

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24592  
Docket Number MW-24767

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employees  
(Peoria and Pekin Union Railway Company

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

(1) The dismissal of Track Laborer W. E. Stockert for allegedly making 'a loud popping noise in Foreman Flores' ear' was arbitrary, capricious, unwarranted and on the basis of unproven charges (System File PPU-1891/M-TC 181-81).

(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.

OPINION OF BOARD: Prior to his dismissal, the Claimant, W. J. Stockert, was employed as a Trackman. On May 13, 1981 he was notified as follows by E. J. Dean, Chief engineer:

"I have a report alleging that on May 13, 1981, at approximately 6:55 A.M., in the East Side Section #1 Tool House, you made a loud popping noise in Foreman Flores' ear with sufficient severity to cause pain in the ear for approximately fifteen minutes. This is in violation of Safety Rules 4 and 12.

Formal investigation will be conducted in the General Office Building on Friday, May 22, 1981, at 3200 P.M., to determine the circumstances and your responsibility, if any, in connection with the above allegation.

Your personnel record will be reviewed in the investigation."

The hearing investigation was rescheduled and held on May 21. Claimant was dismissed from service effective June 2, 1981. The contention that Claimant did not receive a fair and impartial hearing was not raised by the Brotherhood during handling of the claim on the property; only after the claim was submitted to this Division. On this point it must be observed that the National Railroad Adjustment Board is an appellate body and cannot consider or adjudicate questions not raised between the parties while the dispute was processed in the usual manner or the Carrier. Thus in another Third Division Award, 18006 Referee Dugan determined as follows:

"In the Organization's reply to Carrier's *Ex Parte* Submission, it raises *for* the first time the charge that Carrier's hearing officer, Superintendent, M. W. *Hallenbeck* gave evidence of *prejudgement* against Claimant at the hearing. This Board has consistently held in numerous awards that charges or contentions not raised on the *property* can not be considered by this Board in the determination of a dispute. Therefore, we cannot consider such contention of alleged bias of the hearing officer in deciding this dispute."

The evidence is *unrefuted* that Claimant did *indeed* cause a loud popping noise near the foreman's ear from a distance of *three* to five inches causing pain in the ear for some *fifteen* minutes. The deed was perpetrated as a prank and *must* be considered as a violation of the following safety rules as charged:

Safety Rule 4:

"They must endeavor to prevent accidents *and* injuries."

Safety Rule 12:

"Scuffling, wrestling, fighting or playing jokes on fellow *employes* by air pressure, by electric shock *or* by other means, *either* on or off duty, while on company property is positively prohibited."

In dismissing the Claimant from service Carrier took into account his previous record where he had been disciplined six times previously. During 1980 he *ms* dismissed for fighting with another *employe* and was restored on a leniency basis. In view of the unrefuted evidence in this case and his prior record it is determined *Carrier's* disciplinary action cannot be considered capricious, *arbitrary* or unwarranted.

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 *invovled* herein; and

That the *Agreement* was not violated

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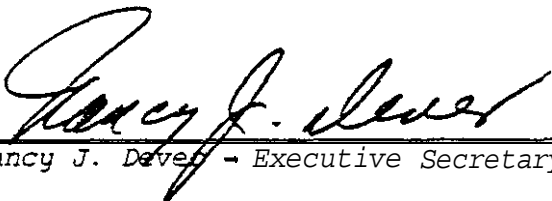
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST :

  
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Nancy J. Deves - Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1983.