

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25485  
Docket Number MW-25392

M. David Vaughn, Referee

(Brotherhood of Maintenance of Way **Employes**

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway Company

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

(1) The sixty (60) days of **suspension** imposed upon **Trackman** P. A. Cipolletti for alleged "**insubordination**" and alleged "**conduct unbecoming an employee**". on July 4, 1982 was without just and reasonable cause (System File C-D-1417/MC-3595).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Claimant is employed by Carrier with seniority dating from October 1974. On July 4, 1982, Claimant was employed as a **Trackman** and performed emergency service at Ambassador Bridge near **Detroit, Michigan** under the supervision of Track Foreman **Kull**. At various intervals during his work shift, Claimant requested the Track Foreman to provide suitable drinking water. Claimant also requested permission to obtain food for his lunch break and to retrieve an arm brace prescribed for his injured arm. He had left the brace at Rougemere Yard, several miles away. The Track Foreman denied Claimant use of the Carrier vehicle, which would have been necessary to obtain food and the arm brace. The Track Foreman directed Claimant to obtain water at a facility of a foreign Carrier approximately one-half mile distant.

At approximately 4 p.m., Claimant engaged in a heated argument of at least several minutes duration **over** these issues. During the **course** of the argument, Claimant "**chest butted**" the Track Foreman.

After notice to Claimant, the Carrier conducted an investigatory hearing concerning the incident and, based on **the** results of that hearing, determined Claimant to be guilty of **insubordination** for failure to comply with the Track Foreman's instructions and for conduct unbecoming an employee. Carrier assessed discipline of **sixty** days actual suspension. The appeals from Claimant's suspension **were** denied, and this claim was brought before the Board.

The Organization argues initially that the record supports Claimant's position that he did comply with the Track Foreman's instructions and that he did not touch the Track Foreman in such a **way** as to constitute conduct unbecoming **an** employe. The Organization's argument in this regard **must** be rejected. The record contains testimony from more than one witness that Claimant did argue repeatedly with **the Track** Foreman and that Claimant did "**chest butt**" him on at least one occasion. Although there is conflicting evidence as to the number of times and the force with which Claimant pushed the Track Foreman, even a single use of physical force against a supervisor would be sufficient **to** support a finding of conduct unbecoming an employee. Testimony in the record also indicates that Claimant refused to return to work for several minutes **after** he had been instructed to so do.

The **Board** finds that the record contains substantial evidence supporting Carrier's determinations. **Where** such evidence exists in the record to support Carrier's conclusions, the Board will not disturb them. The Board's function is not to substitute its judgment for **that** of the Carrier, but to assure that there is sufficient evidence in the record on which the Carrier's finding of guilt can be based.

The violations having been established, the Board turns to the question of the propriety of the discipline assessed. The Organization maintains that the penalty assessed **was** excessive since **Claimant's** behavior was provoked by a deprivation of food and water. Carrier argues that the penalty **is** appropriate in light of Claimant's prior record. Carrier asserts that Claimant has been disciplined for **similar** offenses on two prior occasions, which assertion is not rebutted by the Organization. The Board is unable to conclude, based on Claimant's previous work record, that the penalty should be reduced.

It appears from the record, however, that **Carrier bears** partial responsibility for the incident. First, it does not appear that the Track Foreman acted in an appropriate **manner** when Claimant made his requests. Further, the record supports the **Organization's contention** that **the Carrier** failed to meet its obligation under Rule 52 of the Agreement to make suitable drinking water available at all times. Rule 52 states **in** relevant part:

**"The** Railway will see to it that an adequate supply of water suitable for domestic use is made available to employees living in its buildings, camps or outfit cars, and that suitable drinking water is made available for the forces while at work. Where it must be transported and stored in receptacles, they shall be well adapted to the purpose.\*

Carrier's obligation under Rule 52 was not met by referring an injured **employee** to a foreign Carrier's facility some distance away. Since Claimant's behavior was provoked in part by Carrier's own apparent violation of the Agreement, the Board concludes **that** the penalty was excessive and should be reduced to thirty **(30)** days actual suspension, and that the Claimant be made whole for the thirty days excessive discipline at the rate of pay in effect at the time of the discipline.

Accordingly, the claim is sustained in part and denied in part.

**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 **Employees** involved in **this** dispute are respectively Carrier and **Employees** 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 discipline was excessive.

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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
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Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May 1985.