

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

CONSOLIDATED RAIL CORPORATION

Docket No. 443

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 Helper D.R. Watkins on November 22, 1978.
- b) Claimant Watkins' record be cleared of the charges brought against him on October 13, 1978.
- c) Claimant Watkins 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. Engaging, abetting and participating in an unauthorized work stoppage at Canton MW Shop at 3:20PM on September 28, 1978.
- 2. Influencing fellow employees to illegally picket the Company's property and/or not to perform their assigned duties in that you were picketing at the main entrance to Division Road at 3:20PM on September 28, 1978.

3. Attempting to intimidate Superintendent of MW Shop, W.J. Gottsabend, in the performance of his duties at 3:20PM on September 28, 1978, in that you attempted to block his entrance to the Shop after he was allowed to proceed by MW Shop employees on the picket line and striking Mr. Gottsabend's car with a sign.

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 opinion on certain procedural and substantive questions raised by Organization there as well as here.

Turning to the particular facts of the instant situation, the record shows:

1. Claimant, who was employed as an MW Repairman in the Track Department at Canton, Ohio, was off work as "disabled" when the 2-day stoppage began at the Canton MW Repair Shop on September 28, 1978.

2. Testimony was given at the trial by W.J. Gottsabend, Superintendent of the MW Repair Shop at Canton as follows:

a) On September 28, 1978, as he traversed by his car the crossing leading into the main entrance roadway of the Canton Shop at about 3:20 PM, he encountered a group of men standing in the roadway. When they saw that it was Mr. Gottsabend attempting to enter, they opened a path for him through the group.

b) When he started his car into motion to do this, an individual identified by Mr. Gottsabend as a certain T. Devney, Clerk for the Operating Agent, approached the Superintendent's auto in a condition described by Gottsabend as "very unstable", leaned over his car and asked him where he was going. When Gottsabend explained, this individual asked "in a slurred voice" who he was. When told, he offered to show Mr. Gottsabend the way ; the latter declined.

c) After Mr. Gottsabend's car had proceeded a few feet further and just after Gottsabend had turned his attention away from Devney, he saw a figure standing partly in the path of the car. The moving vehicle made contact with this individual as Gottsabend brought the car to an abrupt stop.

d) The individual who had been bumped came to the side of the car, saying: "You hit me" and struck the top of Gottsabend's car "with a banner of some sort", saying: "You know who I am." At this time, according to Mr. Gottsabend, he was unsure of the identity of

this man but surmised who it might be from the fact that he had on a neck brace. He subsequently determined that this individual was Claimant.

e) At this point another individual standing nearby grabbed the man who had struck the car, pulled him away, and said to the Superintendent, "Wait, I apologize. We do not want this kind of incident to happen."

3. D. Dolph, MW Repairman testifying as a witness for Claimant, stated that he was at the site identified by Mr. Gottsabend at approximately 3:20PM on September 28, 1978 when he "heard a commotion" at a point behind him and turning around, saw Claimant "trying to get a sign or something out from the front of the car, and he was bumped." Mr. Dolph further testified that it appeared to him that Claimant had picked the sign off the ground. He went over to "help out" Claimant and then apologized to Mr. Gottsabend. "There were quite a few" people around.

4. Another witness called by Claimant, S. Risaliti, MW Repairman Painter and local Union officer, testified as follows:

a) He was standing at or near the Shop entrance with a "bunch of other people" about the time of this incident and looking "down the hill" into the plant entrance of the roadway, "heard a small

bang or something like that" and saw that the car being driven into the plant on that road had been brought to an abrupt stop and then backed up. He heard the driver shout, "Who did that?"

b) At the same time he saw the Claimant standing at the side of the car among "quite a few other people."

c) He saw "somebody standing around with a banner" but, "I never seen Mr. Watkins with a banner to hit the car..."

5. Claimant testified that he had been off from work on disability status from September 28, the date involved in the incident, until October 10 (the trial was held on October 31, 1978). He had earlier been employed in the Canton Shop, but had bid into the track job and, after his return on October 10, had "bumped" back into the Shop. He had stopped at the Division Road entrance for approximately 5 or 10 minutes. He saw a strike sign propped up in the center of the drive at the entrance, and it appeared to him to be at a "peculiar angle" which might have scraped Mr. Gottsabend's car as he drove by.

Because of this Claimant, with his back to the advancing auto, attempted to move the sign out of the way. As he stepped away from it, he was struck by the car and lost his balance. His description of what happened subsequently is "...I was then enveloped in a group...physically pushed into the crowd unaware of the situation,

and I heard somebody yelling, somebody about an N&W employee, Norfolk & Western I believe that refers, at which time I stood in the crowd and Mr. Gottsabend then proceeded down the hill."

He explained his appearance at the site by the fact that he had been to the doctor in the morning and then to a drug store in another community - Louisville - and on returning from the drug store, passed the main entrance of the Shop "and noticed" that they were on strike or it appeared that there was a strike in progress.

"Being an employee I felt it was part of my duty to find out what exactly was going on and because of the time I was on sick leave and I had no such knowledge of any such activities or any person involved in the strike."

Claimant exhibited a card indicating that he had had an appointment with his doctor on September 28 at 9:30AM.

Claimant also testified that his residence was in Middle Branch, about 5 or 6 miles northeast of Canton; and his doctor was located in Hartsville, another 5 or 6 miles north of his residence.

We find that:

1. Carrier had reasonable and credible grounds for concluding that Claimant went out of his way to involve himself, while on disability,

leave, on September 28, 1978 at about 3:20PM in activities which can fairly be described as involvement and participation in the picketing going on at the Canton MW Repair Shop as part of an illegal and unauthorized strike there.

2. Claimant's presence at the spot where the strike sign was displayed and the Superintendent's car was attempting to move into the plant has not been satisfactorily explained by Claimant. His explanation that he made his way to this spot through the group gathered there to move the strike sign out of the way shows, at least, a gratuitous involvement in a situation in which he had no business being present or in acting. But by the tests of credibility, including the inconsistencies and variances in the testimony of himself and his two witnesses, there is strong probative reason not to accept his version of his presence.

3. Unquestionably, Claimant was bumped, grazed or brushed by Superintendent's auto. But he was in an unexpected place and one, moreover, in which he should not have been from the point of view of an employee in general, an employee on leave and an employee who, we are convinced, knew that an illegal strike was going on, having gone about 9 miles out of his way to get there and to be immersed in it.

4. As to whether Claimant committed an act of violence and attempted damage to the Superintendent's car, the sum of his testimony

and that of his two witnesses when measured against the testimony of Mr. Gottsabend, causes a strong case to survive probatively that he did just that. At best, this was an assaultive over-reaction by an individual who was in the wrong place, for the wrong reasons and purpose and may have gotten himself accidentally bumped into by a car which he had no business being in front of.

For these reasons we find no basis on which to intrude on Carrier's judgment in imposing the subject discharge penalty.

A W A R D

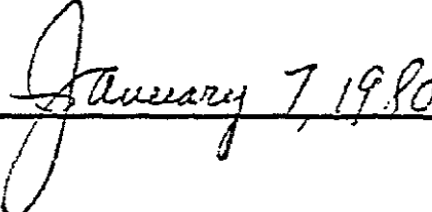
Claim denied.

  
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LOUIS YAGODA, CHAIRMAN & NEUTRAL

  
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FRED WURPEL, JR., ORGANIZATION MEMBER

  
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N.M. BERNER, CARRIER MEMBER

DATED

  
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January 7, 1980

[5] This concludes the docketed cases for PLB 2420.