



Award No. 4792

Docket No. 4699

2-LV-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Dudley E. Whiting when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

LEHIGH VALLEY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Carman S. A. Pilecki, Buffalo, New York Car Department, was unjustly dealt with when he was given five (5) days actual suspension, April 3, 4, 5, 6 and 7, 1963.

2. That accordingly the Carrier be ordered to compensate Carman S. A. Pilecki for eight (8) hours at the applicable rate of pay for the above named dates respectively and his service record cleared accordingly.

EMPLOYEES' STATEMENT OF FACTS: Carman S. A. Pilecki is regularly assigned to position as car inspector on the 2:30 P.M. to 10:30 P.M. shift at East Buffalo, N. Y. The claimant was notified to appear on March 7, 1963 in accordance with the following letter dated March 2, 1963:

"Arrange to appear, Room No. 22 Buffalo Passenger Station, 1:30 P.M., Thursday, March 7, 1963, for hearing and investigation in connection with your failure to comply with instructions issued to you by General Foreman J. R. Shoop, for inspecting and servicing 38 cars at East Buffalo, on February 28, 1963.

You are privileged to have representative present if you so desire, for which you will arrange for.

/s/ G. P. Barth
Master Mechanic"

A question and answer statement was taken from the claimant and Mr. Shoop on March 7, 1963 by the officer, Master Mechanic G. P. Barth.

On March 29, 1963 the Claimant received the following notification:

"Due to your failure to comply with instructions to inspect cars at East Buffalo and leaving the property at 1:30 A.M., March 1,

1963, you are being given five (5) days actual suspension, April 3rd to 7th inclusive.

/s/ Joseph Calveric
G. C. Foreman"

The facts as developed, taken from the questions and answers investigation taken from the claimant show that the claimant and Car Inspector A. Kuczynski were ordered to work overtime. In fact, they were already on overtime when they were told by the yard clerk to work overtime at about 10:45 P. M., which was already fifteen (15) minutes past their assigned quitting time. The questions and answers shows they released the BP2 fill-out at 11:35 P. M. It also states that they were told to work overtime because there was a yard engine assigned to work overtime in the yard or the third track. Although it is not clear, based on the questions and answers taken from General Foreman Shoop, it appears that the extra engine was out mainly to get a train ready that night for Tift Terminal.

The questions and answers of both the claimant and General Foreman Shoop show clearly that this extra engine had nothing to do with the 38 cars on Track No. 1. These cars were delivered from the Erie Railroad at approximately 9:20 P. M. and were not shifted for classification until the first shift the following day. The claimant was not held on overtime to inspect these cars, they were not going anywhere until the following day. The claimant was held on overtime specifically for completing the work on BP2 fill-out and the train that was to be made up to go to Tift Terminal. There were no instructions relayed from the Yardmaster to work these 38 cars on overtime. It was only when General Foreman Shoop put in an appearance that he decided the claimant should work on these cars.

This entire matter hinges on the 38 cars that were standing on track No. 1. It is a matter of record in the questions and answers taken from the claimant that a dangerous working condition existed on track No. 1 where these 38 cars rested. This matter was brought out in the questions and answers and has not been disputed by any management representative.

The questions and answers taken from the claimant and General Foreman Shoop brings out the facts that the westbound track No. 1 had been condemned by General Car Foreman Joseph Calveric and Local Chairman Ralph Miller for use on account unsafe working conditions existing. The matter is on record as having been also referred by switching crews to trainmaster, division engineer and supervisor of track. This has not been disputed.

General Foreman Shoop, in questions and answers, even states:

"I will admit on the other side there was high snow."

In same questions and answers, Master Mechanic Barth asks General Foreman Shoop if there were any bulletins posted to his knowledge of any tracks out of service at East Buffalo and he states that he had no knowledge of any tracks being taken out at East Buffalo for any reason.

This indicates a complete breakdown of cooperative supervision. The records, taken from the questions and answers, clearly show that the unsafe conditions existing on westbound track No. 1 had been discussed with

General Foreman Joseph Calveric by Local Chairman Ralph Miller and that the matter had likewise been reported by switching crews to trainmaster, division engineer and supervisor of tracks, and yet here we have the master mechanic asking General Foreman Shoop if he had any knowledge of bulletins posted in regard to this unsafe condition. It is quite evident master mechanic was probing for something he did not know.

Now, it is a matter of undisputable record in both questions and answers that an unsafe working condition existed on track No. 1, yet the management neglected to inform their own supervision, in this case General Foreman Shoop who admittedly only appeared at East Buffalo on occasions, of the unsafe conditions and that cars were not to be worked on that track. However, General Foreman Shoop admitted that he partly recognized the hazard himself.

In local chairman's letter of grievance dated April 18, 1963 on behalf of the claimant to General Foreman Joseph Calveric, there is the following paragraph:

" . . . If you recall February 13th when you and I were in East Buffalo in the presence of Mr. Sorrintino and Mr. Joseph Tighe of the switchmen, we agreed that West Bound No. 1, due to the ice and snow plowed along the track was an unsafe place to work and that inspections would be transferred from No. 1 track to other safer places in the yard." . . .

In General Foreman Calveric's denial reply of May 2, 1963 to Local Chairman, he states in part:

"The fact is that S. Pilecki was inspecting and repairing cars on his tour of duty from 2:30 P.M. to 10:30 P.M. on Feb. 28, 1963, and there were also other carmen who performed work under the same conditions from 6:30 A.M. to 2:30 P.M., 2:30 P.M. to 10:30 P.M., and 1 A.M. to 5 A.M. There were no conditions that would prevent carmen from performing their duties." . . .

General Foreman Calveric's reply evades the crux of this case, the 38 cars on track No. 1. Certainly the claimant and other car inspectors inspect and repair cars on their tour of duty, that part is not an issue. The 38 cars on track No. 1 is the only issue in this case and they were not worked by car inspector called out between 1:00 A.M. and 5:00 A.M. In fact, Carman Matla who was called out around 1:00 A.M. did not touch these cars. General Foreman Calveric's reply also does not dispute the reference to meetings regarding unsafe conditions on track No. 1. In fact, he makes no reference at all to this most important matter.

The March 29, 1963 letter to the claimant from General Foreman Joseph Calveric wherein the claimant is advised he is being given five (5) days actual suspension, said letter states in part:

"and leaving the property at 1:30 A.M."

Rule 37 of the current agreement reads:

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pend-

ing a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses." . . .

The claimant was never notified in accordance with Rules 37 and apprised of the precise charge of leaving the property at 1:30 A. M.; therefore, no need to defend same.

The whole matter of working overtime and length thereof is vague. The questions and answers taken from the claimant divulges:

"The yard clerk relayed message from yardmaster they were to work overtime.

You were advised at approximately 10:45 P. M. to continue overtime as long as it was necessary on the third trick.

(It is silent as to who would determine the length necessary, likewise, there is no third trick of car inspectors regularly assigned.)"

"No, the only thing we got from the yard was that we would have to stay all night.

(Yet the carman called out at 1:00 A. M. only worked until 5:15 A. M.)"

The questions and answers also shows that claimant advised General Foreman Shoop he was going home and the reasons. Also, General Foreman Shoop made no reply. The questions and answers taken from General Foreman Shoop shows that the claimant informed Mr. Shoop he was going home and his reasons for same.

And as to the question if Mr. Pilecki had requested permission to leave the property at 1:30 A. M., Mr. Shoop says, no, he did not. Yet, both question and answer indicate that the claimant had told Mr. Shoop he was going home and the reason. At no place in either questions and answers does it show that Mr. Shoop refused him permission to go home. Since as said in the foregoing, the claimant was not charged with this matter as per Rule 37, it, of course, is immaterial and irrelevant to the deciding of this dispute.

It is also a matter of record that the claimant was being required to work these 38 cars on track No. 1, which is the only question before the division, yet Carman Matla upon being called out could find other work to do to keep him busy until 5:15 A. M. and then allowed to go home without working the 38 cars. If these cars were so important at 1:00 A. M., this importance surely did not decrease at 5:15 A. M.

We also question the propriety of the carrier in having the questions and answers statements taken by an officer who is the father-in-law of General Foreman Shoop.

The dispute was handled with carrier officials designated to handle such affairs who all declined to adjust the matter.

The Agreement effective September 1, 1949, as subsequently amended, is controlling.

It is submitted that under Rule 35 the claimant was unjustly dealt with when General Foreman Shoop deliberately instructed the claimant to perform work under unsafe conditions, which should not be permitted at any time, and in this particular case was senseless, these cars were not being classified until the following day or shift and no need to work on an overtime basis, this was no emergency work. The instructions issued by General Foreman Shoop were unreasonable in that it exposed the claimant to known and reported dangerous working conditions.

The claimant exercised his prerogative in complying with the following provision in the "General Notice" of the Safety Rules governing maintenance of equipment employes:

"The Company does not wish or expect its employes to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves".

in order not to be in violation of Safety Rules:

4001 "Employes who are careless of the safety of themselves or others will not be retained in the service".

4007 "Employes must not rely on the carefulness of others, but must protect themselves when their own safety is involved".

4023 "Avoid stepping on surface covered with ice, oil, grease, wet paint or other substance, creating a slipping hazard. Avoid passing under icicles".

If the claimant would have complied with instructions issued by General Foreman Shoop he would have exposed himself to a known unsafe working condition.

The instructions of General Foreman Shoop in ordering the claimant to work these 38 cars on track No. 1 was arbitrary and an abuse of management discretion.

In view thereof, due to that part of Rule 37 reading:

"If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal, less amount earned in other employment."

the Employes' Statement of Claim shall be sustained.

CARRIER'S STATEMENT OF FACTS: Buffalo, New York, is the main western terminus of this carrier. Yard operations are conducted in the Buf-

falo yard district mainly for the purpose of handling interchange traffic with other carriers. The consist of trains arriving in Buffalo is mostly cars to be interchanged to other carriers, likewise, the consist of trains leaving Buffalo is mostly cars received from other carriers. To protect this interchange traffic, which is highly competitive with other carriers at that point, it is imperative that all cars be handled and moved as promptly as possible.

On the night of February 28, 1963, an Erie Railroad yard crew placed 38 cars on Westbound Number One Track, East Buffalo yard. The Erie yard crew had no difficulty placing the cars on this track. In placing the cars, it was necessary for train crew members to throw switches and walk alongside the track while the cars were moving onto the track and again walk alongside the track in getting back to their engine. They found nothing to be unsafe in using Westbound Number One Track.

The 38 cars received from the Erie Railroad were cars for eastbound movement and it was planned to move the cars early in the morning of March 1st, as certain of the cars contained obligation business which required prompt handling. It was for this reason a carman was to be worked overtime to inspect the cars so that they could be classified by the yard crew and placed in a road train for movement. The cars were not inspected as scheduled and a delay of 12 hours occurred in the movement of the cars in question.

Claimant S. A. Pilecki entered the service of this carrier as a car inspector on September 1, 1949. On the date of the occurrence for which he was disciplined and prior thereto, Mr. Pilecki was regularly assigned as car inspector on the 2:30 P. M. to 10:30 P. M. shift at East Buffalo.

About 12:30 A. M., March 1st, the night general car foreman instructed Mr. Pilecki to inspect the above 38 cars so the morning yard crew could handle them for eastward movement. This Mr. Pilecki refused to do without another car inspector being with him. The Foreman, Mr. Shoop, advised claimant he was to inspect the cars himself and Mr. Pilecki then walked off the property without inspecting the cars he was ordered to inspect.

On March 2nd, claimant was properly notified to report for hearing and investigation, as principal, as indicated by the following notice:

"Mr. Stephen A. Pilecki
Car Inspector
East Buffalo, N. Y.

Arrange to appear, Room No. 22 Buffalo Passenger Station, 1:30 P. M., Thursday March 7, 1963, for hearing and investigation in connection with your failure to comply with instructions issued to you by General Foreman J. R. Shoop, for inspecting and servicing 38 cars at East Buffalo, on February 28, 1963.

You are privileged to have representative present if you so desire, for which you will arrange for.

/s/ G. P. Barth
Master Mechanic"

The hearing and investigation was held on March 7, 1963. Transcript was made of the proceedings.

As a result of the facts adduced in the hearing and investigation, the following letter was addressed to Mr. Pilecki:

"Buffalo, N. Y., March 29, 1963

Mr. Stephen A. Pilecki
Car Inspector
East Buffalo, N. Y.

Referring to investigation conducted March 7, 1963 by Master Mechanic G. P. Barth in connection with your failure to comply with instructions of Night General Foreman J. R. Shoop, issued 12:30 A. M., March 1, 1963 while you were working on overtime basis, to inspect and service 38 cars on Westbound No. 1 track at East Buffalo: As you refused to comply with these instructions and went home without permission at 1:30 A. M., discipline to the extent of five (5) days' actual suspension is assessed.

/s/ J. E. Crowley
Superintendent"

Claim was filed on April 18, 1963, by the Local Chairman. The claim was declined by the general car foreman in letter dated May 2, 1963, as follows:

"Tift Terminal, May 2, 1963.

Mr. R. I. Miller
Chairman, Local Protective Board
95 Mafalda Drive
Buffalo, N. Y.

Referring to your letter April 18, 1963, regarding the suspension of Carman, S. Pilecki at East Buffalo, N. Y., requesting reconsideration of the recent suspension of five days.

This man had refused to comply with instructions of night Gen. Foreman, John Shoop.

The fact is that S. Pilecki was inspecting and repairing cars on his tour of duty from 2:30 PM to 10:30 PM on Feb. 28, 1963, and there were also other carmen who performed work under the same conditions from 6:30 AM to 2:30 PM, 2:30 PM to 10:30 PM, and 1 AM to 5 AM. There were no conditions that would prevent carmen from performing their duties, therefore, your request for reconsideration is denied.

/s/ Joseph Calveric
Joseph Calveric
G. C. Foreman"

The claim was then appealed to the superintendent on date of June 4, 1963. The superintendent declined the claim by the general chairman in letter dated June 19, 1963, as follows —

"June 19, 1963.

Mr. A. U. Koch,
General Chairman, R.C. of A.,
150 No. 9th St.,
Lehigh, Pa.

Dear Sir:

Referring to your letter of June 4, 1963 requesting that Carman S. A. Pilecki be compensated for eight hours each day, April 3, 4, 5, 6, 7, 1963 and his service record cleared of disciplinary action resulting in actual suspension of five (5) days.

Pilecki failed to comply with the reasonable request of General Foreman Shoop to perform duties assigned. He was well aware of the fact that a yard engine was working in East Buffalo yard for the purpose of preparing a train for movement from that point.

This was the purpose of working a car inspector extra, as there is no car inspector assignment on the third track.

Inasmuch as Carman Pilecki failed to comply with instructions and also left the property at 1:30 A.M., March 1, 1963 without permission, I must deny your request.

Yours very truly,

/s/ J. E. Crowley
Superintendent"

General Chairman Koch further appealed the claim to the superintendent, Motive Power in letter dated June 28, 1963. Mr. W. E. Lehr, Superintendent, Motive Power, declined the claim in letter dated July 2, 1963, reading as follows:

"July 2, 1963

Mr. Albert U. Koch
General Chairman, Carmen
150 N. 9th Street
Lehigh, Pa.

Dear Sir:

Reference your letter of June 28, 1963 with copy of grievance submitted in behalf of Carman S. A. Pilecki, Buffalo, N. Y., requesting he be compensated for eight hours each day, April 3, 4, 5, 6, 7, 1963 on account of unjust actual suspension from service on these dates.

The hearing and investigation of Mr. Pilecki clearly shows that he did not comply with the instructions of General Foreman Shoop. He stated that he would not work by himself; the other carman who was assigned to do this work performed same satisfactorily. Mr. Pilecki admitted that he was told to work and did not. He stated he did not attempt to work the track.

I cannot see any reason for not applying discipline in this instance. I also feel the Superintendent was very lenient with this man, therefore, it is necessary for me to respectfully deny your claim.

Very truly yours,

/s/ W. E. Lehr
Supt. Motive Power"

The claim was then further appealed by the general chairman to the chief of personnel and further denied in letter of September 5, 1963:

"September 5, 1963

Mr. A. U. Koch
General Chairman, BRCoFA
150 North Ninth Street
Lehighton, Penna.

Dear Sir:

This has reference to our conference August 21, 1963, concerning Carman S. A. Pilecki, Buffalo, New York, Car Department.

After thoroughly reviewing the circumstances in connection with this case and taking into consideration statements you made at the appeal, it is my decision that Mr. Pilecki did have a responsibility and that the discipline applied is neither harsh nor arbitrary.

In these circumstances, my decision is that there will be no change in the discipline applied.

Yours very truly,

/s/ P. N. Mansfield
P. N. Mansfield
Chief of Personnel"

POSITION OF CARRIER: The employes in this dispute are requesting your board to order this carrier to compensate Carman S. A. Pilecki, five days' pay, claiming he was unjustly dealt with when he was given five (5) days' suspension for refusing to comply with instructions given him by his supervisor.

The carrier must admit that it is at a loss to clearly understand or define the issue in dispute, if, in fact, an issue does exist.

Mr. Pilecki was given specific instructions by his designated supervisor to inspect the 38 cars which the Erie Railroad had delivered to this carrier on Westbound No. 1 Track. There was no ambiguity or confusion as to the instructions and claimant clearly understood such instructions.

Despite this he refused to comply with those instructions as he admitted in the investigation:

"Q. At 1:30 AM on March 1st, you advised Mr. Shoop you would not work alone on these cars and went home. Is that correct?

"A. That's correct.

"Q. You also previously stated that Foreman Shoop did not instruct you to inspect and service the cars on Westbound No. 1. Is that correct?

"A. That's when we walked in the yard office, he did not give no instructions to work cars on Westbound No. 1. The instructions I got from him to work Westbound No. 1 is after I asked him how I am to work that run. After I left the office I went in the shanty, got my lamp and my gloves, went over on Eastbound No. 1 to couple up roustabout and noticing that the roustabout was not together, I did not bother to go on that track. From the roustabout I went to check a mobile trailer and Junk or Xtra to take any exceptions on the trailer; after this, I walked in the shanty, and a few minutes later who walked in but Mr. Shoop and he asked me if I worked Westbound No. 1. I replied 'No', then he said, 'Why not', I said I can't work that run by myself. He said, 'Why can't you', and I said I can't under those conditions on Westbound No. 1, then he said, 'You won't work those cars', and I said I can't account of those conditions, then Mr. Shoop walked out and got a hold of Mr. Husted.

"Q. However, you did not perform or attempt to perform the work assigned to you on Westbound No. 1 by Foreman Shoop at 12:30 AM on March 1st?

"A. No, I didn't.

"Q. Did Mr. Shoop give you permission to leave the property at 1:30 AM?

"A. He didn't give me permission to leave the property. After this argument, I started to take off my overalls. He asked where I was going and I said I am going home. He said no more but he picked up the telephone and was calling somebody.

"Q. When you left the property at 1:30 AM, you were aware that the work was not completed as the yard engine was still working?

"A. Yes.

"Q. You are aware that night gen. foreman Shoop is my representative as well as the Superintendent's representative while on duty in this territory. Do you understand this?

"A. Yes, I understand."

This was a deliberate and calculated failure to comply with instructions from his superior.

When the claim was appealed by the general chairman, he stated that "The claimant was never notified in accordance with Rule 37 and apprized of the precise charge of leaving the property at 1:30 A. M., therefore, no need to defend same".

There is no doubt that the notice given claimant of investigation adequately informed him that the purpose of the hearing and investigation was to develop the facts concerning his failure to comply with instructions on February 28, 1963. The notice given further advised claimant he was privileged to be represented at such proceeding on his behalf. The notice was crystal clear that he was not called merely as a witness to relate his version of the happening, but rather that the matter of his own involvement was the issue to be dealt with. It follows from the statements taken at the hearing and investigation that the notice fully apprized claimant of the nature of the offense of which he was charged and said notice fully complied with the requirements of Rule 37.

“REFERENCE: Hearing and investigation in connection with your failure to comply with instructions issued to you by Gen. Foreman, J. R. Shoop, in the inspection and servicing of 38 cars at East Buffalo during your tour of duty on Feb. 28, 1963.

“Q. Mr. Pilecki, we are about to take a statement from you in connection with the above, have you been previously notified in writing that you were to appear here for the purpose of giving this statement?

“A. Yes, I have.

“Q. Do you desire to be represented by witness or counsel of your own choice?

“A. Yes, Mr. Miller.”

Also refer to page No. 3:

“Q. Where were you and Kuczynski between the departure of BP 2 fill-out and the time Mr. Shoop issued instructions to Kuczynski to go home and you to work the cars on Westbound No. 1?

“(Mr. Miller) I object to that question, as the precise charge is failure to comply with instructions.”

Also refer to page No. 5 —

“Q. Has this investigation been conducted in a fair and impartial manner in accordance with scheduled requirements?

“A. Yes.”

There is admitted evidence to the effect that claimant refused to comply with instructions of his superior. Chaos would result if an employe is permitted to flaunt, ignore and disobey instructions of his superior.

In Third Division Award 4298 reference is made to Robertson v. Panhandle and S. F. Railway Company, 77 S.W. (2nd) 1078, wherein it was held: “Disobedience of reasonable rules of the employer which are known to the employe constitute just grounds for discharge”. Similarly, in Second Division Award 1814 it was held:

"The operation of a railroad is complex. Many departments and crafts perform responsible work to produce efficient railroad operation. Most employes accept their responsibilities, but when laxness and indifference manifest themselves, discipline must sometimes be imposed to secure the necessary personal service required. If this were not so, chaos and confusion would soon hinder effective and safe operation. It is for these reasons that this Board would hesitate to interfere with the action of the Carrier in cases such as we have before us."

It is for these reasons: a clear and admitted failure to comply with instructions of a superior as developed and admitted in a hearing and investigation, conducted as required by the current agreement, the resultant discipline which must be viewed as neither unjust nor harsh but which was actually lenient under the circumstances, that the carrier respectfully requests that this claim be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934;

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record of the hearing shows that the claimant refused to perform work as directed. There is no question about the right of an employe to refuse to comply with an order which involves an immediate hazard to his safety or health. The claim is based upon the contention that such was the reason for the claimant's refusal to work as directed in this instance.

The difficulty with that contention is that it is not supported by the record of the hearing, which shows that claimant stated his reason for refusing to be that he could not work that run by himself under the conditions. It is obvious that this was a refusal to work as directed because the other car inspector had been sent home, rather than because the assignment represented an imminent hazard to his safety or health.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 4th day of November, 1965.

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