

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21298
Docket Number MW-21298

James C. McBrearty, Referee

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(The Texas and Pacific Railway Company

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

(1) Under Rule 12, Section 1(e) of the working agreement, Trackman Lionel Hardison is entitled to all time lost inasmuch as the charges against him were not sustained. Therefore, his record should be cleared of the charges, and since he was suspended, he should be paid 8 hours each work day, and for any holidays falling therein, beginning August 3, 1973, continuing through to November 1, 1973. (System File K 247-5143)

OPINION OF BOARD: On Friday, August 3, 1973, Claimant was a member of track gang #5506 cutting weeds at Mile Post #28 near Taft, Louisiana. The trackmen were using "ditch-bank blades" or "brush hooks" to cut the weeds and brush. A "ditch-bank blade" is a blade about 18" to two (2) feet long, six (6) inches wide, sharp on both sides (although duller on the back side), and on the end of a handle about three (3) feet long.

An argument ensued between the Section Foreman and Claimant over the manner in which Claimant was cutting weeds. During the course of the argument, Claimant allegedly threatened to "cut off" the Section Foreman's "damn neck." Things eventually cooled down, and that was the end of the incident.

However, the Roadmaster, after being advised of the incident, took Claimant out of service on Monday, August 6, 1973, at approximately 3:45 PM, pending formal investigation of the incident on August 3.

Claimant received a notice to appear for an investigation to be held on August 9, 1973, at Donaldsonville, Louisiana. Before the investigation could be held, however, the General Chairman requested and was granted a postponement until September 14, 1973. The investigation was convened on that date, but Claimant said he did not realize he was supposed to have his witnesses present. As a result, the investigation was recessed until 10:00 A.M., October 16, 1973. By mutual agreement, the investigation was later moved up one day, and was completed beginning 10:00 AM on October 15, 1973.

By the time of the hearing on October 15, 1973, Claimant had been out of service for almost two and one-half months (August 6 - October 15). Subsequently, Carrier's Superintendent discussed the matter with the General

Chairman. During the course of this discussion the Superintendent advised the General **Chairman** that he **was** willing to reinstate claimant to service on a leniency basis without pay for time lost, and that claimant had agreed to this. At this point confusion sets in, since the Superintendent believed the **General Chairman** and Claimant both agreed to this **arrangement**, while the latter two deny this.

At any rate, **Claimant was** permitted to return to work effective November 1, 1973, but did not do so until November 2. At that time Claimant was asked to sign a written statement to the effect he was being reinstated on a leniency basis, **but** without back pay. Claimant refused to sign this statement, **saying** he wanted to "speak to his union **man.**"

On November 5, 1973, the General Chairman received a copy of the transcript of **the** investigation held on October 15, and there was a note attached stating, "**No** discipline issued." The note was signed, "**CP.**"

Under date of December 20, 1973, the General Chairman wrote a letter to Carrier's Superintendent requesting back pay for Claimant. This request was denied by the Superintendent under letter dated January 25, 1974.

The claim was thereafter progressed in the usual manner to Carrier's Director of Labor Relations, without being satisfactorily resolved, and is now properly before the Board.

The basis for the instant claim is Rule 12, Section 1(e):

DISCIPLINE AND **INVESTIGATIONS:** Rule 12. Section 1.

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(e) If the final decision decrees that charges against the **employee** were not sustained the record shall be cleared of the charges; if suspended or **dismissed**, the **employee** shall be reinstated and compensated for wage loss, if any, suffered.

The first question which has to be examined by the Board is whether there was **an** agreement among the parties to the effect that Claimant would be reinstated on a leniency basis without back pay.

This **Board** can find no substantial evidence thnt there actually **was** such a verbal agreement. It was the Superintendent who verbally advised the General Chairman after the hearing on October 15, 1973, **that** he (the Superintendent,) **was** willing to reinstate Claimant to service on a leniency basis without pay for time lost, and that Claimant had agreed to this. So, it was the Superintendent telling the General Chairman that **Claimant** had agreed to

this arrangement, not the other way around. Yet, there is absolutely nothing in the record (verbal or written) to substantiate this position of the Superintendent that Claimant had agreed to the above arrangement.

On the contrary, the record shows that the General Chairman, under date of October 23, 1973, wrote a **letter** to Claimant asking if going back to work without pay for time lost would be satisfactory, and we have Claimant's written reply, "No Sir." "I want to claim **time** for everyday I lost."

Carrier **was** apparently so notified of Claimant's reply, **and** Claimant returned to work on **November** 2, 1973. At that time Claimant was asked to sign a written statement to the effect that he was 'accepting reinstatement without back pay, but refused to do so. Yet, Claimant was permitted to resume service nonetheless,

To further complicate matters, the General Chairman received a copy of the investigation transcript on November 5, to which was attached a note reading

"No discipline issued."

"CP"

(The initials "CP" refer to Carrier's Superintendent, C. Percy, Jr.).

Now if no discipline was issued, why would Claimant be docked for almost three (3) months' pay? Certainly this suspension without pay was "discipline." If Claimant were to be so disciplined, the note, to be consistent, would have had to read, "No further discipline issued." (**Emphasis added**). Yet this was not done.

Consequently, under the totality of circumstances in the instant case ~~this~~ Board can find no substantial evidence presented that there ever was a verbal agreement among the parties to the effect that Claimant accepted reinstatement without back pay.

Since Carrier's Superintendent stated, "No discipline issued," under **Rule 12 Section 1 (e)** the instant claim **must** be upheld except that back pay shall only be for the period August 7 through **September 14**, and from October 16 through October 31. Claimant is not entitled to back pay for the period September 15 through October 15 because that delay **was** of his **own** making.

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 Employee 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.

A W A R D

Claim sustained to the extent indicated in Opinion.

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

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 12th day of **November** 1976.