

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35506
Docket No. MW-35870
01-3-99-3-880**

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees
(I & M Rail, LLC**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) days’ actual suspension] imposed upon Mr. J. S. Roberts, effective September 3, 1999, for alleged violation of I&M Rail Link General Code of Operating Rules 1.6, 1.7, 1.13, CP Safety General Rule 0 and CP Safety Rule 14 on July 5, 1999 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File D-37-99-510-03-IM).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall be set aside and removed from Claimant J. Roberts’ record and he shall now be compensated for all lost wages, including but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, flex time, health and welfare benefits, and any and all other benefits lost as a result of said discipline.”**

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.

The Claimant established and holds seniority as a Class 1 Machine Operator. He was assigned as a Section Laborer to the Nahant Section Gang, under the direct supervision of Section Foreman S. Simmons and Roadmaster J. Manning at the time this incident arose.

Prior to the beginning of his shift on Monday, July 5, 1999, the Claimant and several co-workers were gathered in the crew room at section headquarters. Acting Foreman D. Dixon, who was also in the crew room, was on the telephone discussing the days' assignment with Roadmaster Manning. The Claimant asked Foreman Dixon, at least twice, to speak to Roadmaster Manning when Dixon finished his conversation. It is not disputed that Dixon simply hung up the phone without allowing the Claimant an opportunity to speak to the Roadmaster. Nor is it disputed that the Claimant wanted to speak to the Roadmaster to request time off from work to attend the funeral of a long time friend who had died that weekend. It is not disputed that when the Claimant demanded to know why Foreman Dixon did not honor his request, Dixon responded: "Because I'm the foreman and I can"; to which the Claimant muttered: "Dumb old bastard."

Shortly thereafter, the crew proceeded to the yard office to commence preparations for ballast dumping. For extraneous reasons that project did not materialize, but Foreman Dixon later asserted that the Claimant had refused to perform that work. However, when Foreman Dixon then asked for a volunteer to help the Speed Swing Operator attach a magnet to the equipment, the Claimant volunteered for the task. In doing so, however, he stated that he would "gladly" help the Speed Swing Operator because he would "rather work with somebody that's got some brains."

By certified letter dated July 7, 1999 General Roadmaster Holloway directed the Claimant to report for an August 11, 1999 fact finding Hearing to determine the Claimant's responsibility, if any, for allegedly calling Foreman Dixon obscene names and telling the Foreman that he would not unload ballast for him. Following the fact finding, the Claimant was informed that he had been found guilty of violating GCOR 1.6 items 3, 6 and 7; GCOR 1.7; GCOR 1.13; CP Safety General Rule 0 items 3, 6 and 7 and CP

Safety Rule 14. As a result, the Claimant was suspended for a period of 30 days, commencing September 3 through October 3, 1999.

On September 13, 1999, the Organization submitted a claim on behalf of the Claimant, which stated, in part pertinent to the name calling charge:

“Claimants’ friend of 12 years was killed in a tragic motor cycle accident over the July 4th weekend. Although Claimant spent much time grieving, he went to work on July 5th with the intent to request time off work to attend his deceased friend’s funeral.

Upon reporting for work, his immediate supervisor Don Dixon was engaged in a telephone conversation with the local Roadmaster, Jim Manning. Claimant made several inquiries to Mr. Dixon during the pendency of that phone call that he, Claimant, urgently needed to speak with Roadmaster Manning when Mr. Dixon finished his conversation. Mr. Dixon was certainly aware that Claimant requested to speak with the Roadmaster. Several witnesses, including Dixon, overheard Claimant’s repeated requests.

Instead, Dixon terminated the call without advising Roadmaster Manning that Claimant had requested to speak with him. Claimant, still grieving and upset that Dixon failed miserably in allowing Claimant to speak with his superior, was provoked by his supervisor into an argument.”

With regard to the Claimant’s alleged insubordination, the Organization contends that the testimony was “speculative” at best, and the Carrier had not proven the charge. Finally, the Organization asserts a procedural argument maintaining that the Hearing was not “fair and impartial” due to the “multiple roles” of General Roadmaster Holloway. The Organization contends that Holloway was the “prosecution, judge, jury and executioner” because he issued the notice of fact finding, conducted the Hearing and dispensed the discipline. The Carrier denied the claim, contending that the Claimant violated Rule GCOR 1.13 when he “refused” to follow his supervisor’s instructions to dump ballast.

With respect to the exchange with Foreman Dixon, the Carrier maintains that the Foreman was not “indifferent,” but rather “uninformed” of the circumstances

surrounding the Claimant's request to speak to Roadmaster Manning. According to the Carrier, Dixon was "concentrating" on his orders for the day, and intended to allow the Claimant to speak to the Roadmaster in a subsequent phone call. Further, the Carrier contends that, "by his own testimony" the Claimant is guilty of profanity and name-calling and in violation of the Rules for which he was cited, thereby rendering the discipline appropriate. Finally, the Carrier maintains that there is nothing in the Agreement that would prohibit Holloway from performing multiple roles in the disciplinary process, and that it is "normal as well as logical" for one person to assume those roles.

At the outset, the Organization asserts that certain procedural errors were serious enough to require modification of the discipline. The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of many Awards. While these Awards caution the Carrier against this practice because of the obvious due process risks involved, the better reasoned majority of these Awards also provide that, in the absence of Agreement language specifically prohibiting one officer from serving multiple roles, each case must be reviewed to determine if the employee's due process rights were actually compromised or prejudiced in any way. We are persuaded that the multiple roles filled by Hearing Officer Holloway did not result in any prejudice to the Claimant sufficient to compromise his right to a "fair and impartial Hearing."

Regarding the very serious charge that the Claimant refused to follow Dixon's directive to perform ballast dumpingwork, the evidence is inconclusive and we note that none of the co-workers witnessed any such refusal. In fact, the evidence of record tends to support the Claimant's contention that he fully intended to unload ballast, but was not required to do so when the unloading crew was not available.

Regarding the Claimant's undisputed use of disrespectful language to his supervisor, two eyewitnesses to the precipitating telephone incident, Backhoe Operator B. Wold and Assistant Foreman S. Simmons stated that the Claimant requested, "at least two (2) times," to speak to Roadmaster Manning, and that Dixon had heard each request. According to Messrs. Wold and Simmons, when Dixon hung up prior to allowing the Claimant to speak to the Roadmaster, the Claimant said: "Why in the hell did you do that?" Dixon replied: "Because I can. I'm the foreman." Clearly, neither the Claimant nor Dixon are blameless for these incidents. In fact, each professed a

dislike for the other, and forthrightly admitted that the incident(s) could have been “handled differently.”

The Board reiterates that the Claimant was not without fault in this situation, and we neither justify nor condone his disrespect toward his supervisor. While we empathize with the Claimant over the loss of his friend, his behavior toward Foreman Dixon was both inappropriate and intolerable. It is clear, however, that Dixon’s provocative and argumentative behavior exacerbated the situation, and must be considered in mitigation of the severity of the Claimant’s intemperate remarks.

Based on the particular facts and circumstances in this record, the imposition of a 30-day suspension was unreasonably harsh. For the reasons stated in the foregoing, the discipline imposed by the Carrier is reduced to a ten day suspension.

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 21st day of June, 2001.