Award No. 17228
Docket No. MW-16694

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The discipline assessed to Assistant Extra Gang Foreman Leo Rivers and to Trackmen James Dillon, Paul Dreimiller, Colin Kenneally, Leslie Hoffman and William Conway because of 'Insubordinate refusal to perform work as assigned resulting in delay to the work', which alleged offense occurred "on October 22, 1965, was unwarranted and improper." (System Case Nos. 3.66 MW, 4.66 MW, 5.66 MW, 6.66 MW, 7.66 MW and 8.66 MWO)

(2) Each of the employes named in Part (1) be allowed pay for time lost during the 'period of seven (7) days effective October 23, 1965' and that each of their records be cleared of 'notification of discipline'.

(3) The Carrier violated the Agreement when it did not allow the aforenamed employes eight (8) hours' pay for October 22, 1965. (System Case No. 16.66 MWO)

(4) Each of the aforenamed employes be allowed a wage adjustment to provide them with the difference in pay between what they did receive and pay for eight (8) hours for October 22, 1965."

OPINION OF BOARD: The record shows that on October 15, 1965, Tie and Surfacing Gang No. 3 was assigned to surfacing track on what is referred to as the Albany Main between Delanson and Duane. In order to bring this gang up to its authorized strength of 10 men, the Claimants herein, one assistant extra gang foreman and five trackmen from Kenwood, were instructed, on a daily basis, to report to the Extra Gang Foreman at Delanson to assist in the work.

On October 22, 1965, the Claimants were at the work site near Delanson when the Extra Gang Foreman arrived at the work location with the necessary track machinery, and had performed some work on the track, such as removing track spikes from certain ties. When the Extra Gang Foreman arrived, he apprised the men of the train movements scheduled for that location that day, and at that time some question was raised as to whether

the men would be able to return to Kenwood during their regular eight hours, and the manner in which they would be paid if required to travel after their assigned quitting time in order to return to their headquarters at Kenwood. There is some dispute in the record as to what was actually said by the Claimants and by the Foreman of Extra Gang No. 3, but the Claimants did return to their headquarters at Kenwood apparently on instructions of the Foreman of Extra Gang No. 3. They were then instructed by the Assistant Track Supervisor to return to the tie gang. They started back toward the work site near Delanson, but were stopped enroute by the Track Supervisor who advised them that they were out of service at approximately 12:45 P.M., October 22, 1965. On October 25, 1965, each of the Claimants was notified:

"Please arrange to report to my office at Albany, N.Y. at 9:00 A.M. D.S.T. Friday, October 29, 1965, for a formal hearing.

"This hearing is being held to determine responsibility for your insubordinate refusal to perform work as assigned with the tie gang working north of Delanson on Albany Main on October 22, 1965 and resulting delay to this work.

"Assistant Track Supervisor David Hoadley and Extra Gang Foreman Frank Lavech and Carmen Young will appear at this hearing as witnesses.

"In accordance with the terms of the effective agreement with the Brotherhood of Maintenance of Way Employees, you may be accompanied at this hearing by a representative of your choice.

"Please acknowledge receipt of this letter on the attached copy."

The Claimants were held out of service pending hearing, which was held on Friday, October 29, 1965. As a result of the hearing the Carrier found Claimants guilty of insubordination, and each of them was suspended from service for a period of seven calendar days, October 23 to October 29, 1965, inclusive. All of the Claimants returned to service November 1, 1965, with the exception of William Conway, who had returned to college on October 29, 1965. A transcript of the hearing conducted on October 29, 1965, has been made a part of the record.

The Petitioner contends that the charge placed against the Claimants was not sustained by the evidence adduced at the hearing held on October 29, 1965, and that, therefore, Claimants are entitled to the reparations set forth in Parts (2) and (4) of the claim.

While the Board is reluctant to interfere with the administration of discipline by a Carrier, we do adhere to the principle that it is incumbent upon the Carrier to substantiate by positive evidence the charge or charges upon which the discipline is based. The Board has carefully reviewed the transcript of the hearing, and it is our conclusion that the Carrier has not proved that the Claimants were guilty of insubordination. We will, therefore, sustain the claim, except that Claimant William Conway will not be allowed any compensation for Friday, October 29, 1965, it being shown in the hearing that he left early that morning to return to college.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained, except that Claimant William Conway will not be allowed pay for October 29, 1965.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June 1969.

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