

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19293
Docket Number MW-19543

Thomas L. Hayes, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company (Western Region)

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

(1) The dismissal of Assistant Foreman Ellis Walker was without just and sufficient cause and on the basis of unproven charges (System File MW-CGO-70-101).

(2) Assistant Foreman Ellis Walker be reinstated with seniority and all other rights unimpaired and that he be compensated for all wage loss suffered in accordance with Rule 20(g).

OPINION OF BOARD: Claimant, Ellis Walker had been in the Carrier's service for fifteen years when he was asked by a foreman to go to work on Saturday August 22, 1970, a rest day for Claimant, who had been on vacation the previous three weeks. Claimant did not want to go to work and told the foreman this but, when asked a second time, he agreed to report and did so late in the morning of August 22, 1970.

When he arrived at work Claimant met Ernie Bradley, Track Superintendent, who told him to go over and fix the switch. Bradley said if he had thought Walker was unable to work he wouldn't have assigned him on August 22, 1970.

Claimant and section laborers restored the damaged track and late in the afternoon of August 22, 1970, Assistant Superintendent DeBusk, new to his rank and unknown to Claimant and the section laborers, questioned Claimant as to whether he was working and subsequently accused Claimant of having been drinking. A quarrel ensued and Claimant used offensive language. There is some evidence that the Assistant Superintendent needled Claimant.

The Assistant Superintendent said he noticed an odor of alcohol coming from Claimant and that Claimant weaved. On the other hand, the Section Laborers testified to the effect that Claimant was not affected by the use of alcohol. Their story is consistent with the statement of Superintendent Bradley that if he had thought Claimant had been unable to work on August 22, 1970, he wouldn't have assigned him on that day.

Here we are dealing with an employee with fifteen years of service to the Carrier, with no blemish on his record of which we are aware prior to the events of August 22, 1970. The employee had just finished a three week vacation, was on a rest day, and came to work against his inclination because he was needed

by Carrier. He shared a modest amount of alcohol with friends before he knew of the emergency at work, labored all day to alleviate the emergency and late in the day got in a quarrel with a new assistant superintendent and used offensive language.

The Board finds that Claimant was not intoxicated on August 22, 1970, that he performed work that he could not have accomplished in a drunken condition, that Claimant came to work against his inclination, that he had something to drink before he came because he had finished up vacation, was on rest day and did not expect to go to work.

There is persuasive evidence in the record that Claimant "cussed" or used abusive language directed to an officer of the company and some evidence of at least partial provocation on the part of Assistant Superintendent DeBusk.

If the facts were as alleged by Assistant Superintendent DeBusk then certainly Track Superintendent Bradley would have or should have stopped Claimant from working.

In the light of all the facts, we feel that Carrier failed to take into proper account the long years of service of Claimant; the circumstances under which he reported to work, including the fact that he had no expectation he would be called, the testimony of the section laborers, the difficult work performed by Claimant during the day, and the indication from Track Superintendent Bradley that he would not have let Claimant go to work if Claimant had been unable to do so.

The language used by Claimant justifies discipline but the Carrier's action in dismissing him was excessive. We therefore decide that Claimant is to be reinstated but without back pay. Dismissal under the circumstances in this case would be out of proportion to the actual events.

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 Employees involved in this dispute are respectively Carrier and Employees 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

Award Number 19293
Docket Number MW-19543

Page 3

That the Agreement was violated in accordance with Opinion.

A W A R D

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: EA Killen
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of June 1972.