

PUBLIC LAW BOARD NO. 4021

Award No. 28
Case No. 34

PARTIES
TO
DISPUTE

The Brotherhood of Maintenance of Way Employees
and
The Los Angeles Junction Railway Company

STATEMENT
OF CLAIM

1. That the Carrier's decision to remove Los Angeles Junction Railway Company Track Foreman B. L. Brooks from service, was unjust.
2. That the Carrier now reinstate Claimant Brooks with seniority, vacation, all benefit rights unimpaired, and pay for all wage loss as a result of the investigation held July 24, 1986, continuing forward and/or otherwise made, because the Carrier did not introduce substantial, creditable evidence that proved that the Claimant violated the rules enumerated in the decision, and even if Claimant violated the rules enumerated in the decision, permanent removal from service, is extreme and harsh discipline under the circumstances.

FINDINGS

This Board, upon the whole record and all of the evidence, finds that the parties herein are the Carrier and the Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement dated November 26, 1985, and has jurisdiction over the parties and the subject matter.

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Claimant was employed as a Track Foreman, and had seven years' service with the Carrier. On July 8, 1986, Superintendent Smith and Claimant had a verbal altercation, which resulted in a formal investigation, which was held on July 24, 1986. The Claimant was charged with disrespectful and insubordinate conduct, and refusal to obey a direct order from the Superintendent, in violation of certain Carrier rules. Claimant was found guilty as charged, and was dismissed from the service.

The Organization objected to the fairness of the investigation, because the Hearing Officer was a subordinate of the Superintendent, and, therefore, could not be fair and impartial. Railroad disciplinary hearings are administrative proceedings, and they are governed by Company policy, except to the extent that there are limitations in the collective bargaining agreement between the parties. There is no contractual limitation on the selection of the Hearing Officer, so it was permissible for Mr. Edwards to serve. Whether he, as a subordinate of the Superintendent, can be fair and impartial, is for the record to show. In this case, there is nothing in the record which demonstrates bias or unfairness and, therefore, we will deny the objection.

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With respect to the merits of the case, the facts are clear and, for the most part, undisputed by the parties. According to the record, Superintendent Smith approached Claimant Brooks outside the yard office on the Morning of July 8, 1986, and began to speak with him with regard to use of the radio, and reporting messages. Several members of Claimant's gang were in the vicinity and the Claimant asked if they could go to the yard to have the conversation. The Superintendent said "no", and continued to address the matter.

The Claimant became angry, and attempted to walk away from the Superintendent. (There is some testimony that Claimant shook his finger or fist at the Superintendent). While walking away, the Claimant said that the Superintendent "didn't have to treat him and yell at him and talk to him as a four year old and chastise him in front of everybody."

The Superintendent followed the Claimant around a nearby fence, and continued to engage the Claimant in conversation. Claimant refused, and said that he did not have to talk to the Superinten-

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dent, and other similar statements. The Superintendent stopped the Claimant, ordered him to stand and talk,, or be subject to an investigation. Claimant refused to comply, and the charges were filed.

There is conflicting testimony with respect to the volume used by the Superintendent and the Claimant in the exchange. According to their own testimony, each spoke in polite tones, while the other raged. The uninvolved witnesses added little to clarify the conflict.

Claimant admitted that he walked away from the Superintendent, and that he refused to stop when ordered to do so. He also admitted that he knew the Superintendent, and was familiar with the rules. His only defense is that the Superintendent was being abusive, in public, and that he was trying to avoid a more serious confrontation. He further acknowledges that he was in no physical danger. The following exchange, from pages 14 and 15 of the transcript, is of particular interest:

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Q. If you thought that Mr. Smith was being abusive to you, could you not have listened to what he had to say and, if unreasonable, file a protest under your labor agreement rather than taking the course as alleged?

A. I don't know.

* * * * *

Q. But you are aware of the opportunities to file a protest against the company or against one of its?

A. Yes, I am aware, yes.

That is exactly the point, and it is the only appropriate remedy available to the Claimant under circumstances such as these. Unless there is a clear threat of bodily harm, employees must comply with orders, and grieve later. The foregoing principle has been so frequently endorsed by this and other Boards, that it requires no citation. Therefore, Claimant is guilty as charged, and discipline is appropriate.

Insubordination is a most serious offense, which often has been found sufficient grounds for termination, even in the case of a

"first offense." However, the circumstances in this case are unusual. One of the witnesses, Mr. Body, made the following statement at the conclusion of the investigation:

I think Mr. Smith and Mr. Brooks both handled it real, it was a real nasty situation, and I think Mr. Smith was right in a sense that he wanted Mr. Brooks to know what he wanted done because he is the Superintendent, he does hold the title. I think Mr. Brooks was wrong for walking away from Mr. Smith, but I also think Mr. Smith was wrong for not going to the side and telling Brooks this is what was going on, because there was more than just Los Angeles Junction employees out there that morning of this incident. So, just my own personal, I think both were wrong the way they handled the situation. It was really blown out of proportion.


The Board agrees with Mr. Body. The Claimant is obliged to follow and attend to the instructions of his superiors - whether or not they are given politely. However, the Claimant's offense must be viewed in the context in which it occurred. In this case the Claimant erred, but his error was somewhat mitigated by the actions of the Superintendent. In view of this fact, and the fact that the Claimant had seven years service with a clear

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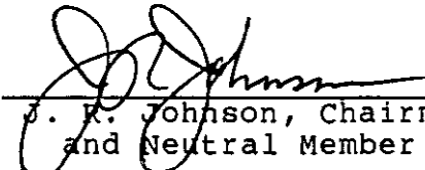
record, we will reduce the penalty to a ninety day suspension.

AWARD

The discharge is set aside, and the discipline is reduced to a ninety day suspension from service, without pay.


C. F. Foose, Employee Member


L. L. Pope, Carrier Member


J. R. Johnson, Chairman
and Neutral Member

Dated:

10/6/86