

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23975
Docket Number MW-23947

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Illinois Terminal Railroad Company

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

(1) The dismissal of Laborers S. J. Musgrave and L. L. Osborn for failure 'to repair a broken rail or rails subsequent to twelve noon on December 18, 1979' was excessive and wholly disproportionate to the offense with which charged (System Files ITRR 1980-12 and ITRR 1980-13).

(2) The claimants be reinstated with seniority and all other rights unimpaired and they be compensated for all wage loss suffered."

OPINION OF BOARD: Prior to their dismissal, Claimant S. J. Musgrave and L. L. Osborn were employed by the Carrier as trackmen. At the time of the incident involved here, Claimants were working under the supervision of Foreman Robert Smith. The Claimants and Trackman R. L. Reed (also working under Foreman Smith) had been notified that they were to be laid off at the close of work on December 18, 1979 by Chief Engineer J. M. Bierne.

Prior to the close of work on December 18, 1979 Supervisor Hilligoss made it known that Foreman Smith's crew was to be used to replace three (3) broken rails that day. The Claimants, Trackman Reed and the other crew members were engaged in such work until they left the work site at 3:30 PM in accordance with their furlough notice.

Subsequently, Claimants received notices dated December 29, 1979 informing them that a formal investigation was to be held on January 7, 1980 in regards to the charge that they failed to repair a broken rail or rails subsequent to 12:00 noon on the subject date after being ordered to do so by Track Supervisor S. Hilligoss.

Subsequent to the investigation the Claimants were notified by letter dated January 16, 1980 that they were found in violation of Carrier's Rule H and dismissed from Carrier's service.

The Carrier maintains that the Claimants walking off the job after being ordered by their supervisor that they would have to work until the repairing of the broken rails was completed, constitutes acts of "desertion from duty," "insubordination," and "willful neglect," prohibited by Carrier's Rule H.

Supervisor Hilligoss testified that the broken rails made the tracks impassable for trains and that he instructed Claimants to work until the rails were repaired. Supervisor Hilligoss further testified that the Claimants stated they would not work past their regular quitting time. Further, Supervisor Hilligoss testified that he contacted his immediate supervisor, Assistant Chief Engineer Metcalf who came to the scene.

Assistant Chief Engineer Metcalf testified that since there was some question in Claimants' minds concerning the lay-off notice, he explained the operation of the furlough rule to them. The Assistant Chief Engineer testified that he explained to Claimants that they would have to continue to work until the work was completed and that the Claimants walked off the job at 3:30 PM.

Carrier maintains that in light of the Claimants' short service with the Carrier (Musgrave, 15 months; Osborn, 14 months) coupled with Claimants' failure to appear at the investigation, the penalty of dismissal was justified. Further, the charges of desertion from duty and insubordination warrant discharge of Claimants (Desertion from Duty: Third Division Awards 8832, 10034, 12255, 12492, 12985, 14601, 19698 and 19791; Insubordination: Third Division Awards 15828, 16074, 16118, 16281, 16347, 17154, 17153 and 20189).

Organization maintains that Claimants were not insubordinate nor in any way attempting to impugn the authority of their supervisors when they did not remain on duty after 3:30 PM on December 18, 1979 but were instead following the written instructions issued to them by Chief Engineer Bierne. Track Supervisor Hilligoss testified that the Claimants informed their Foreman that they were leaving and that Foreman Smith knew that the Claimants had letters of furlough. Assistant Chief Engineer Metcalf also testified that the Claimants had been furloughed by Chief Engineer Bierne.

Organization asserts that the dismissal of Claimants was excessive and wholly disproportionate under the circumstances peculiar to this case. The Organization notes that a "30 day suspension (held in abeyance)" was imposed upon Trackman Reed while dismissal was imposed upon the Claimants for the same offense. The Organization maintains that the disparity between the supreme penalty of dismissal imposed upon the Claimants and the suspension imposed upon Trackman Reed for the same offense on the same date constitute arbitrary and capricious discipline (Third Division Awards 1989, 15751, 22006, 22160 and 22480).

Upon a careful consideration of the record in this matter, the Board concludes that disciplinary action was warranted. However, in these circumstances the Board concludes that the discipline was excessive. The time that claimants have been out of service should constitute sufficient discipline. The Board concludes that Claimants shall be restored to service with seniority and other rights unimpaired, but without any compensation for time lost while out of service.

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

That the discipline was excessive.

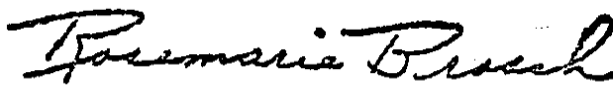
A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By



Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of August 1982.