

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23099  
Docket Number MW-23189

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Consolidated Rail Corporation

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

(1) The dismissal of Trackman J. L. Guarnieri, Jr. for alleged insubordination and fighting with a company employe was without just and sufficient cause, arbitrary, capricious, unwarranted and an abuse of justice and discretion (System Docket 385).

(2) Trackman J. L. Guarnieri, Jr. be reinstated with seniority, vacation and all other rights unimpaired, his record be cleared and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Mr. J. L. Guarnieri, Jr., the Claimant, was employed as a trackman by the Carrier and was assigned as the "backhoe" operator for the gang. Claimant was charged with insubordination and for fighting with a company employe while on company property, both incidents occurring on October 4, 1978. Claimant was removed from service as of that date. After two delays a trial and/or investigation was held on November 3 and 6, 1978.

Study of the record supports Carrier's position that proper and timely notice was given the parties as required by the Agreement. A copy of the transcript of the trial was made a part of the record and it reveals that Claimant was given a fair and impartial hearing. He was given full opportunity of representation by his duly accredited representative, presented witnesses in his behalf and was permitted to question Carrier's witnesses.

On October 4, 1978 Claimant was assigned to a gang under the supervision of Acting Foreman C. Cherry. The gang was assigned to cribbing, removing dirt between the ties, and installing switch ties at Longs Crossover. About 10:00 A.M., the record is not clear as to what occurred prior to that time, Claimant was sitting in the bus and Acting Foreman Cherry instructed Claimant to get out of the bus and assist with the cribbing and other work being performed at that work location. Claimant refused to do so stating that he had instructions to pick up the backhoe located some distance from Longs Crossover. The record is confusing as to when or who gave Claimant the orders to pick up the backhoe. X-

X-2  
Irrespective, Claimant was basically a "trackman" and was working under the direct supervision of the Acting Foreman. When he failed to respond to instructions, as the record clearly shows, he was guilty of insubordination. The record shows later in the day that the backhoe would not be needed until after the cribbing had been completed, indicating clearly that Cherry was well within his jurisdiction to require Claimant to perform as a trackman until the backhoe was needed. The controlling factor is that the Claimant was working under the direct supervision of Cherry and he failed to obey a lawful order.

Y-3  
The charges of fighting with a company employe while on company property poses some problems. The evidence produced in the trial was conflicting; however, the Board concludes, after carefully studying the entire record, that Claimant's argument that Cherry was the aggressor outweighs the Carrier's argument. (While this Board does not condone fighting between employes on the property, it cannot, in view of the evidence produced, condemn the Claimant for defending himself.) Testimony supports Claimant's claim that he attempted to avoid the onslaughts by Cherry but was unsuccessful and had to defend himself.

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The Board held a hearing before this Referee on October 14, 1980 but neither the Claimant nor the Carrier was present.

Y-4  
While the Board finds Claimant guilty of insubordination, we find the punishment excessive. We, therefore, award reinstatement of Claimant with full seniority and all other rights unimpaired, but with a one-year penalty without back pay, and we further award compensation for wages lost, less outside earnings, commencing October 5, 1979 and continuing until reinstated.

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 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 discipline imposed was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

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By Order of Third Division

ATTEST: *A.W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1980.