

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25663
Docket Number MW-25458

Nicholas **Duda**, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(Consolidated Rail Corporation

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

(1) The dismissal of Foreman **F. Fludd** for alleged *Failure to perform your assigned duties on Sunday, November 21, **1982*** and for allegedly "Displaying a hostile attitude to Supervisor **F. A. DiLorenzo**" on November 22, 1982 was capricious, unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File MR 1/83 **BMWE**).

(2) Track Foreman **F. Fludd** shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including overtime pay.

OPINION OF BOARD: On Friday, November 19, the Track Supervisor offered Claimant, a Track Foreman, overtime work on Sunday, November 21, 1982, replacing timbers at switch **9W** on track number 3 at Woodlawn. Claimant accepted the assignment. Claimant told the Supervisor he would need a Burro Crane to remove the rail before he would be able to change the timbers. The Supervisor assured him that the crane would be brought to the site and also that third **railmen** would be called in to attend to the rails before they were removed and after they were replaced. The Supervisor marked the timbers **to** be changed. The Assistant Track Supervisor was present for some **or** all of the conversation between the two men.

The Track Supervisor did not work and was not present on November 21, 1982. The Assistant Track Supervisor was in charge of Claimant and the assignment given him concerning replacement of timbers. On the Sunday in question, timbers were replaced by Claimant's gang; however they were not the timbers desired by the Track Supervisor. On Monday, November 22, 1982, the Track Supervisor interviewed the Assistant Supervisor and Claimant separately. The record does not account **for** the specific conversation between the Supervisor and the Assistant Supervisor. The record does show that the Supervisor was very dissatisfied with the work done by Claimant's crew and the performance of both **Claimant** and the Assistant Track Supervisor.

The three principals - Supervisor, Assistant Supervisor and Track Foreman - all testified at the investigation hearing on the charges made against Claimant. In respect to the specific circumstances and the method of explaining the assignment on November 19, the witnesses were in disagreement. The Supervisor testified that the three were together when he, the Supervisor, specified which ties were to be replaced. He claims he showed them both the replacement ties which were immediately adjacent to the track and measured the ties. According to the Claimant, the specific discussion about the ties occurred between the Supervisor and the Assistant Supervisor, but he, Claimant, was with his Gang within eyesight, but unable to hear their conversation. The Assistant Supervisor claims that he was present but heard only "bits" of the conversation between the Supervisor and Claimant. Although some of the circumstances of the Friday assignment were in dispute and could be determined by the Hearing Officer, there was agreement by all three witnesses that on Sunday Claimant's gang did not change the ties specified by the Supervisor on Friday.

The first charge against Claimant was that he had failed to perform his assigned duties on Sunday, November 21, 1982. The Supervisor was not present on that Sunday and did not testify on the explanation given by Claimant for the work performed on Sunday. The testimony on this point was provided only by Claimant and the Assistant Supervisor. On the day of the job, and at the site of the job, according to the testimony of both of these men, Claimant's crew performed other work because the necessary tamping crew and equipment were late in arriving. Claimant recommended a change in the planned work because he thought sufficient time was not available during the scheduled eight hours to complete the project. The recommendation was made to and approved by the Assistant Supervisor. The Assistant Supervisor was delegated by the Supervisor to **run** the work and he had the authority to change the Supervisor's original plan. Under these circumstances, the record does not support a finding that the Claimant failed to perform his assigned duties. On the contrary, the record shows he performed the work approved by the Assistant Supervisor, although it was different from that desired by the Supervisor. The evidence by the only two witnesses was to the effect that Claimant had a reasonable excuse for not performing the work specified by the Supervisor and that the on-site Supervisor approved the change of assignment. If the Supervisor was dissatisfied with the Sunday work he might, on Monday morning, criticize the reasoning of Claimant on the prior day and seek an explanation, but no discipline could be imposed for action approved and concurred in by the on-site Supervisor. For the foregoing reasons, the record does not have substantial evidence to show that Claimant was guilty of failing to perform his assigned duties on November 21, 1982.

The Supervisor was critical of Claimant during the interview on November 22nd in the Supervisor's office. There is no significant dispute on the facts of their communications. The Supervisor was very unhappy and expressed his dissatisfaction. Claimant disagreed and resented the criticism. Their conversation was in loud tones. The Supervisor said he would not assign overtime to either Claimant or the Assistant Supervisor in the future. If that statement was improper or incorrect, Claimant could have pursued the matter in the grievance procedure. Instead, Claimant became extremely profane and obscene. The entire conversation, including the hostile and insulting attitude of Claimant was in the presence of another Employee whose testimony conformed to that of the Supervisor and Claimant in respect to the occurrences in the office on November 22. Accordingly, there was substantial and credible evidence in the record for the Carrier to find that Claimant was guilty of -displaying a hostile attitude to Supervisor F. A. DiLorenzo."

Claimant's conduct on November 22, 1982 in the office, in the presence of another Employee, was grossly insubordinate. Claimant's reaction to the Supervisor's criticism is understandable and perhaps a heated response was predictable. However, Claimant's profane, obscene and threatening language went much too far and was improper. It was not justified by, nor excused by, DiLorenzo's statement. It was also another in a series of disrespect to authority which had been committed by Claimant. Only a little more than a year earlier he had been dismissed for an incident similar to the instant one where he threatened his Supervisor. On that occasion he was restored to service on leniency basis. Despite the prior discipline and leniency, his unacceptable conduct continued. Under the circumstances, there is no basis for finding that the discipline imposed was excessive or arbitrary.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 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 28th day of October 1985.