

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24233
Docket Number MW-24317

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: {Brotherhood of Maintenance of Way Employes
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 {Seaboard Coast Line Railroad Company

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

(1) The thirty (30) calendar day suspension imposed upon Trackman G. L. Gray for alleged insubordination was without just and sufficient cause and on the basis of unproven charges (System File C-4(13-GLG/12-39(80-30) G).

(2) The claimant's personal record be cleared and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: On December 17, 1979, Claimant G. L. Gray, was employed as a Trackman assigned to Rail Gang 8591 which was in process of renewing welded rail. The gang consisted of some 65 employes all assigned to various tasks in connection with the rail renewal. Work of the gang was spread out over some 1/2 to 3/4 miles along the track.

The testimony of Claimant is somewhat in conflict with that of his accuser, Assistant Foreman J. L. Thompson. According to the Claimant he was engaged in hardening down spikes. At first he was working behind the gang but as he progressed along the track he passed them and proceeded with his work until he was 50 to 100 yards ahead when he noticed the Assistant Foreman coming up the track calling. Claimant said the foreman contended he had been calling and "wasn't going to call any damn more". Claimant took exception to so called profanity and at being hollered at. Claimant told foreman "if you want me to do something, come and tell me and I'll do it". Claimant alleged foreman said he could get Gray "sent down the road", meaning he could get Claimant fired from his job. At that point the foreman called his superior, Foreman Ward of the incident and took Claimant to the crossing where they met Mr. Ward. The incident occurred around 4:30 to 5:00 in the afternoon. When they arrived at the camp car Claimant was informed he was being removed from service. Claimant denied ever refusing to perform tasks assigned by the foreman or talking back.

Arrangements for a disciplinary hearing were made and Claimant was advised accordingly. In the notice of hearing Mr. Gray was charged with violation of Rule 18 of Company Safety Rules in that he was insubordinate to Assistant Foreman Thompson. The hearing was held on January 9, 1980 and Claimant was suspended from service for 30 days.

Claim was timely and properly progressed through various appeals as required by the Labor Agreement. It is contended by the Union that the discipline was based on unproven charges and was arbitrary and capricious.

A witness, C. E. Daniels, testified to having been working with Gray. He heard the foreman yell at Gray who apparently did not hear. Seeing this, the foreman asked Daniels who was nearer to Gray to call to him. After getting Gray's attention Daniels saw the two--Gray and the foreman walking up the track together to meet Mr. Ward.

At the time of the incident Assistant Foreman Thompson was in charge of some ten or fifteen men and was assigned to straighten up the area. The Claimant had been instructed to harden down spikes but in doing so had worked up some distance--nearly 100 yards from others in the gang and the foreman wanted him back for other work. According to Mr. Thompson's testimony the problem developed as follows:

"Q. Will you tell what you know of incident that took place between you and Mr. Gray on that day?

A. Yes, sir, I will. Well, we just finished the tie-in and I was instructed to take some men and go down the track, straightening up. Mr. Gray was one of the men. I had the men straightening up out there and I looked down the track and Mr. Gray was way down the track. So I walked down and I hollered at him. You know, I was kinda distance away from him. He must not have heard me, and I hollered again and he answered me and told me if I wanted to speak to him to come down there. I told him I would be right there. I walked down to him and asked him what was he doing down there. I said I need you; you're supposed to back up there behind the other men to harden down spikes. He said, 'Well, I'm hardening down here.' Well, I said, 'I need you up there.' I said to go on up there behind them and do it. He said, 'I ain't going to do it.' I said, 'What did you say?' He said, 'I ain't going to do it.' I said okay, so I called Mr. Ward over the radio and told him the situation and he told me to have Mr. Gray to go to the crossing and he would pick him up."

Mr. R. D. Ward, Foreman, Mr. Thompson's superior on the gang also testified at the hearing as follows:

"Q. On December 17, you heard the charges that were made against Mr. Gray for an incident that took place. What was the first knowledge that you had of some problem between Mr. Gray and Mr. Thompson?

A. Mr. Thompson called me on the radio and told me to come back to where he was at, that he had a man back there he wanted to charge.

Q. Where was Mr. Thompson working at that time? What was he doing?

A. He was straightening up; I had sent him back with some men to straighten up.

Q. Did you go back to where he was?

A. Yes.

Q. What did you find out when you got there?

A. He said that he had told Gray to bring his hammer back and get with the men that were pulling spikes with the pull bars; he wanted him to spike there, and he refused to do it.

Q. Did you talk to Mr. Gray at that time?

A. Yes, sir.

Q. What were you able to find out?

A. Mr. Gray told me that he had been ahead of everybody else driving spikes and that the man was just giving him a hard time.

Q. Did you find out from Mr. Thompson what it was specifically that he wanted Mr. Gray to do?

A. Yes, sir. He wanted him to bring his hammer back and get with the men with the pull bars; and when they pulled the bent spikes out, to drive in new spikes back in the hole there.

Q. Was this a reasonable request?

A. Yes, sir.

Q. Is it the way that you would normally go about straightening up?

A. Yes, sir.

Q. Does it appear to you that Mr. Thompson was doing it to try to give Mr. Gray a hard time or was just doing it to try to get the job done?

A. Just doing it to get the job done.

Q. You felt like his instructions to Mr. Gray were reasonable instructions, something that he should have been doing?

A. Yes, sir.

Q. Did you talk to anyone else about what took place?

A. Well Gray said that Thompson had cussed at him when he talked to him, and he called C. E. Daniels over, but Daniels didn't hear if he did cuss him; he didn't hear that. He wasn't really sure about what all was said. He was the only one I talked to.

Q. Mr. Daniels told you that he didn't hear any cursing used?

A. Yes, sir."

This case comes to the Board to determine whether the Carrier had sufficient evidence to support the findings of guilt and whether the penalty is appropriate. As has been determined in many cases it is not incumbent on us to resolve credibility issues arising out of conflicting testimony. In this case we have only the testimony of the principals. To accept Claimant's version would be to determine nothing occurred in the incident worthy of any real concern. It must be realized, however, that Assistant Foreman Thompson must have had reason to select the Claimant from all of the ten or more men under his supervision for charges of insubordination. His report just after the incident occurred to his superior Foreman Ward substantiates his problems with the Claimant. Essentially, the testimony of Ward agrees with that of Thompson that Claimant refused orders to work and that the orders were reasonable. That Thompson hollered at the Claimant and was unable to make him hear because of the distance substantiates that Claimant had worked his way some distance beyond the location where the foreman had his other men at work straightening up at the end of a day's work.

There is a problem concerning the charge Mr. Thompson used profanity in addressing the Claimant. The use of "damn" hardly qualifies as profanity if we accept the general definition of profanity being associated with disrespect of God or other indications of irreverence. On the contrary, the expression "damn" is common in every day usage to the point its meaning may be easily associated with regularly heard slang and jargon. Mr. Thompson's testimony does not admit use of the word but even if he did it is hardly something to consider of material importance in a situation such as this. Certainly it is not a word that would offend ordinary sensibilities.

On the whole, such evidence as we have would appear to support the disciplinary action taken by the Carrier. If the Carrier, after full investigation of an incident, such as was done in this case determines guilt, and there is no evidence to indicate discrimination, the Board is not inclined to disturb the disciplinary action taken.

This case is somewhat similar to another Third Division case, i.e., Award 22711 involving the same parties in which there was a substantial amount of conflicting evidence. We agree with the Board's findings in that case as follows:

"The principle that we may not substitute our judgment for that of the Carrier when there is conflicting testimony has been established for many years. Since the record contains adequate evidence to sustain the Carrier's action and the punishment was not excessive, the claim will be denied."

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 Agreement was not violated.

A W A R D

Claim denied.

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 14th day of March 1983.