

Award No. 19061
Docket No. MW-19279

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The discipline assessed Section Laborers D. Wimberly, D. Saatkamp K. Saatkamp and K. Carpenter was without just and sufficient cause and based upon unproven and disproven charges. (System File 313-207.)

(2) Section Laborer D. Wimberly be restored to service with seniority, vacation and all other rights unimpaired; the personal records of all four (4) claimants be cleared of the charges placed against them and they be reimbursed for wage loss suffered, all in compliance with Rule 34(d).

OPINION OF BOARD: This discipline case, like all others brought before this Board, must be tested to determine if substantial evidence was adduced at a fair and impartial investigation to support Carrier's action and whether Carrier's action was arbitrary. Awards 14479 10582, 18320, and others.

We find that the discipline meted out to Claimant Wimberly meets these tests solely because of his attack on his then, foreman, Heustis. This, is not to condone the use of words which cast doubt on the legitimacy of one's birth or suggest that one's mother was a lewd woman. In the world of industry, the railroads being no exception, the use of these words is quite commonplace. They are sometimes applied affectionately. When said seriously a feeling of resentment by the one to whom the words are directed is understandable. Resort to violence to punish the speaker is not to be tolerated, however. Awards 13684, 9422, 18708, and others. Particularly is this so when a relatively new employe, 29 years of age, attacks a veteran of 62 years with 34 years of service. Moreover, there is less reason for personal resentment when the words were addressed to all four men who were in the car at the time and not to Claimant Wimberly in particular. The record contains evidence from Claimant Carpenter as follows: "Mr. Heustis came up and asked up to go to work, while we were putting on our coats, and putting away our dinner buckets, Mr. Heustis started using profanity on us, he said, excuse my language, but * * *." Thus we shall deny the claim as to Claimant D. Wimberly.

We find that the Carrier acted arbitrarily with regard to the other Claimants.

The four Claimants were members of Gang No. 132 under Foreman Mount. They along with other members of the Gang were assigned on November 18, to assist Gang No. 129 at St. Elmo, Illinois under an Assistant Foreman. Gang No. 129 is under Foreman Heustis.

The truck assigned to take Gang No. 132 to the work place was too crowded. With the permission of Foreman Mount, the four herein involved, were permitted to go to the work place in a private car driven by Claimant K. Saatkamp. They arrived at a place where they thought they were to work about 8:15 A.M. before either of the trucks assigned to the gangs arrived. These trucks carried the tools as well as the rest of the gangs. With no tools available they parked to wait the arrival of their truck. The first truck to arrive was that of Gang No. 129 under Foreman Heustis. The place where the employes had parked was near the point where Foreman Heustis and his gang were to perform. Thus, we find that the time from 7:00 A.M. when they left the assembly point to the arrival at the wrong crossing and the waiting was working time for the four just as it was for those who came by truck.

The record reveals that when Foreman Heustis did arrive he did not approach the car immediately. When he did the four men were then "engaged to wait rather than waiting to be engaged." When Foreman Heustis did come to the car the four started to put on their outer clothes and put away their dinner pails. Heustis apparently was impatient and after having told the men to get to work and not getting as quick a response as he desired opened the door of the car and admittedly forcefully directed them to go to work. After the men explained to him that they were waiting for their truck and had no tools he told them to take tools from his truck and get to work. Claimants admit he approached them twice while Heustis says three times. Two of the Claimants left the car by the driver's side and the other two left by the right side. One of these was Claimant D. Wimberly. The fight ensued with Foreman Heustis being knocked to the ground. When it was over the men took tools from the truck and after working 10 to 15 minutes for Foreman Heustis, the truck driver for Gang No. 132 told them they were at the wrong crossing. Whereupon they left the tools in a pile as directed by Foreman Heustis and rejoined their Gang.

Carrier emphasizes that the four had been under duty 1 and $\frac{3}{4}$ hours with no work being performed. The bulk of this time was consumed by travel and waiting. What is involved is a relatively short period of time when it is considered that it was about 8:30 A.M. when Foreman Heustis arrived with his truck.

In our opinion, the relatively short delay encountered by Heustis in getting the desired response from the employes assumed a significance far beyond its importance because of the altercation. The zealous impatience of Foreman Heustis cannot be used to impute insubordination to the three Claimants under discussion. Thus we will sustain the claim as it involves Claimants D. Saatkamp and K. Carpenter. As to wage loss they shall be compensated in accordance with Rule 34(d) of the agreement less interim earnings.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated in accordance with Opinion.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1972.