

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26191
Docket Number MW-26094

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Chesapeake and Ohio Railway Company
Northern Region (excluding Hocking Division)

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

(1) The ten (10) days of suspension imposed upon Machine Operator M. Vasquez for allegedly 'assaulting his Assistant Foreman' on June 28, 1983 was unwarranted and on the basis of unproven charges (System File C-D-1891/MG-4232).

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

OPINION OF BOARD: The Claimant was charged with assaulting his Assistant Foreman while on duty at Muskegon, Michigan at approximately 3:25 PM on June 28, 1983. After a Hearing was held on July 27, 1983 the Claimant was advised that he had been found guilty as charged and he was assessed a ten (10) day suspension.

During the Hearing the supervisory status of the Assistant Foreman who was allegedly assaulted by the Claimant was disputed by the Organization on the grounds that he had been displaced by a more senior employee. The record shows, however, that this employee was kept in the Assistant Foremanship position up to the time of the incident, was paid at that scale, and that his supervisory status had not been questioned by subordinates. Although it apparently was not common for the Carrier to have two Assistant Supervisors on Force 1250 it was nevertheless its managerial prerogative to assign two of them concurrently to this gang if it so wished, for its convenience. According to the Assistant Foreman he continued to work the position "... from approximately May 1 through June 28, 1983." He did work several days during this timeframe as an operator but he continued to receive Foreman scale on those days and continued to be responsible for the care and maintenance of the bus which transported the employees. The objection by the Organization that the investigation was inappropriate because the Foreman did not have "legal" authority on the day the incident allegedly occurred must be dismissed, therefore, for lack of substantial evidence. There is also some dispute with respect to when the incident took place. There is sufficient evidence of probative value in the record, however, to warrant the conclusion that the incident took place at 3:25 PM, or prior to the end of the shift on June 28, 1983, as the Assistant Foreman testified. Although the Claimant testified that it was after 3:30 PM when the incident took place, this Board is not empowered in its appellate function to resolve such conflicts of evidence and it must view such testimony as self-serving (see Third Division Awards 16281, 21238, 21612).

A review of the record shows that the Assistant Foreman testified that when Force 1250 arrived by bus at the Carrier's North Yard, Muskegon, Michigan shortly before the end of the shift on June 28, 1983 he requested that everyone on the bus close their windows because "... it looked like rain." After everyone exited the bus and the Assistant Foreman was walking toward the camp cars the Claimant said something to the Foreman which, according to this testimony, the Foreman asked the Claimant to repeat. According to the Assistant Foreman the Claimant stated to him: "I didn't shut my window; you shut it for me." At the same time the Claimant grabbed the Foreman by his shirt to, apparently, emphasize this point. The Claimant denied, at the Hearing, that he touched the Foreman but he did testify that he told the Foreman that he "... had left the window open, and if he wanted it shut, he would have to shut it (himself)."

There can be little doubt, from the evidence of record, that the Claimant acted inappropriately to a Foreman whom everyone recognized as holding that position, and that some discipline was appropriate. It is doubtful, however, if what he did can be classified as "assault" in the proper sense of the word since the Claimant made light of the incident the following day when he was questioned by supervision about it after it had been reported by the Assistant Foreman. The tone of his own testimony at the Hearing suggests that the Claimant meant no harm to the Foreman although he does admit that he and the Foreman "... had words." Given these extenuating circumstances the ten (10) day suspension shall be reduced to a five (5) day suspension and all back compensation due the Claimant for the other five (5) days held out of service shall be paid to him in accordance with the working Agreement.

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.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of November 1986.