

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22160
Docket Number MW-22207

Abraham Weiss, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Illinois Central Gulf Railroad

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

(1) The suspension of seven (7) days imposed upon Messrs. K. D. Cockrum, C. L. Cockrum, R. W. Burzynski, B. J. Wallace, A. G. Albers, R. J. LaForge, B. A. Minton and B. J. Webster and the suspension of thirty (30) days imposed upon Mr. J. R. Schroeder was unwarranted, without just and sufficient cause and an abuse of justice and discretion (System File SL-192-T-76/134-296-222 Spl. Case No. 1059 MofW).

(2) The claimants be compensated for all wage loss suffered."

OPINION OF BOARD: The employees involved in this claim were disciplined because they left the work site to seek shelter during a rain at about 9:30 a.m. on July 27, 1976, after having asked supervision for permission to leave and having been denied such permission. Claimants, during the investigative hearings, defended their actions on the allegation that "lightning and tornado warnings were out and the fact that we didn't have any track torn out." Supervision, at the hearing, characterized the rainfall as "medium," and stated that they did not believe the conditions were dangerous. Both the employees involved and management testified that it was not unusual to work in the rain.

Claimants also based their action on Rule 29 of the applicable Agreement, governing work during inclement weather:

"Rule 29 (a) Hourly paid employees required to report at the usual starting time and place for the day's work, and when weather or other conditions prevent work being performed, will be allowed a minimum of 3 hours; if held on duty over 3 hours, actual time will be paid for.

(b) Employees released under paragraph (a) of this rule and called back in emergency within their regular assignment for further work will be paid 8 hours (including the 3 hours for reporting)."

Claimants understood Rule 29 to mean, Petitioner states, that they were not required or expected to work in the rain "unless an emergency situation existed or unless the work had been started rendering the track impassible."

Effective April 1, 1976, Rule 29 was eliminated by Letter of Agreement. Considerable testimony was introduced at the Hearing as to whether claimants (or, for that matter, various members of supervision of the gang of which claimants were members) were aware of the elimination of Rule 29 and revisions of Rule 18 (c) effective April 1, 1976. Petitioner also maintained that most of the claimants were never furnished a copy of Rule "P" of "Rules for the Maintenance of Way and Structures," which the claimants were charged with violating. Rule P states in pertinent part:

"...Employees must not absent themselves from their duties nor substitute others in their place without proper authority...."

Rule 18 (c) as revised reads:

"When less than 8 hours are worked at the request of employees only actual time worked or held on duty will be paid for."

Carrier states that on March 24, 1976 all of the changes in the rules were sent to all of the divisions with an explanation, as follows as they relate to Rules 18 (c) and 20:

"Rule 18 (c) - Employees will still be required to obtain permission to lay off for a portion of a work day."

"Rule 29 - This rule was eliminated. Employees will now be required to work in any type of weather. An employee who shows up will be entitled to 8 hours pay unless he can obtain permission to lay off under Rule 18 (c)."

Petitioner argues that under many prior Board decisions, an employee need not perform an act which could endanger his own health, safety and/or welfare of others, and that the lightning strikes in the immediate vicinity made it unsafe to work out in the open. Hence, it concludes, claimants were justified in leaving the work site to seek shelter from the storm.

Petitioner also argues that the 30-day suspension for Claimant Schroeder and the 7 day suspension imposed upon the other claimants for precisely the same alleged offense on the same date constitute an arbitrary and capricious imposition of discipline.

Carrier disputes the intensity of the storm, characterizing it as "medium rain" and not dangerous, and cites testimony by its supervisory employees and by the claimants that it was not unusual to work in the rain. Moreover, other members of the gang remained on the job, working with supervision, and performed their work without incident.

More fundamental, however, in Carrier's view, is that the rules do not give employees the prerogative or authority to leave work or absent themselves at will and without permission. The fact that claimants requested permission from their supervisors to leave work on the date in question demonstrates their knowledge of the fact that they had to request permission to leave, for whatever reason. This, Carrier maintains, indicates their awareness of the rules and appropriate behavior under the circumstances. As added confirmation, Carrier cites the testimony of the Track Supervisor at the investigation that claimants knew Rule 29 had been eliminated because he "told them." This statement was not contradicted in the record.

That claimants left work without permission is uncontroverted in the record before us. Given the conflicting statements as to the state of the weather, and whether it was unsafe to work, a few facts, proffered by either party, would have been helpful to this Board in coming to a conclusion as to whether a safety or danger factor was present. The fact that eight other employees, plus their supervisor, worked in the rain on that same day without incident and that four carrier supervisors testified that the weather presented no danger to the employees is persuasive. We, therefore, are of the opinion that claimants were in the wrong and in violation of the applicable rules requiring permission to leave their duties. Accordingly, we will sustain their 7 day suspension, except for Claimant Schroeder, to whose case we will now turn.

Claimant Schroeder's suspension, as noted in the Statement of Claim, was for 30 days. Schroeder, according to the record, was the first to request permission for himself and for the other claimants to leave on account of the rain, a request that was denied by the Supervisor in the presence of other employees. Carrier justified Schroeder's 30 day suspension (compared to 7 days for the other claimants)

on the grounds that his attitude encouraged the other employes to leave work and that he instigated the disruption of the work force, and that his personal record was worse than that of the other claimants and hence warranted a greater measure of discipline. In substantiation of the latter charge, Carrier submitted an exhibit (Exhibit B-9).

Exhibit B-9 does not substantiate Carrier's case. As of the time of the incident on July 27, 1976, all that Schroeder's personal record shows is three injuries, with no lost time and no indication of employe fault. There is no indication or evidence of previous discipline or warnings of rule infraction or violation of safety rules.

The record indicates that several of the claimants independently approached the acting Foreman to ask permission to leave because of the rainfall. The record also indicates that a half hour elapsed between the time Schroeder first asked permission to leave and the time he and several of the other claimants left their jobs, and that another claimant left his job about one hour after Schroeder made his request. Taken together, these events do not support Carrier's contention that Schroeder was a ringleader.

We are of the opinion that Carrier has not made a case for assessing a 30 day suspension on Claimant Schroeder while imposing a 7 day suspension on the other claimants. This Board finds that Schroeder's 30 day suspension was excessive and that suspension should be for the same period as meted out to the other claimants; i.e., 7 days.

Accordingly, Claimant Schroeder's suspension should be reduced from 30 days to 7 days, and he should be compensated for the wage loss suffered.

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 22160
Docket Number MW-22207

Page 5

That the Agreement was violated to the extent shown in Opinion.

A W A R D

Claim sustained in part and denied in part in accordance
with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1978.