

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26417
Docket Number MW-26969

Edwin H. **Benn**, Referee

(Brotherhood of **Maintenance** of Way **Employees**

PARTIES TO DISPUTE: (

(The Denver and Rio **Grande** Western Railroad Company

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

(1) The dismissal of Section Laborer **J. Mendoza** for alleged failure to comply with instructions of Roadmaster **J. R. Vialpando**, causing alleged personal injury, was arbitrary, capricious and in violation of the Agreement (System File **D-69-84/MW-7-85**).

(2) The claimant shall be reinstated with seniority and **all** other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: **Prior** to his dismissal, Claimant was in the Carrier's service for approximately three years. At the time of his dismissal, Claimant was employed as a Section Laborer under the supervision of Roadmaster **J. R. Vialpando** and Assistant Section Foreman **N. R. Gleason**.

On November 20, 1984, Claimant was instructed to pull a track spike. While in the process of using a claw bar, Claimant injured his wrist when the spike broke. Claimant was charged and ultimately dismissed after Hearing for failure to comply with instructions thereby causing the injury.

The record reveals that Claimant was instructed by Vialpando to use a jack to raise the rail a few inches before removing worn out spikes and to be certain that force was not put on the spike. Claimant testified that he received, but did not follow those instructions from Vialpando prior to the breaking of the spike head. Claimant's wrist injury amounted to **soreness** that cleared up in approximately one week.

We are satisfied upon an examination of **the record** that Claimant admitted that he did not follow **Vialpando's** instructions. Clearly, substantial evidence therefore exists in the record to support the Carrier's decision that discipline should be imposed. See Third Division Awards Nos. 23292, 20164, 14700. However, we are of the opinion that the imposition of dismissal was an excessive penalty in this case. Under the circumstances, we shall award that Claimant be returned to service with seniority unimpaired but without compensation for time lost.

We have examined the Organization's procedural argument concerning the alleged lack of specificity of the charge and find the charge to be sufficiently specific so as to notify Claimant of the allegations against him and to permit Claimant to adequately prepare his defense. See Second Division Award No. 8034.

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

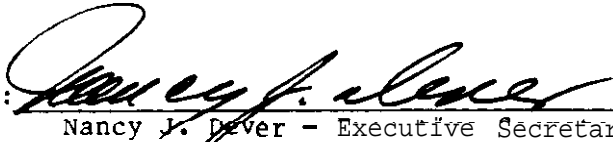
That the discipline was excessive.

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 August 1987.