

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21249
Docket Number MW-21.329

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Terminal Railroad Association of St. Louis

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

(1) The suspension of ninety (90) days imposed upon hack Foreman Leonard Allen for allegedly "engaging in an altercation with TRRA Switchman E. Mock" was without just and sufficient cause, on the basis of unproven charge and in violation of the Agreement (Carrier's File 013-293-13).

(2) The charge against Track Foreman Leonard Allen be stricken from his record and he be compensated for all monetary loss suffered, all in accordance with Rule 24(d).

OPINION OF BOARD: This claim arises out of an incident involving Switchman Mock and the Claimant Allen, a track foreman, wherein claimant was alleged to have engaged in an altercation with Mock without just and sufficient cause. The claimant, along with Switchman Mock was suspended from service pending a hearing which was held on June 28, 1974. As a consequence of such hearing both were held responsible for engaging in an altercation and each was suspended from service for ninety days. Mock had been charged also with violating Rule G but no finding had been made in that connection.

The facts involved here require analysis. Apparently Mock addressed some offensive remark to claimant who was passing by. Claimant ignored the remark and went about his business. Shortly thereafter he returned and inquired about the whereabouts of the man who made these remarks. Mock came out of the shanty and thereafter there is some conflict as to the facts. There is evidence that Claimant addressed certain provocative remark to Mock which, if stated, were calculated to gain a reaction. Claimant states he removed his jacket and radio and placed them aside while the two argued face to face. Thereafter, Mock drew a pocket knife and gave the appearance of threatening claimant with it. The latter wrapped his jacket around his arm and began swinging the radio as a means of defending himself. There is evidence that Mock had the odor of alcohol on his breath. The dispute was stopped before injury occurred.

It is the contention of the Brotherhood that claimant did no more than defend himself from a knife attack by someone under the influence of liquor. We do not agree. There is ample evidence here to justify the Carrier's conclusion that claimant engaged in an altercation without just and sufficient cause. On their first encounter claimant did the right thing by ignoring the remarks of Mock. When claimant returned to seek out

Mock he demonstrated by thought, word and deed that he **was ready** for some **physical resolution** of their **differences**.

When **asked** his **purpose in** returning to the service building, claimant **answered:**

'I come back to the **service building** as I previously Stated to **find out** who **this person** was and what **was** his problem and to let **him know** that I'm nobody to be playing with like that and talking to me **in** that manner like they're **trash** and I didn't appreciate that."

The **testimony** of **Switchman Mooshegian** clearly indicate that claimant **made** a provocative statement **concerning** Mock's wife which could be calculated as a **challenge**. Claimant's **version** of **this** statement is materially different. **Going further, claimant's** action **should be considered:** he returned to the **service building** where he engaged in a face to face, **name-calling session** with Mock, then he removed **his** jacket and placed it aside along with his **radio**. All **this** tends to give credence to the view that **claimant was** engaging in an altercation with **Mock**. **There was** no finding of a **violating of Rule G** against **Mock** but there is evidence **enough** to indicate that alcohol **was** a factor in Mock's behavior. **We fail** to see how **this** helps claimant. In our **view**, it fortifies the belief that **claimant** acted properly on their **first** encounter by **ignoring** the remark **rather than seek him out** and, **in effect, challenge him** as it appear he did in the second **encounter**. In any event, **all** of **this** occurred before **Mock pulled out a knife** and **menaced** claimant.

This board **cannot substitute** its judgment for that of the carrier in discipline cases where there **is** **substantial** evidence that the **offense charged was** in fact committed. **We conclude** here that the carrier met **this** obligation **in this case** and its **conclusions must stand**.

It **is claimed** before the board that the **discipline** imposed against the claimant **was unjust** and the claimant **was** denied a **fair and impartial investigation** insofar as the **assessment of discipline against** Mock failed to include a violation of **Rule G**. We are not persuaded that this was an **omission, inadvertent or otherwise**, and we **must** conclude that the alleged violation of **Rule G was** not **substantiated**. As a **consequence** both Mock and the claimant were guilty of the **same offense** and both received the **same suspension, ninety days**. **We have no basis for overturning this** discipline and the Carrier's action here were neither **arbitrary, capricious nor unreasonable**.

One final question relates to the exclusion of **witnesses** urged by Mr. Mock's **representative**. The **witnesses** referred to were members of Mr. Mock's crew and they were not **witnesses** to the altercation. It is

pointed out that **claimant** made no such objection at the hearing. We do not believe this **exclusion** prejudiced claimant and the omission of these witnesses is not a **basis** for setting **aside** this decision.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, find6 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 ha6 jurisdiction over the **dispute** involved herein, and

That the agreement **was** not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive **Secretary**

Dated at Chicago, **Illinois**, **this 28th** day of September 1976.