

NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1

THIRD DIVISION

Award No. 29470  
Docket No. MW-29834  
93-3-91-3-196

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance  
(of Way Employees  
(  
(Chicago Central and Pacific  
(Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Group B Operator W. B. Webber and Trackman W. H. Newman for alleged violation of Rules 530 and 532 on October 29, 1990 and for failure to report for duty and protect their assignments on October 30 and/or from October 30 to November 2, 1990, was arbitrary, without just and sufficient cause, exceedingly harsh and in violation of the Agreement.

(2) The Claimants shall be reinstated with seniority and all benefits and rights unimpaired and they shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Prior to dismissal, Claimant Webber worked as a Group B Machine Operator (truck-crane) on Gang No. 192, which was assigned to work with Crossing Gang No. 158. Claimant Newman worked as a Trackman on Crossing Gang No. 158. The Claimants were assigned to positions which required them to live away from home during their assigned workweek.

At approximately 9:00 P.M. on Monday, October 29, 1990, after

their normal tour of duty, an altercation occurred between the Claimants and their Foreman in a room of the lodging facility provided by the Carrier. The Claimants were upset and angry with the Foreman because he refused to allow them to use the Carrier's dump truck to tow Claimant Newman's car back to the motel.

The Claimants burst into a fellow employee's room where the Foreman was engaged in a card game with other employees. Upon entering the room, Claimant Newman shoved the Foreman onto the bed as Claimant Webber "slapped or back handed" him. Both Claimants continued to verbally threaten the Foreman while attempting to entice him out of the room to ensue further altercation. The other employees in the room intervened and persuaded the Claimants to leave without further incident.

Claimant Webber failed to report for duty or to obtain permission to be absent on Tuesday, October 30, 1990. Beginning on Tuesday, October 30, and continuing until Monday, November 5, 1990, Claimant Newman failed to report for duty or obtain permission to be absent.

By letter dated November 7, 1990, the Claimants were instructed to attend a Hearing, and they were charged with:

"\*\*\* responsibility, if any, in connection with your alleged failure to comply with Rule G of the Rules of Maintenance of Way on Monday, October 29, 1990; with your alleged quarrelsome and vicious conduct with Foreman B. W. Kent on Monday, October 29, 1990; with your alleged altercation with Foreman B. W. Kent on Monday, October 29, 1990; with Mr. Webber's alleged failure to report for duty and protect assignment at the designated time and place and absenting himself without proper authority on Tuesday, October 30, 1990; with Mr. Newman's alleged failure to report for duty and protect assignment at the designated time and place and absenting himself without proper authority from Tuesday, October 30, 1990 to Friday, November 2, 1990."

As a result of the Hearing, the Chief Engineer notified the Claimants that they were dismissed from service for violation of Rules 530 and 532. Rule 530 - Relieved From Service provides:

"Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or who do not conduct themselves in such a manner that the Railroad would not be subjected to criticism and loss of good will."

Rule 532 - Report for Duty provides:

"Employees must report for duty at the designated time and place. They must be alert, attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place, without proper authority."

The Organization contends that Carrier's decision to charge the Claimants for their off-duty conduct is not justified or supported by the record. It argues the Board has frequently held that Carrier Rules do not apply to employees while they are off duty and off Carrier property. (First Division Awards 14321, 20671 and Third Division Awards 3411, 21293). In essence, the Organization contends the Carrier failed to show that, as a result of the incident in question, it was subjected to criticism, loss of good will, or any adverse effect upon its business or reputation. (Third Division Awards 20874, 21109, 22314, 24846 and 25499).

The Carrier asserts the right to assume jurisdiction in this matter because the entire situation developed because of and centered primarily on two work-related facts. The Foreman refused to use or allow to be used the Carrier's equipment to tow Claimant Newman's car, and the Claimants had previously developed a discordant attitude towards the Foreman. The Carrier contends the Claimant assaulted the Foreman with the intent to intimidate and dissuade him from complying with Carrier Rules, so the Carrier acquired an immediate and vested interest in the act which occurred off-duty. The Carrier argues that employees may be held accountable for their off-duty conduct when such conduct proves to have a negative and detrimental impact on the employer/employee relationship.

The Organization maintains the Claimant was disciplined in violation of Rule 35(a) which entitles the Claimants to a fair and impartial Investigation. (Third Division Awards 9027, 19566). According to the Organization, the Hearing Officer's actions denied the Claimants their right to a fair and impartial Hearing by asking leading questions, attempting to fix blame, and prejudging the Claimants. (First Division Awards 13354, 20335; Second Division Awards 2923, 6158, 6795, 8468; Third Division Awards 18963, 20014, 20148; Fourth Division Award 1685). The Organization maintains that the Claimants were also denied a fair and impartial Investigation because the decision following the Hearing held on November 16, 1990, was improperly rendered by the Chief Engineer because he was not present at the Hearing. (Third Division Award 17901).

The Organization argues the decision of dismissal was arbitrary, without just and sufficient cause and exceedingly harsh based on Claimant Webber's one day absence on October 30, 1990, and Claimant Newman's three days' absence from October 30 to November 3, 1990. (Third Division Awards 18105, 18603, 20578 and 22174). Further, no progressive discipline was provided. (Second Division Awards 10065, 10460; Third Division Award 23864). Although the Foreman knew Claimant Webber had no means of transportation to the work site, he left Claimant Webber at the motel without transportation. This failure by the foreman constitutes a mitigating factor because lack of transportation as a result of car trouble has been deemed justifiable cause for absence. (Third Division Awards 19589, and 20198). Any discipline against Claimant Newman should also be mitigated by car trouble. When discipline is excessive, capricious, improper and unwarranted, it cannot stand. (Third Division Awards 2813, 6074, 10582, 11556, 14120, 14339, 14479 and 16166).

The Carrier notes that neither Claimant obtained proper authority to absent himself from duty. The Carrier reports Claimant Webber had been verbally warned on numerous occasions, and served a five working day suspension for violating Rule 532 in August of the same year.

With respect to the substantive charges of violation of Rules 530 and 532, the Board finds the Carrier sustained its burden of proof to show the Claimants committed the offenses. The Carrier has the right to exercise jurisdiction over the Claimants' off-duty conduct given the fact the altercation occurred in a lodging facility furnished by the Carrier, and the dispute concerned the ability to use the Carrier's truck to tow Claimant Newman's car. Further, bursting into the room of another employee and physically assaulting the Foreman constitutes quarrelsome or otherwise vicious conduct in violation of Rule 530. In addition, the Claimants failed to offer sufficient justification for failing to obtain proper authority to absent themselves from duty in violation of Rule 532.

With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. (Third Division Award 26160). A violation of Rule 530, in and of itself, constitutes a dismissal offense. The violation of this Rule was compounded by violations of Rule 532, and in Claimant Webber's case, his record of progressive discipline. Therefore, dismissal is the appropriate discipline in this case.

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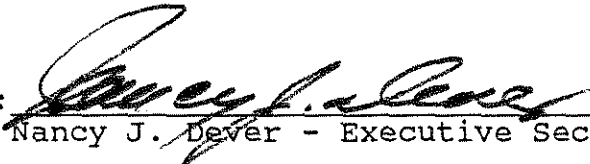
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A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1993.