 and the Absenteeism Agreement of January 26, 1973, when it assessed discipline of dismissal on MW Repairman S.A. Risaliti, November 22, 1978.
- b) Claimant Risaliti's record be cleared of the charges brought against him on October 13, 1978.
- c) Claimant Risaliti be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained in accordance with the provisions of Rule 6-A-1(d), with benefits restored.

OPINION OF BOARD:

Claimant was tried on, found guilty of, and disciplined by discharge for the following charges:

1. Failure to report for duty on your regular assignment at 7:00AM on September 28 and 29, 1978.
2. Engaging, abetting and participating in an unauthorized work stoppage at Canton MW Shop at 8:30AM, 8:50AM, 10:00AM, 3:45PM, 4:10PM, and 11:00PM on September 28, 1978, and 8:00AM, September 29, 1978.
3. Influencing fellow employees to illegally picket the Company's property and/or not to perform their assigned duties in that your truck was blocking

YMCA Ramp to Car Shop at 11:25AM on September 29, 1978, and in that you caused a work stoppage on Surfacing Gangs ST 241 and ST 242 at Mile Post 32.5 on Bayard East of Salinesville, Ohio, at 11:45AM on September 29, 1978.

4. Insubordination in that you refused direct orders to return to duty; from Frank Bucceri, Shop Engineer, at 8:30AM on September 28, 1978, from R. Campitella, Shop Engineer, at 3:45PM, September 28, 1978, and again from R. Campitella, Shop Engineer, at 4:10PM on September 28, 1978.
5. Threatening R. Campitella, Shop Engineer, with bodily harm at 3:45PM, 4:10PM and 11:00PM on September 28, 1978 at Main Entrance, Division Road.

The disciplinary termination was imposed on Claimant because of his alleged participation in an illegal and unauthorized strike at Carrier's Canton, Ohio Maintenance of Way Shop on September 28 and 29, 1978, by members of Local 3050 of the Brotherhood of Maintenance of Way Employees employed there.

We have described the general circumstances of this strike and picketing situation revealed at the hearings thereon in our previous Award No. 1, as well as our opinions on certain procedural and substantive questions raised by Organization there as well as here.

Turning to the particular facts of the instant situation, we reach the following

FINDINGSCharge 1

The unexcused, unauthorized and not legitimately-justified absence of Claimant on the two strike days identified in this charge is fully admitted by Claimant. As indicated by us in our Award No. 1, purely as absences these do not subject Claimant to the dismissal penalty under the January 26, 1973 Absenteeism Agreement between the parties. They are, nonetheless, subject to discipline which may be added to other penalties - if such are found justified - resulting from actions of which found guilty in the other charges.

In considering the record of the actions embraced in the remaining charges, we must confront the conspicuous presence in the evidence of the fact that Claimant was, at the time of these occurrences, the highest officer - the President - of the local union whose constituents at Canton were dominantly involved in the subject strike and picketing activities.

The evidence, as well as the argument of the parties derived therefrom, is repeatedly expressed in terms of Claimant's responsibilities and obligations as President of Local 3050: how well he did or did not carry them out on September 28 and 29 and the extent to which, if any, Claimant's union status and authority affected the culpability of his actions on those days.

Claimant's posture and that of his Organization before this Board was put in terms of Claimant having been conscious of and honorably responsive to his obligations as a union officer by diligently attempting in good faith to convey to his members that their striking and picketing was illegal and unauthorized; he urged them to cease these activities and return to work. When he could not succeed, he used his leadership influence and efforts to keep the strikers orderly and to curb the growth of the stoppage.

Carrier reads the evidence as showing the opposite. Although Claimant repeated to the strikers and pickets the message from his higher union officers that the strike was illegal and unauthorized and that they were urged to go back to work, Carrier contends that Claimant acted in a way that gave the lie to his own words. He stayed on strike himself, he was part of the picketers. By lending the cachet of his union status to these activities, he unavoidably supplied leadership and encouragement to the illicit behavior of his members.

Carrier goes substantially beyond the charge of Claimant's merely having communicated legitimization and tolerance of the striking and picketing by his authoritative presence therein. It attributes to him use of his office in conscious and purposeful leadership in sustaining the strike in Canton and, in particular, in an expedition to

Carrier's operations in the Salinesville area about 28 to 30 miles from Canton, attempting and succeeding in interrupting work activities there in enlargement of the existing stoppage.

Carrier concludes from these considerations that Claimant's position and authority in his organization were purposefully misused and abused by him in efforts to perpetuate, encourage and spread the strike in very serious default of his duties and, because of this, he was guiltier in critical respects than his fellow strikers and pickets.

We will bring to bear on our consideration of the remaining charges the extent to which we find the evidence to support any of these opposing contentions.

Charge 2

The evidence is not seriously challenged that Claimant was in close proximity to or in the midst of, but unquestionably part of, the group actions of Carrier's employees (and which may have included NW "outsiders")* who were making it known that they were carrying on a strike against the Canton MW Shop on September 28 and 29, 1978. At the least he was there as an authoritative resource whose presence gave Local 3050 sanction to the strike and thus encouraged it to continue and to be expressed through assemblages of striking employees - in short, picketers - at various times and at the various points of

* It did include as strikers and among those gathered at the Shop entrance when the strike broke (and possibly afterwards) members of other craft unions of the Conrail operation and was nominally a "sympathy strike" supporting another Carrier's illegal strike.

access into the plant.

The evidence is not in conflict that Claimant was called in to the Shop on the first morning of the strike. There (along with two other strikers) he was told by phone by the spokesman for the Union standing above him in authority, that the strike was illegal and unauthorized. He was instructed by this official (General Chairman LaRue) to go out and order the strikers to return to work and inform them that they were putting themselves subject to discipline if they did not. It is also not disputed that Claimant went out to the massed strikers and repeated that message.

The evidence does not clearly reflect whether in the way Claimant conveyed the message from his General Chairman to the strikers, he included with it a sincere and unambiguous endorsement and appeal of his own or merely passed it on literally. If the latter, coming from the highest Union officer on the scene, the effect of such a lack of affirmative association with it could only act as encouragement to ignore it. The testimony on this subject was given by Shop Superintendent Gottsabend. He stated that Claimant "repeated verbatim to the best of his ability what Mr. LaRue had told him to say" but that when he relayed the request that the men come back to work, he was "boosed down" by the group.

However, when the hearing officer asked Mr. Gottsabend whether Claimant's statement "was...a request of Mr. Risaliti of the personnel to return to work", Mr. Gottsabend responded: "No, sir. I would say it was a request relayed by Mr. Risaliti of Mr. LaRue" and that he had no way of knowing whether it was a "true feeling" of Claimant.

Claimant testified that in the course of visiting the pickets at all four Canton entrances at various times, he repeatedly urged the strikers to go back to work, but they would not listen to him. He was supported in this by a number of strikers who were presented as witnesses. However, Assistant Superintendent Guveiyian quoted a striker - D. Peden - as telling him that he had been ordered to his picket assignment by Claimant. Mr. Peden testified that his conversation with Guveiyian consisted entirely of being asked, and giving, Guveiyian his name.

Testimony was also given by Shop Engineer F. Bucceri that at the time on the morning of September 28, he had ordered strikers to work including Claimant - without success - Claimant asked him if there was anything he could do to be of help; Bucceri asked Claimant to help him get the men back to work. Claimant thereupon told the group to do what Bucceri was telling them to.

Thus, there is evidence that at certain times in the strike Claimant displayed a verbal posture of characterizing the strike and

picketing as illegal and unauthorized. It is not possible to clearly determine from the evidence whether the words were conveyed in a way that identified them as sincerely embodying Claimant's own feelings and persuasive efforts.

But the evidence as to Claimant's own activities during the two days strongly indicates a course of behavior which could only serve to demonstrate his own opposition to his own words to the strike participants. He not only stayed away from work in the same way as the others whom he had seemingly urged to end their strike, he moved with the pickets from entrance to entrance; he failed to utilize recourses of movement that were available to him to exemplify intentions different from those of the strikers or to attempt to influence them by diligent discouragement of or dramatic disassociation from the details of strike activities - massing across roadways by individuals and vehicles, the presence of strike signs where the groups were gathered and the like.

At the very least, Claimant was guilty of having been an illegal and unauthorized striker and picketer himself, after having had the fullest and most authoritative direct, personal knowledge of the illicit nature of its activities. In his case, to be a striker and picket had the unavoidable effect of putting the sanctioning and approving imprimatur of his office on the actions of which he was a part. In doing so, he misused that office for encouragement to a

contractual commitment for which he was the highest ranking union underwriter on the scene.

But there are strong indications in the evidence that Claimant was more than a tolerant participant in these activities in demonstrated opposition to his own messages of disapproval. He acted as spokesman for the strikers in a TV interview and no evidence was presented by him or others that he made a public appeal by that or other means to denounce and discourage or disassociate himself from the striking and picketing.* He ordered a management representative away from the picket line under threat of injury to him. He organized a mission to Salinesville, about 28 miles away from Canton, to spread the strike among the employees there. The latter two instances are dealt with in other charges, but they give credence to the activist role he is accused of in this one.

Aside from his protestation that he had sincerely tried to persuade his members to end the strike but it was impossible to do so, Claimant contends also that he was subjecting himself to danger of injury if he attempted to support his words by going back to work himself.

This posture runs counter to Claimant's own testimony that "I don't cross picket lines that anybody else puts up" and that no threats or coercive statements were expressly directed at him. Nor does it explain the statement made at the hearing of one of Claimant's

*He is quoted, without denial, as saying for the strikers in that interview, that they would go back to work if and when a court injunction were to be issued. The evidence shows that when such injunction was issued, 2 days later, he ordered the strikers back and they obeyed him.

witnesses that if Claimant had walked in, that individual would have followed him back to work. Further, if Claimant's fears were genuine, he could nevertheless have been more faithful to his responsibilities by at least desisting from any presence among the strikers and pickets.

We conclude that Carrier acted on valid evidentiary grounds in finding Claimant guilty of the accusations in the second part of Charge 2.

Charge 3

We find a material and substantial evidentiary basis on which Carrier was entitled to find that Claimant's truck was partially blocking the road at the so-called "YMCA ramp" leading to the Car Shop at 11:25AM on September 29, 1978. But it has not been established that Claimant was there or had caused his vehicle so to be placed there.

We find a material and substantial evidentiary basis on which Carrier was entitled to resolve the conflicting evidence on part two of this charge in favor of the witnesses who testified that Claimant was one of a group of strikers who instigated a work interruption at Salinesville.

We find it unbelievable that these visitors to the site, who had been such steadfast strikers and pickets at Canton and Alliance, made the long journey to Salinesville for the purpose of cautioning supervision there that attempts might be made to take their employees out on a strike in sympathy with the strike being carried on by them (the

visitors) at Canton and Alliance and to persuade supervision and the employees to resist.

Although Claimant seems to have done only some of the talking, he organized the expedition, was identified there by his colleague who did most of the talking, as President of the Local, and he supported what the latter said. Although the evidence is not conclusive that the employees at Salinesville were directly exhorted by Claimant and his companions to strike or that all the members of the gangs walked out while the visitors were still at Salinesville, the evidence is entitled to belief that the group came there to spread the strike, so notified the supervisors in a way that unavoidably conveyed that purpose to their employees at this locale, and that, while there, accomplished sufficient incitement towards the beginning of a strike that the supervisors were compelled to act protectively to make the machinery secure and release the employees. Accordingly, we find that they "caused" the work stoppage as stated in charge.

We regard the latter actions as a very serious exacerbation of the strike and picketing activities, of such purposeful aggressiveness as to strip Claimant of his posture that he played a strike discouragement role throughout these 2 days. On the contrary, this was an explicit purposeful misuse of his authority which dispositively contravenes his protestations of an opposite attitude.

Charge 4

This charge was also supported by substantial and convincing evidence. The fact that Claimant was one of a group to whom the orders were addressed made these orders no less applicable to him. We are convinced Claimant heard them, understood them and disobeyed them.

Charge 5

The intense, insistent, and peremptory order by Claimant to Mr. Campitella to leave the scene was not shown to be of the same threatening nature as a poised possibility of a blow. But the words, the tone in which they were used, their accompaniment by an agitated series of rapid pointing gestures peremptorily ordering the management official away from the scene unquestionably amounted to a belligerent and intimidating effect. When these are added to the comments to Campitella about his avoiding the possibility of his having to be sent flowers, there was displayed the totality of threatened bodily harm characterized in the charge.

The entire tone of Claimant revealed in the evidence was too intense, hostile and bellicose to make believable Claimant's defense that he was merely making a friendly effort to protect Mr. Campitella from the antagonistic reaction of the strikers to his taking down their names. There is no evidence from Claimant or from

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any other source that Claimant exerted similar efforts in attempting to calm down individuals who might have been a threat to Campitella and two of whom subsequently molested the latter.

We sustain this charge and believe that it deserves inclusion in the assessment of the appropriate penalty for the total set of charges.

CONCLUSIONS

We find that Carrier was entitled to conclude that Claimant had been guilty to so great a degree in respect to the charges on which the evidence shows his guilt, that it justified discharge.

We are mindful of the possible difficulties faced by Claimant in attempting to be a responsible guardian of the Agreement between the parties and at the same time deal with a restive constituency. We appreciate, too, the point that has been raised that the long delay in reaching resolution of a Section 6 contract change proposal had left Claimant and his fellow employees with a feeling of prolonged frustration and that pressures may have been present also from Norfolk and Western employees who had already ventured on their own strike course and sought support from the similarly situated Conrail employees. We are conscious, also, of the fact that Claimant had been employed here for about 9 years at the time of these events without any showing of a

severely adverse earlier disciplinary record. But we are dealing with a serious illegal and unauthorized set of actions destructively directed towards the very heart of an existing collective bargaining relationship built up over many years of separate and joint effort to attain, preserve and enforce. That relationship meant nothing if it could not rely on the carrying out of the mutual pledges therein for its benefits and obligations constructed on a foundation of continuous and uninterrupted operative administration, peaceful appeal processes and legal bargaining procedures.

By being a leading party to the breaking of both the contractual sanctity to which he was the highest union underwriter on the scene and of the law which forbids such, Claimant subjected himself to guilt of the charges on which tried in kind and degree which does not show Carrier to have been other than justified in imposing the dismissal penalty therefor.

A W A R D

Claim denied.


LOUIS YAGODA, CHAIRMAN & NEUTRAL


FRED WURPEL, JR., ORGANIZATION MEMBER


N.M. BERNER, CARRIER MEMBER

DATED January 7, 1980