

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37325
Docket No. MW-36949
05-3-01-3-581

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [suspended from service without pay for thirty (30) workdays] imposed upon Ms. C. A. Follmer for alleged violation of ‘. . . Engineering Department Rules 1.1.2, 1.6, 1.10, 1.13, 1.15, and 1.20, of the Maintenance of Way Operating Rules, effective October 1, 2000***’ in connection with alleged failure to perform work duties on November 8, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (2) The discipline [suspended from service without pay for twenty (20) workdays] imposed upon Mr. R. C. Jorgenson for alleged violation of ‘. . . Engineering Department Rules 1.1.2, 1.6, 1.10, 1.13, 1.15, and 1.20, of the Maintenance of Way Operating Rules, effective October 1, 2000***’ in connection with alleged failure to perform work duties on November 8, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (3) As a consequence of the violation referred to in Part (1) above, Ms. C. A. Follmer’s record shall be cleared of the charges leveled against her and she shall be compensated for all wage loss suffered.

- (4) As a consequence of the violation referred to in Part (2) above, Mr. R. C. Jorgenson's record shall be cleared of the charges leveled against him and he 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 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 C. A. Follmer has seniority dating from August 1976 and established and holds seniority in the Track Sub-department. Claimant Follmer received discipline several times since March 1996. Three of these incidents involved safety and poor work performance. Claimant R. C. Jorgenson has 28 years of service and established and holds seniority as a Track Laborer in the Track Sub-department.

In the instant case it is alleged that the Claimants were not performing their required duties. According to the Carrier, they were "killing time and hiding out from supervision so that they could avoid work." Track Engineer G. C. LaValley indicated that he knew that the Claimants had a coffee break at 9:20 A.M. because he saw them at that time in the headquarters building, being instructed by Foreman Hudacek to clean snow from four switches. LaValley next observed the Claimants in their truck reading the newspaper at 10:19 A.M., at which time LaValley confronted the Claimants regarding their failure to work. At the Investigation, Claimant Follmer testified that at 10:19 A.M., neither she nor Jorgenson had begun to shovel the four switches as instructed. The temperature that day in Duluth was in the high 20's. According to the Carrier, it is undisputed that the Claimants left the headquarters building less than one hour before the confrontation and had been driving around in the truck with the heater on before being observed by LaValley at 10:19 A.M.

By letter dated November 10, 2000, the Carrier directed the Claimants to report on November 16, 2000 for an Investigation, in which they were ". . . charged with failure to perform . . . duties, dereliction of duty, and failure to follow directions of a supervisor on a November 8, 2000 incident in Proctor." Following a postponement the Investigation was ultimately held on November 21, 2000.

Pursuant to the Investigation, Claimant Jorgenson was suspended for 20 calendar days and Claimant Follmer was suspended for 30 calendar days. The Board notes that the discipline imposed took into account the Claimants' prior disciplinary records.

The Organization claims that the discipline imposed upon the Claimants was unwarranted, harsh and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization claims that the Carrier has been unable to prove that the Claimants engaged in the acts alleged, and further, that even if they had engaged in such acts, the discipline imposed was unreasonably harsh. According to the Organization, the Carrier should now be required to clear the Claimants' records of any mention of the incident, to compensate them for all lost wages, including lost overtime, and to make them whole for vacation, holidays and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimants were afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. It considers the Claimants guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation leaves no doubt that the Claimants violated the applicable Rules.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325 and Third Division Award 16166.

After a review of the evidence, the Board finds that the Carrier proved that on November 8, 2000, the Claimants did not perform their assignment as directed, as acknowledged during the Investigation by Claimant Follmer. The Claimants did not comply with the directions that were issued to them, in violation of the Rules cited by the Carrier. "It is . . . self evident that an employee must faithfully and diligently perform his duties. He owes the employer a fair day's work for a fair day's pay." See Public Law Board No. 458, Award 1.

Based on the evidence, including the Claimants' prior disciplinary records, the Board finds that the discipline imposed was reasonable and we will not disturb it. It is well established that the Board will not interfere with the assessment of discipline unless ". . . it clearly appears that the disciplinary action was discriminatory, unjust, unreasonable or arbitrary so as to constitute an abuse of sound discretion." See Third Division Award 24229.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of January 2005.