

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the effective Agreement on April 20, 21, 22, of 1966, by failing to inform Extra Gang Laborer John Garcia, in writing, of the reason why he was not allowed to continue working his position.
2. Carrier shall now reimburse Extra Gang Laborer John Garcia, in the amount of 20½ hours at his pro rata rate, to compensate him for wages lost as a result of this violation of the Agreement.

OPINION OF BOARD: At the time the present claim arose John Garcia was employed as as Track Laborer in Extra Gang No. 587 in the vicinity of San Antonio yards. J. E. Autrey was Foreman of the Gang, but during the week of April 18-22, 1966 he was on vacation. In his absence the Laborers in his gang were added temporarily to the gang of Section Foreman H. L. Harrell. At about 11:30 A.M. on April 20, 1966 Foreman Harrell criticized Claimant Garcia for the manner in which he was performing his work. It appears that Harrell had instructed Garcia to do the work in a certain way and Garcia had not followed instructions. Harrell then told Garcia that if he did not do what he was told to do he was fired. Garcia inquired whether Mr. Harrell wanted him to leave right now and was told by Harrell that if he could not comply with instructions he was fired. Garcia remained at the location of the work during the remainder of the day but was not allowed to perform further work. On Thursday,

April 21 he reported to work at the usual time but Foreman Harrell refused to let him to to work. The next day, April 22 he again reported for work but was not allowed to resume his position. In the meantime Garcia contacted Roadmaster Smith and requested that he be allowed to return to service. Smith told him that when his regular Foreman (Autrey) returned from vacation he (Garcia) could return to work. On Monday, April 25, 1966 Autrey did return from vacation and Claimant Garcia resumed his position as Laborer on Gang number 587.

The Organization contends that Claimant was dismissed from service by Foreman Harrell on April 20, 1966 and that the Company violated Article 23, Rule 2 when it failed to notify him in writing of the reason for such action.

Carrier takes the position that the Organization has not proved that Claimant was dismissed from service in violation of Article 23, Rule 2. On the contrary it contends that he quit his job after refusing to follow instructions of the Foreman.

The primary question in the case, is whether Garcia voluntarily quit or was dismissed or held out of service by the Company. The overwhelming weight of arbitral authority holds that there is no voluntary quit by reason of an employee's refusal to perform work to which he is assigned. Unless some affirmation of an intent to quit the job is manifested by the employee the refusal of the employer to let the employee continue his status constitutes a discharge rather than a resignation. 24 LA 552,553 (1955, Arbitrator Merrill). See also 8 LA 248 (Arbitrator McCoy) and Elkouri and Elkouri, How Arbitration Works, 1960, p.414. We have been referred to no awards disputing this principle. In the present case we find no manifestation of an intent on the part of Garcia to quit the job. All indications are to the contrary. After the above described verbal altercation at approximately 11:30 A.M. on April 20th Garcia remained at his work location the rest of the day apparently with the hope

that he would be allowed to resume work. Furthermore, he returned on Thursday, April 21 and Friday, April 22 and reported for work at the usual hour but was not allowed to resume his position in Extra Gang 587. It was only after contacting Roadmaster Smith that he was advised that when Foreman Autrey returned from his vacation he (Garcia) could go back to work. On the following Monday (April 25) this happened. Statements from Carrier's own officials support the Organization's position that Garcia was involuntarily held out of service. In his letter of July 11, 1966 the Division Engineer stated that his investigation revealed that "the foreman told Garcia if he could not do what he was told to do, then he was fired." A similar statement is found in the letter of August 26, 1966 from the Chief Engineer, whose words were "Investigation of the matter develops that Garcia refused to follow the instructions of Foreman Harrell; that Mr. Harrell told Garcia that if he intended to work for him he would have to do what he was told. Garcia inquired whether Mr. Harrell wanted him to leave 'right now', and was told by Mr. Harrell that if he could not comply with instructions, he was fired."

In our judgment the evidence in the record clearly shows that Garcia did not voluntarily quit his job but was in fact removed from service by Foreman Harrell. This being so it was incumbent upon the Company to comply with the provisions of Article 23, Rule 2 by giving Claimant a written notice of the reason for its action. This it failed to do. The purpose of such a notice is to afford the employee an opportunity, upon request, to have a fair and impartial hearing on the matter. Carrier's failure to give the proper notice has deprived Claimant of an important right. He was entitled to a hearing on the question of whether he quit or was fired. Carrier cannot compel an employee to accept its conclusion that he resigned and escape the effect of Rule 2. If Carrier's actions here were sanctioned it could by the simple expedient of finding that an employee had resigned rather than was discharged, no

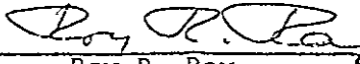
matter how great the conflicting evidence, remove an employe from the protection of the Agreement.

We hold that Carrier did violate Article 23, Rule 2 and that the claim has merit.

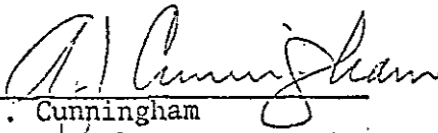
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The Claim is sustained. Carrier is directed to reimburse Garcia in the amount of 20-1/2 hours at his pro rata rate for the time lost on April 20, 21 and 22, 1966.

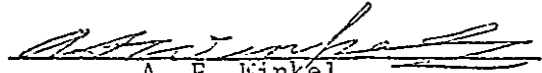
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Roy R. Ray
Neutral Member and Chairman



A. J. Cunningham
Employee Member



A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968