

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13633

Docket No. 13508

01-2-99-2-110

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood Railway Carmen Division/
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

1. That the Springfield Terminal Railway violated the terms of our current agreement, in particular Rule 13.1 when they arbitrarily suspended Percy Goodblood from service for three (3) working days as a result of an investigation held on January 26, 1999.
2. That accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman Percy Goodblood in the amount of eight (8) hours pay for each workday he was withheld from service commencing February 16, 1999 through and including February 18, 1999. Additionally, the carrier compensate the claimant for any other lost wages as a result of this investigation.”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant was employed by the Carrier as a Carman at the Waterville, Maine, repair facility when the events leading to this claim occurred. On January 7, 1999, the Claimant was notified to attend a Hearing in connection with the charge that he failed to perform his assigned duties on that same date. More particularly, the charge specified that, from 1:05 to 1:20 P.M., he had been observed sitting in the B & B dump truck instead of moving snow as assigned. Following the Hearing, the Carrier concluded that the Hearing evidence established the Claimant's guilt and on February 11, 1999, the Claimant was assessed a three-day suspension.

The record shows that the Claimant and a co-worker, Mr. Delano, were assigned a tractor and a dump truck to remove snow from the Waterville Repair Track on January 7. Their lunch break was from noon until 12:20 P.M. At approximately 1:05 P.M., Supervisor Lozano and two others were returning from lunch when they observed the Claimant and Mr. Delano sitting in the cab of the dump truck. The dump truck bed was empty. About 15 or 20 minutes later, Supervisor Lozano returned and saw that the Claimant and Mr. Delano were still in the cab of the dump truck. No work had been performed since his initial observation. Supervisor Lozano approached the Claimant and asked why he was not working. The Claimant responded that he was warming up.

Based on these facts, the Carrier contends, the charges were proven and the discipline was fully warranted. The Carrier clearly mistrusts the legitimacy of the Claimant's proffered excuse, and argues that the Claimant had just returned from his lunch break only 30 minutes earlier and was dressed to work outside in cold weather. In the Carrier's view, the Claimant was simply shirking his duties and was therefore deserving of discipline.

The Organization takes the opposing view. It asserts that the Claimant was denied a fair and impartial Hearing when the Carrier permitted a Hearing Officer and a Co-Hearing Officer to conduct the Hearing. In addition, it submits that the charges against the Claimant were not proven. Although the Claimant was charged with and disciplined for an alleged failure to perform duties as assigned, the facts developed at the Hearing failed to establish that there was a time limit set for this work to be performed nor was there evidence that the duties assigned were not carried out. Finally, the Organization maintains that the penalty assessed was unreasonable and excessive. The Claimant was attempting to get warm in freezing weather. As the testimony at the

Hearing showed, permission is not required for employees to go inside for a few minutes to warm up when temperatures or weather conditions become uncomfortable. The loss of three days' pay under these circumstances was unjustified and without proper basis.

In assessing the record in its entirety, including the arguments presented by the parties during the handling of this case on the property, the Board finds at the outset that the Organization's procedural argument is without merit. No contractual prohibition on the utilization of two Hearing Officers has been cited and no evidence was adduced which would establish that the Carrier prejudiced or otherwise deprived the Claimant of due process or the opportunity for a fair Hearing in so doing. The decision cited by the Organization in support of its argument, Public Law Board 6073, Award 12, merely points out that the use of two Hearing Officers is "not a desirable procedure," but ultimately concludes that it does not provide a proper basis to vacate or modify the discipline imposed. We reach that same conclusion.

Turning to the merits, the Board's role is well-established. It is our function to review the record to determine whether substantial evidence exists to support the charges and, if so, whether the imposition of discipline was reasonable. On this record, we find that there is substantial evidence to support the Carrier's findings that the Claimant was not performing his assigned duties as charged. The Claimant was on duty and under pay when he was observed by his Supervisor in the cab of the dump truck. The Claimant does not dispute the fact that no work was performed but claims that he was trying to get warm. As the evidence established, however, the Claimant was prepared to work in the cold weather. He was dressed properly for the job, and the weather, though cold, was seasonal for the time of year and location. Thus, the weight given to these extenuating circumstances was properly discounted.

We note, too, that although employees are permitted to take five-minute cold weather breaks from time to time if necessary, the situation here stood on a different footing. The Claimant had returned from his lunch break only a half hour earlier. Moreover, the length of time in which no work was performed significantly exceeded that which was permissible as a matter of practice and practicality. These factors significantly undercut the Claimant's assertion of reasonable cause to be in the truck. The Union's argument that the Claimant ultimately finished his job assignment that day does not negate the fact that, during the time period charged, he should have been engaged in the performance of his assigned duties.

Concluding as we do that the charges directed against the Claimant have been proven, we next examine the propriety of the discipline imposed. The Board finds that no extenuating or mitigating circumstances have been shown to warrant modifying the discipline under review. We therefore conclude that the discipline of a three-day suspension was reasonable and not arbitrary in light of the nature of the offense established by the hearing evidence. Therefore, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 3rd day of July, 2001.