

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 24554
Docket Number MS-24183

John B. LaRocco, Referee

(L. M. Gray

PARTIES TO DISPUTE: (

(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: **"This** is to serve notice as required by the rule of the National Railroad Adjustment Board of our intention to file an ex-party submission on July 29, 1981, covering an unadjusted dispute between L. M. Gray and the Chicago and North Western Transportation Company involving the question of the **dismissal** of L. M. Gray, Claim D-11-24-47 and for his **request** for reinstatement as a laborer in the Maintenance of Way **Department.**"

OPINION OF BOARD: Claimant, a Trackman, was charged with failing to perform his assigned duties on August 3, 1979. Though Claimant had worked less than sixty days for the **Carrier**, an investigation was timely **convened** on August 24, 1979 to determine if Claimant had **committed** the charged offenses.

On August 3, 1979, the Roadmaster instructed Claimant's Foreman to repair **two** low spots along the right of way which **were** subject to slow orders. Claimant was one of two men working with the Foreman. Claimant testified, at the hearing, that he complied with his Foreman's directions and that, to **the** best of his recollection, the crew performed the assigned work. **Two** Carrier Special Agents observed the crew's activities on August 3, 1979. According to the Special Agents, Claimant and his fellow crew members performed little **work**. Though the Agent's surveillance was **temporarily** interrupted several times **during the** day, they watched Claimant **standing** around talking to his fellow **workers**, taking extended breaks, reading magazines. stopping at various stores and cafes **and** traveling up and down the right of way. **Without** identifying himself, one Special Agent approached Claimant and asked him if he could take some railroad ties. Claimant told the Agent that he was welcome to take all the ties he wanted. The Special Agents compiled a written report of the observations. The **report indicates** that between **7:30** a.m. and **4:00** p.m. Claimant was under observation for approximately six hours. During that period, Claimant **worked** only seventy minutes. At the hearing, Claimant took exception to the contents of the report. He specifically denied giving anyone **permission** to take ties **and** he reiterated that he worked hard **throughout** the day.

Subsequent to the investigation, the Carrier dismissed Claimant and his fellow crew members from service. While the record is **unclear**, apparently the Carrier eventually reduced the discipline assessed against the other **two** crew members and allowed them **to** return to service. However, the Carrier affirmed the discipline imposed against Claimant.

Claimant argues that the record contains insufficient evidence to support a finding that he failed to perform his assignment. Alternatively, Claimant contends that dismissal was an excessive and arbitrary penalty for two reasons. First, the dismissal was inconsistent with the principle of progressive discipline. **Since** this incident was **Claimant's** first offense, the Carrier should have issued Claimant a warning and given him an opportunity to improve. Second, Claimant was a victim of disparate treatment. Because all three crew members committed the same misconduct, all should be assessed equal discipline. By upholding only **Claimant's** discharge, the **Carrier** arbitrarily discriminated against Claimant.

After carefully reviewing the record, this Board concludes that the Carrier presented substantial, probative evidence proving that Claimant failed to perform his **assigned work** on August 3, 1979. **Two** Special Agents observed him engaging in activities which could hardly be characterized as **work** related. During his eight hour shift, Claimant **performed** about one hour of **work**. Even if travel time and the time the surveillance was **interrupted** is added to the hour, Claimant, at best, worked three and one-half hours. The testimony of the Special Agents as well as their report is persuasive when compared to **Claimant's** blanket denials **and** his inability to recall what **work** he performed. In resolving this credibility conflict, the Carrier's hearing officer could reasonably attach **more weight** to the Special Agents' **report** than to Claimant's denials.

Claimant, as an inherent condition of his employment, is obligated to perform a **day's** wrk for a **day's** pay. He is not excused from **working** merely because his fellow **workers** are **not** satisfying their responsibilities. Claimant's violation was flagrant. For more than one half day, he performed no work of any value to the **Carrier**.

We find no justification for reducing the assessed discipline. The penalty **was** commensurate with the seriousness of Claimant's offense. Claimant knew or should have **known**, without any warning, that he was expected to perform a full day's **work**. The other members of the crew had accumulated many years of service with the Carrier which was a legitimate basis **for reducing** their discipline. Given Claimant's short length of service, **the** penalty was neither arbitrary **nor** excessive.

Since we are denying this case on its merits, we need not decide if the claim was filed with this Board **beyond** the nine month time limit set forth in Rule **21(c)**.

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

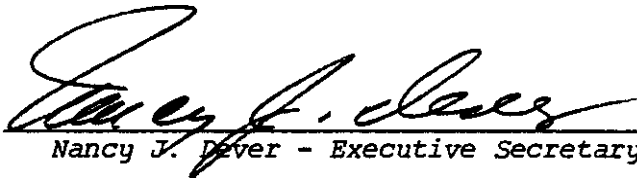
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

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