

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32060
Docket No. MW-32609
97-3-95-3-494**

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: (
(Chicago Central & Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension imposed upon Machine Operator W. A. Miller for alleged violation of Rules 1.6 and 1.15 because of quarrelsome and discourteous conduct with Assistant Roadmaster J. L. Seibert on June 23, 1994 and failure to report for duty and protect assignment at the designated time and place with necessary equipment on Wednesday, June 22 and Thursday, June 23, 1994 was on the basis of unproven charges and in violation of the Agreement.**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the benefit of the remedy prescribed by the parties in Rule 35(g)."**

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 has been employed by Carrier for approximately six years. At the time this dispute arose, Claimant was working as a Mobile Machine Operator at Fort Dodge, Iowa, under the supervision of Track Foreman J. Weepie and Assistant Roadmaster J. Seibert. Claimant's assigned tour of duty commenced 0700 to 1530 hours, with a 30 minute lunch period.

On June 22, 1994, Claimant, who traveled to work with fellow employees, arrived at the designated tie up area at 6:45 A.M. On that morning, shortly before 7:00 A.M., Assistant Roadmaster Seibert assembled the gang for a safety meeting. Prior to the onset of the meeting, Claimant became ill and had to use the restroom. Fellow gang member T. Kaufman preceded Claimant to the restroom, however, when Claimant informed him that he was sick, Kaufman allowed him to use the restroom facilities first. At approximately 7:10 A.M., Claimant returned to the location where the gang was assembled.

Assistant Roadmaster Seibert, who observed Claimant's tardy arrival, but was uninformed about the reason, instructed Foreman Weepie to "tell him to be up here with the rest of the guys at 7 o'clock." However, Foreman Weepie forgot to speak to Claimant on June 22, 1994 as he had been instructed.

The next morning, June 23, Claimant again arrived at the work location at approximately 6:45 A.M. Shortly before the 7:00 A.M. safety meeting, it began to sprinkle. Claimant returned to his vehicle to retrieve a rain coat and rubber boots. By the time he returned, Claimant was tardy for the second consecutive day. Assistant Roadmaster Seibert, apparently assuming that Claimant had defied his earlier admonition (which Foreman Weepie had forgotten to deliver) confronted Mr. Miller with: "You need to get your ass up here with the rest of the guys at 7 o'clock."

Claimant, who took exception to the Roadmaster's "tone and language", retraced his steps, "got in the face of" the Assistant Roadmaster, and exclaimed: "I don't like the way you talked to me when I came up, you know, saying get my ass up here." When the Roadmaster did not respond, Claimant escalated the incident by asserting in words or

substance: "I'll bet you couldn't pass a piss test, and wouldn't that make your life miserable."

As a result of that outburst, Claimant was served a Notice of Investigation. The Hearing was held on July 15, and on July 25, 1994, Claimant was informed that the Carrier had found him guilty of "quarrelsome and discourteous conduct and failure to report for duty at the designated time and place." As a consequence, Claimant was assessed a 30 working day suspension.

The Organization protested the discipline, asserting that:

- 1) Claimant was disciplined for alleged offenses which were not shown to have any connection with the charges Carrier leveled against the Claimant.
- 2) Claimant complied with Rules 1.6 and 1.15 of the Agreement.
- 3) It is "apparent" that Supervisor Seibert "does not like" the Claimant.
- 4) Claimant's right to due process was violated.

Carrier denied the claim, premised upon:

- 1) Carrier's finding of guilt is supported by substantial evidence, and the record "clearly" indicates Claimant's guilt.
- 2) Carrier met its burden of proof, while the Organization did not.
- 3) The Organization's handling in this matter is "flawed", and therefore, not properly before this Board.

At the outset, the Organization asserted that Claimant was not properly apprised of the Agreement Rule(s) with which he was being charged. For its part, Carrier maintained that the Organization did not comply with the established appeal process. A careful review of the record evidence indicates that each of these assertions is without merit, and in no way could be construed as fatal procedural flaws.

Turning to the merits of the issue, Claimant was charged with violating the following:

Rule 1.15 "DUTY - REPORTING OR ABSENCE: Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must be alert, attentive and devote themselves exclusively to the Company's service while on duty. Without proper authority you shall not: Absent yourself from duty. Exchange duties or substitute others in their place."

Rule 1.6. "CONDUCT: Employees shall not conduct themselves in such a manner that the railroad would be subjected to criticism and/or loss of good will."

In addition, employees must not be (1) careless of the safety of themselves or others, (2) negligent, (3) insubordinate, (4) dishonest, (5) immoral, (6) quarrelsome and (7) discourteous. Violation of any of these rules will be considered sufficient cause for dismissal."

For his part, the Claimant insisted that he had not violated either of the aforementioned Rules, and that he had been "on time" for work citing his own testimony, in addition to that of his fellow employees. Further, the Organization strenuously maintained that because Claimant was on Carrier property prior to the requisite 7:00 A.M. start time, he could not be accused of not being "on time and available" for his duties.

The Organization and Claimant have begged the issue regarding Claimant's tardiness. In fact, Claimant was not "on time" or "available" for work at the 7:00 A.M. starting time on either of the dates at issue. Claimant's unfortunate but undisclosed discomfort on the morning of June 22 and lack of appropriate rain gear on June 23, 1994 do not negate the Assistant Roadmaster's reasonable assumption that he was indeed tardy on both June 22 and 23, 1994 in direct violation of Rule 1.15 of the Agreement.

With regard to Rule 1.6, it cannot be reasonably argued that Claimant's remarks to the Supervisor were inappropriate to the point of insubordination. We note that Assistant Seibert's approach was hardly gentle, but, in the circumstances, and in this

venue, the admonition "Get your ass up here with the rest of the guys", cannot be considered sufficiently provocative to justify Claimant's intemperate outburst.

While insubordinate behavior cannot be tolerated, there are two mitigating factors which we have considered in these particular circumstances which lead us to modify the discipline; (1) Foreman Weepie failed to deliver Roadmaster Seibert's message on the morning of June 22 and (2) This was the first disciplinary incident during Claimant's otherwise unblemished six year work history. Therefore, Carrier's imposition of a 30 working day suspension is excessive. Carrier is directed to reduce Claimant's original suspension of 30 working days, to 20 working days.

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 10th day of June 1997.