

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

Parties to Dispute: { System Federation No. 4, Railway Employees'
Department, A. F. of L. - C. I. O.
(Firemen & Oilers)
Baltimore and Ohio Railroad Company

Dispute: Claim of Employee:

1. That under the current agreement Laborer Milton Porter was unjustly dismissed from the Baltimore & Ohio Railroad Company effective October 7, 1977.
2. That accordingly the Baltimore & Ohio Railroad Company be ordered to reinstate this employee with seniority rights unimpaired, made whole for all vacation rights, made whole for health and welfare and insurance benefits, pension benefits, including Railroad Retirement and Unemployment Insurance, and made whole for all other benefits including wages that he would have earned during the time he was held out of service; also that he be provided with 12% (percent) interest on all lost monies due to his dismissal.

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.

Claimant, Milton Porter, a Laborer employed at Carrier's Stock Yards facility located at Cincinnati, Ohio, was dismissed from service of the Carrier effective October 7, 1977, following an investigation held on September 30, 1977, in which Claimant was charged with and adjudged guilty of: failure to protect his assignment; excessive absenteeism; and voluntary unauthorized absence on August 5, 12, 19, 26, and September 2 and 9, 1977.

Subsequent to his initial date of employment with the Carrier, that of October 16, 1974, Claimant became a member of a religious organization known as the World Wide Church of God. Whereas, prior to his becoming a member of the World Wide Church of God, Claimant apparently had not specified to Carrier any limitations with regard to working on any of the days of the week, but that after he joined the Church, Claimant let it be known that, for religious reasons, he could not and would not work on the Sabbath which is celebrated beginning sunset on Friday and

ending sunset on Saturday. This interfered with Claimant fulfilling his obligation of working a normal five (5) day work week as he was regularly assigned as a Laborer on the third shift, 11:00 P.M. to 7:00 A.M., Tuesday through Saturday with rest days of Sunday and Monday. Claimant's personnel file revealed that on June 8, 1976, he received discipline of thirty (30) days actual suspension as a result of being found guilty of voluntary unexplained absence; that on August 24, 1976, he received another thirty (30) days actual suspension for the same offense; and that on June 1, 1977, Claimant received a five (5) day overhead suspension along with a three (3) month probationary period for having caused damage to company property. Claimant's unauthorized absences and excessive absenteeism, the subject of scrutiny in the instant case, occurred during the time of this three (3) month probationary period.

The record reflects that Carrier attempted to accommodate Claimant's religious adherence to his Sabbath on at least three occasions in order for him to be able to practice his religion and at the same time to keep his job. The first attempt occurred in May of 1976, when Carrier offered Claimant an apprentice assignment, first shift, with rest days on Saturday and Sunday. In a memorandum dated May 17, 1976, and addressed to the General Locomotive Foreman, Claimant declined acceptance of the apprentice position based upon "personal reasons" not specifically enumerated. The second attempt was made in early July of 1977, when Carrier requested through the Local Chairman that an employee of the firemen and oiler group voluntarily exchange positions with the Claimant in order that he would no longer be required to work on Friday evenings in violation of his religious beliefs. In letters dated July 15, and 21, 1977, the Local Committeeman of the Organization apprised the Carrier's District Manager, Locomotive Department, that he had contacted all the Laborers on third shift with regard to changing rest days with the Claimant and had contacted all Laborers on first and second shift with regard to changing positions and rest days with the Claimant, but that every Laborer had refused to do so. In a third and apparent final attempt the Carrier's District Manager, Locomotive Department, counselled with Claimant on August 4, 1977, and informed him that his job was a five (5)-day-a-week assignment and that if he layed off for any reason without permission he could be taken out of service. At this meeting, Claimant was again offered an apprentice position on first shift with rest days of Saturday and Sunday, which offer he again refused based on the reasoning that at the end of four (4) years he would be back in the same position as he was then.

The record further reflects that during the year 1977, up to and including September 9, 1977, Claimant was absent a total of twenty-five (25) days, on none of which he either requested or received permission to be off.

We have thoroughly reviewed the record and find, among other things, that Claimant received a fair and impartial investigatory hearing. Neither the multiplicity of roles performed by the Carrier official conducting the investigation nor said Carrier official's pre-knowledge of the surrounding circumstances under investigation were found by us to have, in any way, prejudiced Claimant's case.

The record before us is straightforward and clear with regard to the following facts:

- (1) Claimant, for quite some period of time prior to his dismissal from service, refused, for religious reasons, to work his regular assignment on Friday evening into Saturday morning.

- (2) It became apparent that no amount of discipline imposed upon the Claimant would cause him to work on his Sabbath thereby leaving his regular assignment unprotected at these times..
- (3) That Claimant's assignment was left unprotected did, in fact, work a hardship on the Carrier and even fellow employees with regard to covering Claimant's assigned duties. Furthermore, Carrier would have been subjected to payment of time and one-half ($1\frac{1}{2}$), to employees filling Claimant's position had Claimant been permitted to be absent on each and every Friday.
- (4) Carrier made several good faith attempts to accommodate Claimant's religious beliefs but such efforts were either spurned by the Claimant or as happened in one instance, Claimant's fellow union members refused to voluntarily change assignments with him.

The Organization contended Carrier discriminated against Claimant by not accommodating his religious beliefs in the interim period until Claimant could have bid on a position with Friday as a rest day. However, the record reflects that such an interim period of time would not, in all probability, be of a temporary or short length of time given Claimant's relative low rank in seniority. Under the afore-stated circumstances, Carrier fell victim to a "Catch-22" bind. Carrier could not circumvent the parties' agreed upon seniority system by giving Claimant preference over other employees with regard to picking assignments which, under the Controlling Agreement of May 1, 1944, as amended, he was not entitled to. Carrier however, pursued the next best alternative by requesting the Organization to effect a voluntary exchange of assignments between the Claimant and a fellow union member so as to avoid violating the Controlling Agreement and being subject to a charge of showing favoritism.

A highly similar case composed of almost the same set of circumstances as that before us in the instant case, was brought before the United States Supreme Court in *Trans World Airlines, Inc. vs. Hardison*, 432 U. S. 63 (1977). In answer to the argument advanced by petitioner in that case, that the statutory obligation to accommodate his religious needs imposed by Title VII of the Civil Rights Act of 1964 took precedence over both the collective bargaining agreement and the seniority rights of other employees thereby obligating the employer to order someone else to work petitioner's assignment on the Sabbath, the Court stated in part:

"Collective bargaining aimed at affecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed upon seniority system must give way when necessary to accommodate religious observances."

The Court further declared:

"It would be anomalous to conclude that by reasonable accommodation Congress meant that an employer must deny the shift in job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far."

We conclude from the foregoing that, in the instant case, Carrier acted in good faith and made very reasonable efforts to accommodate Claimant's dilemma of following his religious dictates without it interfering with his obligation to work a normal five (5) day-a-week job assignment. Under the circumstances, Carrier cannot and should not be held responsible for Claimant's unwillingness to compromise and take an apprentice position, especially in view of his steadfast and absolute refusal to work on his Sabbath. In numerous cases in the past this Board has supported the right of Carrier to dismiss employees who do not protect their assignment on a full time basis. Carrier has the right to expect its employees to fulfill their obligation to work all of the assigned work days and to protect the duties for which they were hired. The evidence in the instant case clearly shows beyond any question or doubt that Claimant, given his apparently fervent religious beliefs, would not work on Friday nights. As further proof concerning this point, Claimant stated at his investigation that it was his intent to continue laying off on Friday henceforth in the future. Claimant's attitude in addition to the overwhelming evidence supporting Carrier's position leaves us with no alternative other than to uphold the discipline of dismissal which was imposed by Carrier in neither an arbitrary, capricious, excessive, nor discriminatory manner.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of January 1980.