

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21337  
Docket Number MW-21093

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: ( Brotherhood of Maintenance of Way Employes  
( Cedar Rapids and Iowa City Railway Company

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

(1) The Carrier's suspension from service of Sectionmen Frank Perez, Lawrence Aakre, Paul Malatek and David Malatek from December 31, 1973 through January 7, 1974, both dates inclusive, was without just and sufficient cause and on the basis of unproven and disproven charges (System File CR&IC-D-564).

(2) The second hearing conducted by the Carrier was improper and invalid.

(3) The record of the above-named employes be cleared of any entry made as a result of the aforesaid discipline.

(4) Each of the above-named employes shall now be allowed six days' (48 hours) pay at the rates applicable to their positions on each claim date.

OPINION OF BOARD: This is an appeal of a disciplinary action in which the Board has before it the parties' Submissions and in addition has the benefit of the parties' oral arguments made in a hearing conducted by the Board on October 14, 1976.

The subject discipline involves a five (5) day suspension which was dispensed to the four Claimants following a December 20, 1973 hearing on the charge of refusing to ride on a company truck to the job site at Palo, Iowa, on December 8, 1973. The Organization asserts that the hearing evidence does not support the discipline and additionally, that no consideration should be given to a second hearing which was held on January 25, 1974 over the Organization's objections. 2

The Carrier had no authority under Rule 19 of the Agreement (Discipline and Grievances) to conduct the second hearing in January 1974 and accordingly the record of the second hearing will not be considered in the disposition of this dispute. 3

The incident which led to the discipline arose from a work assignment involving eight trackmen, including the four Claimants, one truck driver, and Track Foreman Richard Lewis. All of these employes assembled at a reporting point at 7:00 A.M. on Saturday, December 8, 1973, preliminary to traveling about forty-five (45) minutes to their work point for that day. The travel arrangements called for the Foreman, the truck driver, and one trackman to ride in the cab of a dump truck, with the remainder of the crew 4

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riding in the back of the truck which was enclosed. The weather was cold, with wind and a temperature 8 degrees above zero. Prior to December 8, the management had refused the employees' request to have another truck available for transport, so as to permit more men to ride in a cab rather than in the back of the truck; their request to drive to the work site in a private auto had also been denied. They renewed their request to use an auto on the morning of December 8 and were again denied by Foreman Lewis. After a brief period, the truck departed from the reporting point for the work site with four trackmen aboard, but without the Claimants who followed in an auto. The work assignment was performed satisfactorily, after which the Claimants returned by auto to their off-duty point.

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The significant fact in the foregoing concerns the mode of travel to and from the work site; however, it is difficult to piece together from the hearing record a clear picture of the events which caused the truck to leave for the work site without the Claimants and the Claimants to drive an auto to the work site. One of the most certain aspects of the incident is that Claimant Frank Perez, as the group's spokesman, was trying to persuade Foreman Lewis to change his decision against the use of an auto. It is also clear that Foreman Lewis definitely said no to the renewed request to use an auto. However, beyond this, the Foreman was extremely ambivalent in regard to whether he gave a direct order for the Claimants to ride in the truck and whether the Claimants definitely refused to obey such order. Indeed, Foreman Lewis emphatically stated that he did not give such an order while, on the other hand, Claimant Perez just as emphatically said that the Foreman did give such an order. The Foreman's testimony indicates that he viewed the situation as one in which the Claimants knew that they were to ride the truck and that their failure to get into the truck promptly manifested a refusal to ride the truck. Claimant Perez' testimony indicated that he viewed the situation as one in which he was negotiating for the use of the auto, with the intention of riding in the truck if his negotiations did not succeed. He stated that he and the other Claimants had in fact decided to board the truck but that it left the reporting point before they had opportunity to do so. The testimony of both Foreman Lewis and Claimant Perez established that, with the exception of Claimant Lawrence Aakre, no employe stated a refusal to ride in the truck. Claimant Aakre, who had just returned to work after a sick period, said that he did make such an express refusal and that he told the Foreman that he would not ride in the rear of the truck because in the Claimant's words: "I was full of germs and right next to pneumonia, and if he hasn't any respect for your health, you have to respect your own health."

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In assessing the foregoing, and the whole record, it is noted that the Carrier offered no evidence to rebut Claimant Aakre's contention that he refused to ride in the rear of the truck because of health considerations. This contention was timely made while the incident was in progress, and no evidence of record casts doubt on its authenticity. The discipline shall therefore be vacated with respect to Claimant Aakre and he shall be compensated for all time lost.

The evidence with respect to the remainder of the Claimants presents more difficulty because the ambivalence manifested in the testimony of Foreman Lewis strongly suggests that his words and actions at the scene of the incident did not clearly convey to Claimant Perez that the Claimants must board the truck promptly, without further discussion of the use of an auto, or be deemed to have refused to obey a direct order. The situation was ambiguous, to say the least, because Foreman Lewis insisted that he never issued a direct order to board the truck. However, on the whole record, it is concluded that the Carrier's evidence narrowly makes out that the Claimants' conduct amounted to a refusal to obey a management directive to ride the truck to the work site. They were aware that the truck was the intended mode of transportation before reporting for work and in addition, their prior request to use an auto had been denied. Also, since the Claimants stated that they intended to ride the truck, but did not because it left without them, it is pertinent to note that the truck departed from the reporting point in circumstances which allowed the Claimants to flag it down if they had made adequate effort to do so. Consequently, it is concluded that the Carrier's evidence supports the charge with respect to the Claimants with the exception of Claimant Aakre and that discipline therefore was warranted. 7

However, the quantum of discipline is disproportionate to the seriousness of the offense involved. The Claimants did persist in their requests to use an auto for the forty-five (45) minute drive to the work site; however, this is understandable in view of the fact that the temperature was 8 degrees above zero, so their persistence cannot be characterized as unreasonable. Also, their use of an auto in no way impaired the quality or efficiency of the crew's performance of the work task for the day and in addition, as previously indicated, Foreman Lewis could have advanced his viewpoint with much more clarity than he did. In these circumstances, and on the whole record, the five (5) day suspension will be reduced to a one (1) day suspension which is appropriate for and commensurate with the offense committed. 2

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

The discipline was excessive.

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Claim sustained with respect to Claimant Lawrence Aakre.  
Claim sustained in part for the remainder of the Claimants in that the  
five (5) day suspension shall be reduced to a one (1) day suspension  
as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.

