NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24355

THIRD DIVISION

Docket Number MW-24450

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance Of way Employes
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(The Chesapeake and Ohio Railway Company

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

(1) The dismissal of Trackman Allen T. Ray for alleged insubordination and for allegedly threatening his foreman oa February 12, 1980 was without just *ad* sufficient cause and *on* the basis of unproven charges (System File C-D-1018/MG-2944).

(2) Trackman Allen T. Ray shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, with about three years of service, was employed by the Carrier *a.8a* laborer, and was assigned to Track Force 1153, headquartered at Winns Branch, Kentucky, under the immediate supervision of Foreman R. 0. Peppi. He customarily operated an air compressor, but on the date of the occurrence out of which the dispute herein arose the air compressor was *idle* and *he* was assigned to perform other track work with Track Force 1153 at Simers, Kentucky.

On February 20,1980, claimant was notified toattend an investigation, to be held in the Conference Room, C&O Passenger Station, Huntington, West Virginia, at 10:00 a.m., February 29, 1980, on the charge:

> "You are charged with your responsibility for being insubordinate when you refused to perform work as instructed by your foreman and also conduct unbecoming an employee when you threatened the foreman with bodily harm at about 8:25 A.M., Tuesday, February 12, 1980, at Simers, Kentucky."

At the request of the General Chairman of the Organization, the investigation was postponed to 10:00 *A.M.,* March 12, 1980. The investigation was held as rescheduled. Claimant did not appear for the investigation, although the record shows that he had contacted Carrier's Engineer-Track on March 11, 1980, in connection with the investigation scheduled for March 12. Following the investigation of March 12, 1980, claimant was notified on March 21, 1980, of his dismissal from service.

In the appeal handling on the property, the Organization contended that the reason claimant did not show up for the March 12, 1980 investigation was because of his becoming lost in the Huntington area. on September 4, 1980, agreement was reached between the General Chairman and Carrier's highest officer of *appeals:*

"When this matter was discussed in conference, it was agreed that in disposition of this claim, another hearing on these same charges would promptly be set up and whether or not any discipline should be assessed Mr. Ray will be determined on the facts to be developed at such hearing. It was also agreed that holding such a hearing will result in full and final settlement of the instant dispute. Finally, it was agreed that the organization will waive the time limits with respect to such hearing."

Pursuant to the Agreement of September 4, 1980, claimant was notified on September 23, 1980:

"Attend investigation in the Conference Room, C&O Passenger Station, Huntington, West Virginia, at 1:30 p.m., Thurday, October 9, 1980.

"You are charged with your responsibility for being in- ♦♦♌□□☥○♦♏ ♦♒♏■ ♋□♦ refused ♦□ perform work as instructed by your foreman and ♋●♦□ conduct unbecoming an employee when you threatened the foreman with bodily harm at about 8:25 a.m., Tuesday, February 12, 1980, at Simers, Kentucky.

"Arrange for representatives and/or witnesses if desired."

The investigation was conducted on October 9, 1980, as scheduled. Claimant was in attendance and was represented. A copy of the transcript of the investigation has been made a part of the record. A review shows that the investigation was conducted in a fair and impartial manner. Following the investigation of October 9, 1980, claimant was dismissed from service on October 27, 1980.

In the investigation of October 9, 1980, there was direct testimony by the foreman that on the morning of February 12, 1980, claimant took exception to the work assigned to him and insisted on operating a crane, although he was not an experienced crane operator. The testimony of the foreman was corroborated by the testimony of the laborer who was assigned to operate the crane, who testified that he heard the foreman instruct claimant to get hand tools from the bus, but claimant insisted he was going to operate the crane; that claimant continued to argue about the matter for about six minutes; appeared to be angry, and that the foreman instructed the claimant about three times to get hand tools from the bus.

It is well settled that employes must comply with instructions of their superiors, unless a proven safety hazard exists, and then complain through the grievance procedure if they consider their agreement rights have been violated. There was substantial evidence in support of the charge of insubordination against the claimant.

As to the charge against claimant of "conduct unbecoming an employee when you threatened the foreman with bodily harm at about 8:25 a.m....." the foreman testified that claimant approached him with a pick in his hand, in an aggressive, threatening manner; that he felt he was in danger of being hit; that claimant had been involved in fights on the job before and that he was hot tempered. He stated that he felt threatened by claimant. The claimant denied threatening the foreman. Thus, we have a conflict between the two individuals involved in the threatening episode. There were no other witnesses. This Board has frequently held that it will not attempt to weigh evidence, resolve conflicts therein, or pass upon the credibility of witnesses. Such functions are reserved to the hearing officer. We are not in a position to say that the Carrier was in error in accepting the statement of the foreman.

The Carrier calls attention, at3It did on the property, that in October, 1979, claimant was disciplined for engaging in an altercation with another employe, which fact was taken into consideration in arriving at the discipline to be imposed in the present case.

Based *on* the entire record, *them* is no proper basis *for the* Board to interfere with the discipline imposed by the Carrier.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May 1983.