NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24549
THIRD DIVISION Docket Number MW-24829

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of Driver-Laborer D. M. Draper for alleged 'threatening and intimidating statements' to his supervisors on June 17, 1981, was without just and sufficient cause, unwarranted and in violation of the Agreement (System File D-25-81/MW-16-81).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared and he shall be compensated for all wage loss suffered, including overtime pay."

OPINION OF BOARD: Prior to his dismissal from service, claimant, with about eleven years of service, was employed by the Carrier as a Truck Driver-Laborer. Cm June 24, 1981, he was notified to report for formal investigation to be held at 10:30 A.M., June 26, 1981:

> "... to develop facts and place responsibility, if any, in connection with your alleged acts of disloyalty, intemperance and insubordination during your tour of duty as Truck Driver-Section Laborer, Ephraim Section on June 17, 1981, when you allegedly made threatening and intimidating statements to your supervisors..

The investigation was held as scheduled, and a copy of the transcript has been made a partofthe record. A review of the transcript shows that the investigation was conducted in a fair and impartial manner. None of the claimant's substantive procedural rights was violated. Following the investigation, claimant was notified on June 29, 1981, of his dismissal from the service.

In the investigation it was developed that Track Supervisor D. L. Parry was in charge of the territory on which claimant was working. R. C. Floyd was the foreman in charge of the section. About 9:30 A.M., June 17, 1981, Mr. Parry had a discussion with the claimant, the foreman, and other members of the section gang. Be testified in the investigation:

> "Q. What was the conversation that you had with Mr. Draper concerning?
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> A. . . . Then I told Mr. Draper what I expected out of him and referred to the fact that if I had to I would do something about this time Doug (the claimant) said, if somebody is trying to fire me, they will end up spending a few days in the hospital and that is what lead up to that."

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"Q. Was there any doubt or any question in your mind when Mr. Draper made this remark to you that "as referring to anyone else, but you?

A. I thought he "as referring to either me or Bob."

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"Q. Mr. Parry, "as this threat of spending a few days in the hospital reiterated a few days later by Mr. Draper to you?

A. Later on that night a conversation took place on the phone. He said, 'My mouth does get me in a lot of trouble.' He said he did mean that about somebody spending some time in the hospital.*

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"Q. When Mr. Draper indicated that someone "as going to spend time in the hospital who "as in the immediate vicinity when he made that comment?

A. Myself and the section foreman of the Ephraim Section.

Q. Was he speaking to you and the foreman when he made that comment?

A. Yes, he was."

The Section Foreman corroborated the testimony of Supervisor Parry, and in addition, stated that claimant had his finger in the foreman's face when the remark "as made.

Claimant's testimony in the investigation "as evasive. In answer to direct questioning, claimant stated:

"Q. Both Mr. Parry and Mr. Floyd testified that subsequent to this you indicated to them that if you were fired or disciplined for some petty thing then someone was going to spend some time in the hospital, is that correct?

A. To a certain extent - it could have been that I "as going to go home and beat my dog and take him to the hospital or I could have meant that I "as going to take my wife to the hospital to have her child. I didn't mention anyone's name.

Q. Did you shake your finger in Mr. Floyd's face?

A. Not that I recall.

Q. If that is what you could have meant, what did you mean

A. Just a figure of speech.

"Q. I think Mr. Parry indicated that later in a phone conversation with him that you stated in the phone conversation you were dead serious about putting someone in the hospital if you were disciplined or dismissed. Did you make that statement.

A. No, I wasn't dead serious.'

Claimant went on to again say that he could have meant his dog or his wife when he made the statement about someone going to the hospital.

The investigation contained substantial evidence that claimant did threaten the Supervisor and the Foreman. Such conduct on the part of au employe simply c-t be condoned.

The record also shows that claimant was previously dismissed for insubordination on June 1, 1977, and reinstated on a leniency basis some thirty days later. We notice that claimant's prior record was raised in the handling of the dispute on the property. It was proper for the Carrier to consider claimant's prior record in arriving at the discipline to be imposed for his actions on July 17, 1981.

The Board considers the discipline imposed not excessive, considering the nature of the offense - threatening supervisory personnel, and coupled with claimant's prior record.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record 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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of November, 1983