

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31922
Docket No. MW-32602
97-3-95-3-535

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Terminal Railroad Association of St. Louis**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension and resulting fifteen (15) days suspension] imposed upon Track Foreman R. E. Gartner for the alleged violation of Rules 'B', 'M', 'N' and 'P' in connection with '... alleged failure to perform your duties as Foreman, and for your alleged failure to comply with instructions issued to you by Assistant Track Supervisor H. T. Goodwin in that you were absent from your assigned work area, without permission, at Valley Junction between the approximate time of 11:55 a.m. to 12:30 p.m. on Friday, October 7, 1994', was unwarranted, without just and sufficient cause and disparate treatment (System File 1994-43).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated for all wage loss suffered and the discipline shall be reduced to a letter of reprimand."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Claimant is a Track Foreman. At the time of this dispute, Claimant and crew were assigned at Valley Junction under the supervision of Track Supervisor L. Guion and Assistant Track Supervisor H. Goodwin.

Claimant was assigned a daily lunch between 12:00 noon and 12:30 P.M. Prior to the week ending October 7, 1994, on some occasions, Carrier had allowed members of the maintenance crews working at Valley Junction to drive Carrier trucks to local fast food establishments to wash up and pick up their lunches. However, on "Monday or Tuesday" (October 3 or 4, 1994) during a routine morning meeting, Assistant Track Supervisor Goodwin issued the following verbal instructions to the employees of the Track Department:

"Lunches are to be eaten at designated areas. i.e. When the crew is working at Valley Junction, lunch is to be eaten at the job site or at the A&S (located approximately one-fourth of one mile from Valley Junction). If you are working in Madison area, you eat at the southend. If you are working at northend, you eat in the cafeteria at the northend. If you're at WR, you eat in the WR Tower down below."

Claimant testified that he found Mr. Goodwin's instructions "vague," and approached Track Supervisor Guion for "clarification." According to Claimant, the following interchange occurred:

Mr. Gartner: "Lonnie, I says, what's we can't go to lunch now? Can't we get our lunch and wash up and get our food and get back or anything? And he says - like I said before, if you're at the southend, you eat at south. If you're north, you eat north. If you're at WR, you eat at WR. If you're at valley, you can go over to the A&S. And I came back and says, you mean, if we make a quick run, get our food and get back, that's okay, just so long as we're back by 12:30, that's the main thing, right? And he says, yes. Just so long as you're back by 12:30. We don't want another Derochie deal. And I said 10-4. Thank you much."

On October 7, 1994, Claimant and his crew members were working with a track crew supervised by Track Foreman C. Wicks at Valley Junction. Some members of both crews had brought a lunch, however, Claimant, along with other crew members, including Foreman Wicks, did not bring a lunch. Instead, they left in Claimant's assigned crew truck, traveled to a local Hardee's Restaurant, where they washed up, picked up their lunches and returned to the job site. It is not disputed that Supervisor Goodwin observed them leaving the property and waved at them. Nor is it disputed that Claimant and all of the individuals who accompanied him had returned to the work site and were performing their assigned tasks by 12:30 P.M.

On October 10, 1994, Claimant received the following:

"An investigation will be held at 9:00 a.m. Friday, October 14, 1994, in the Conference Room, Terminal Operations Building, NEEB, Venice, Illinois, to develop the facts, discover the cause and to determine your responsibility, if any, for alleged failure to perform your duties as Foreman, and for your alleged failure to comply with instructions issued to you by Assistant Track Supervisor Goodwin in that you were absent from your assigned work area, without permission, at Valley Junction between the approximate time of 11:55 a.m. to 12:30 p.m. on Friday, October 7, 1994.

This investigation is to determine if any Operating Rules, Safety Rules or special Instructions were violated in connection therewith, particularly, but not limited to, Rules 'B', 'M', 'N', and 'P'."

Track Foreman Wicks was also issued a letter of charges identical to those leveled against Claimant.

At the Hearing, Claimant reiterated that he had indeed conversed with Track Supervisor Guion concerning Supervisor Goodwin's instructions. In that connection, four of Claimant's fellow employees, including Foreman Green, testified that they too had "understood" that it was alright to leave the property "as long as they were back by 12:30 p.m." Moreover, when Supervisor Goodwin passed Claimant, et al., on their way to Hardee's and waved to them, Claimant "thought that Lonnie (Guion) had communicated with Henry (Goodwin) as far as going to Hardee's and coming back before the 12:30 p.m. deal."

At the Hearing, Track Supervisor Guion conceded that he had spoken to Claimant in relation to the lunch hour, but recalled that the interchange had been "on another occasion, at a different location." With regard to Foreman Green's corroboration of Claimant's recollection, Mr. Guion stated:

"Mr. Green came in and asked me something about it. I do not know who else was around at the time, but Mr. Green did ask me about it. And my reply to him was, if it was not abused, I wouldn't mind. But it would be abused, so it will not be allowed. And that's what, that's what our conversation was. I don't know who else was in the background at the time."

On October 21, 1994, Carrier apprised Claimant of the following:

"The charges were proven at the above hearing. This is to advise you are here by (sic) suspended from the service of this Company for a period of thirty (30) days beginning October 22, 1994.

You will also have to serve the fifteen (15) days suspension which was held in abeyance for a Rule M and F violation which occurred on June 21, 1994. You may return to work December 6, 1994."

For his part, Foreman Wicks was found guilty of the identical charges with which Claimant was charged, however, Mr. Wicks was issued a letter of reprimand only.

On November 4, 1994, General Chairman Roberds presented a claim on behalf of Claimant for "all pay Claimant lost due to the excessive discipline" assessed by Carrier.

A careful review of the record convinces us that there was indeed, a great deal of confusion surrounding this issue. Although Supervisor Goodwin's directive did not constitute a "new" policy, it was meant to make clear that an heretofore "occasionally enforced" policy would now be uniformly enforced.

Importantly, however, each of the witnesses who testified seemed to have a slightly different understanding of the directive, dependent upon where on Carrier property they were working, and what facilities were available at those locations. It is also clear that Supervisor Goodwin's pronouncement came as a result of an employee "taking advantage" of the privilege, and frequently returning later than the 12:30 deadline.

Hence, the phrase "as long as you are back by 12:30 p.m." understandably took on added significance for Claimant and others inquiring as to what the "real" rule meant.

Although Mr. Guion may not have been able to recall the specifics of the conversation to which Claimant alluded, the fact that three additional witnesses also testified that it was their "understanding" that it was "okay" to leave for lunch, as long as they returned at the requisite time, strongly reinforced Claimant's testimony. Further, we found Foreman Green's testimony particularly enlightening as he was not directly involved in this dispute, nor did he stand to gain anything by offering his understanding of the lunch time policy.

In the final analysis, we find no reasonable rational for Carrier's decision to assess Claimant greater discipline than was assessed to Foreman Wicks for the same offense. Based on the facts and circumstances on this record, the imposition of a 30 day suspension was unreasonably harsh and unjustifiably disparate disciplinary action. For those reasons, we shall reduce the discipline imposed by Carrier to a letter of reprimand.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 4th day of March 1997.