

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23564
Docket Number MW-23819

Rodney E. Dennis, Referee

PARTIES TO DISPUTE

(Brotherhood of Maintenance of Way Employees
(
(The Denver and Rio Grande Western Railroad Company

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

(1) The twenty-five (25) day suspension imposed upon Trackman Juan A. Garcia for alleged insubordination, intemperance and willful neglect of duty was arbitrary, capricious and on the basis of unproven charges (System File D-47-79/MW-30-79).

(2) Trackman Juan A. Garcia shall be compensated for all wage loss suffered and have the charges removed from his record."

OPINION OF BOARD: Claimant Juan A. Garcia is an extra gang laborer. On August 29, 1979, he was instructed by his Foreman to set spikes and to give up a jack hammer to a younger man. It is alleged that rather than comply with these instructions, he left the work area to discuss the matter with the General Chairman.

The General Chairman was not available until Monday, September 3, 1979, so Claimant obtained permission to be off from work for two days. When Claimant returned to work, on September 11, 1979, he was suspended from service.

The hearing on the matter was eventually held on Monday, September 17, 1979. Claimant was found guilty of insubordination, intemperance, and willful neglect of duty as the result of the incident that took place at about 9:00 a.m. on Wednesday, August 29, 1979. He was assessed a 25-day suspension, which was to run from September 11, 1979, through October 15, 1979.

The Organization appealed the suspension; the appeal was denied at each step and the dispute was placed before the Board for resolution. A copy of the transcript of the hearing has been made a part of the record of this case.

A review of that transcript reveals that the Foreman, as well as Claimant, were both culpable in this situation. While Claimant did question the Foreman's order, he did not leave the work site until the foreman became angry and yelled at him. This is one of many cases this Board has handled wherein track gang foremen and laborers have been involved in exchanges. Voices are raised and profanity is used. A foreman who acts in this manner

cannot expect that his orders will not provoke a like response. When an employe is disciplined as a result of a situation in which a foreman has been provocative, the legitimacy of that discipline will be questioned.

In the instant case, it is this Board's opinion that Carrier has not administered discipline to Claimant in a proper manner. This Board can find no basis in the record for not allowing Claimant to return to work on September 11, nor is there support for the fact that no written reasons were given Claimant to explain his suspension.

We are of the opinion that Carrier was arbitrary in the suspension prior to the hearing and therefore will reduce Claimant's suspension, deleting the period from September 11, 1979, to and including September 25, 1979. Claimant's suspension shall thus run from September 26, 1979 to October 15, 1979. Claimant shall be reimbursed for all wages lost from September 11, 1979, to and including September 25, 1979.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

A W A R D

The discipline shall be reduced in accordance with the ~~the~~ Opinion.



NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March 1982.