

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10050)

1. Carrier violated the effective Agreement when, following an investigation held January 30, 1985, it determined Mr. Edward E. Brewster guilty of the charge placed against him and imposed discipline in the form of thirty (30) demerits against his record;

2. Carrier shall now rescind the discipline assessed and expunge from his personal record any and all reference therein relating to the instant incident."

FINDINGS:

The Third 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 employes 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.

On January 20, 1985, Claimant was called off the Extra Board to work as a Janitor at Gary, Indiana. Upon reporting to work Claimant was asked and agreed to rearrange to work outside on the Yard I Tower job, to cover a vacancy. It is significant that a record cold temperature of -27° F., with wind chill factors of -60° to -70° , were recorded at Gary that day.

When Claimant reported to the Yard I Tower he learned that the heating system was not capable of keeping internal temperatures above the freezing mark. Not only was there no heat in the Tower but also the water and toilet facilities were not operating because of frozen pipes. Claimant and other employees at that location did work eight (8) hour-tours of duty at the Yard I Tower, notwithstanding these conditions.

At approximately 2:00 p.m. the Supervisor was informed by the Caller that she could not fill a 4:00 p.m. assignment, the so-called "tinmill" job. Under Rule 42-F the supervisor attempted to force assign the most junior qualified Clerk to cover that vacancy. The most junior Clerk on the list was excused when the supervisor learned that his father had just died. The next most junior Clerk was not qualified to work the tin-mill job and after her the next youngest qualified available Clerk was the Claimant.

About 2:30 p.m., the Supervisor telephoned Claimant at the Yard I Tower and ordered him to double onto the 4:00 p.m. tin-mill job. Claimant protested that he was not the youngest Clerk. The supervisor informed Claimant that the most junior Clerk's father had died and again ordered him to work the 4:00 p.m. job. Claimant protested that he was cold and his feet hurt. The supervisor again ordered Claimant to work the job and Claimant responded in words or substance: "No I am going home." The supervisor told Claimant that he would have to write this incident up to which Claimant responded "Fine" and hung up the telephone.

The Supervisor force assigned the next available Clerk and she stayed and worked the 4:00 p.m. tin-mill job. Four days later on January 24, 1985, Claimant received the following notice:

"Report for a formal investigation to be held in the Superintendent's Conference Room, Kirk Yard Main Office Building, Gary, Indiana, at 9:00 a.m., January 30, 1985.

This investigation is being convened to develop all facts and to determine your responsibility, if any, that on January 20, 1985, at approximately 2:30 p.m., you allegedly refused to comply with Supervisor Machine Application Car Control B. E. Shuttz' instructions to perform overtime work on position GT-1197 working 4:00 p.m. to 12:00 Midnight at Gary Works.

B. E. Shuttz, Supervisor Machine Application Car Control, will appear to testify as to his knowledge of the incident under investigation.

You may bring representation and/or witnesses you may desire in accordance with the Agreement."

Following the hearing, Carrier found Claimant guilty of insubordination and assessed a penalty of 30 demerits. Under Carrier's system of discipline an employee with 100 demerits against his record is subject to discharge.

The safety and health exception to the "Obey now, grieve later" maxim in insubordination cases is well recognized by this Board. Third Division Awards 14067 and 21538 among many others. However, the employee who invokes this exception bears the evidentiary burden of proving by persuasive evidence that s/he had a reasonable well-founded fear of immediate danger. Moreover, we find it critical that the safety reasons for refusing a direct order be explained or at least communicated to the supervisor. Requiring proof on this latter point serves a two-fold purpose: 1) It provides in a subsequent review of the situation objective evidence that safety fears were motivating the employee to refuse the order at the time, rather than a belated after-the-fact defense to an insubordination charge; and 2) It allows an informed judgment whether the supervisor was aware of the safety conditions and acted reasonably in insisting nonetheless upon compliance with the order.

In this particular case Claimant initially resisted the supervisor's order on grounds that he was not the youngest Clerk. When that objection was explained away he merely said he was cold and his feet hurt. The record does not show whether the supervisor was aware that Claimant had been working without heat or bathroom facilities, although he was aware that the outside temperature was extremely cold. We do note, however, that the job Claimant was ordered to work on hold-over was not at Yard I Tower but at the tin-mill where heat and water facilities were available.


From the available evidence, neither the supervisor nor this Board could make an informed judgment whether Claimant actually had a legitimate and reasonable concern for his health and safety at the time he refused the direct order. There was no objective indication of this at the time he refused the order and we cannot engage in after-the-fact speculation of this critical evidentiary point. We conclude that Claimant has not presented sufficient proof of his motivation at the time of refusing a direct order to warrant application of the health and safety exception or justification for what otherwise appears to be an act of insubordination.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1988.