

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22616
Docket Number MW-22748

Paul C. Carter, Referee

PARTIES TO DISPUTE: { **Brotherhood of Maintenance of Way Employees**
{ **The Chesapeake and Ohio Railway Company**
(**Southern Region**)

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

(1) **The dismissal of Trackman R. Smith for allegedly assaulting Assistant Track Supervisor W. R. Adams with a shovel on November 9, 1977 was without just end sufficient cause and on the basis of unproven charge8 /System File C(So)-D-547/MG-2086/.**

(2) **Trackman R. Smith shall now be allowed the benefits prescribed in Agreement Role 21(e)."**

OPINION OF BOARD: Claimant was employed as a trackman on Force 1283, under the supervision of a foreman and an Assistant Track Supervisor. On November 10, 1977, Carrier's Manager-Engineering wrote claimant in part:

"Attend investigation at the Y.M.C.A. Conference Room, Walbridge, Ohio at 9:00 a.m., Tuesday, November 22, 1977.

"You are charged with conduct unbecoming an employee when on November 9, 1977, at approximately 11:15 a.m. you assaulted W. R. Adams, Assistant Track Supervisor, with shovel while on duty on company property at Presque Isle Docks, Ohio.

. . . . *. *."

At the request of the Organization, the investigation was postponed until December 1, 1977. A copy of the transcript of the Investigation has been made a part of the record. Following the investigation, claimant was dismissed from the services of the Carrier by letter dated December 19, 1977. The General Chairman of the Organization appealed claimant's dismissal up to and including the highest officer of the Carrier designated to handle disputes of this nature, and each appeal was declined.

The Carrier contends in part that the claim submitted to the Board is not the same claim as handled on the property up to and including the Carrier's highest designated officer. We find no proper basis for the contention of the Carrier. The manner of appeal of discipline cases on the property is as outlined in Rule 21. The claim was not substantially amended on appeal to the Board. The Carrier was in no way misled or taken by surprise.

As to the merits of the dispute, we find that substantial evidence was adduced at the investigation to support the charge against the claimant. The Organization contends that the claimant did not attempt to strike the Assistant Track Supervisor with the shovel, and, therefore, did not assault him. However, the Foreman and the Assistant Track Supervisor stated in the investigation that claimant swung the shovel toward the Assistant Track Supervisor and stated to him that he would like to bash his (the Assistant Track Supervisor's) face in with the shovel. The word "assault" is defined in Webster's New World Dictionary - Second College edition:

"Assault - 1. a violent attack, either physical or verbal.....3. Law, an unlawful threat or unsuccessful attempt to do physical harm to another, causing a present fear of immediate harm....."

Based upon the entire record, the Board finds that Carrier's actions in dismissing claimant from service were not arbitrary, capricious or in bad faith. The claim will, therefore, be denied.

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 Employee 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 not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1979.