

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24554
Docket Number MS-24183

John B. LaRocco, Referee

PARTIES TO DISPUTE: (L. M. Gray
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(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "This is to serve notice as required by the rule of the National Railroad Adjustment Board of our intention to file an ex-party submission on July 29, 1981, covering an unadjusted dispute between L. M. Gray and the Chicago and North Western Transportation Company involving the question of the dismissal of L. M. Gray, Claim D-11-24-47 and for his request for reinstatement as a laborer in the Maintenance of Way Department."

OPINION OF BOARD: Claimant, a Trackman, was charged with failing to perform his assigned duties on August 3, 1979. Though Claimant had worked less than sixty days for the Carrier, an investigation was timely convened on August 24, 1979 to determine if Claimant had committed the charged offenses.

On August 3, 1979, the Roadmaster instructed Claimant's Foreman to repair two low spots along the right of way which were subject to slow orders. Claimant was one of two men working with the Foreman. Claimant testified, at the hearing, that he complied with his Foreman's directions and that, to the best of his recollection, the crew performed the assigned work. Two Carrier Special Agents observed the crew's activities on August 3, 1979. According to the Special Agents, Claimant and his fellow crew members performed little work. Though the Agent's surveillance was temporarily interrupted several times during the day, they watched Claimant standing around talking to his fellow workers, taking extended breaks, reading magazines, stopping at various stores and cafes and traveling up and down the right of way. Without identifying himself, one Special Agent approached Claimant and asked him if he could take some railroad ties. Claimant told the Agent that he was welcome to take all the ties he wanted. The Special Agents compiled a written report of the observations. The report indicates that between 7:30 a.m. and 4:00 p.m. Claimant was under observation for approximately six hours. During that period, Claimant worked only seventy minutes. At the hearing, Claimant took exception to the contents of the report. He specifically denied giving anyone permission to take ties and he reiterated that he worked hard throughout the day.

Subsequent to the investigation, the Carrier dismissed Claimant and his fellow crew members from service. While the record is unclear, apparently the Carrier eventually reduced the discipline assessed against the other two crew members and allowed them to return to service. However, the Carrier affirmed the discipline imposed against Claimant.

Claimant argues that the record contains insufficient evidence to support a finding that he failed to perform his assignment. Alternatively, Claimant contends that dismissal was an excessive and arbitrary penalty for two reasons. First, the dismissal was inconsistent with the principle of progressive discipline. Since this incident was Claimant's first offense, the Carrier should have issued Claimant a warning and given him an opportunity to improve. Second, Claimant was a victim of disparate treatment. Because all three crew members committed the same misconduct, all should be assessed equal discipline. By upholding only Claimant's discharge, the Carrier arbitrarily discriminated against Claimant.

After carefully reviewing the record, this Board concludes that the Carrier presented substantial, probative evidence proving that Claimant failed to perform his assigned work on August 3, 1979. Two Special Agents observed him engaging in activities which could hardly be characterized as work related. During his eight hour shift, Claimant performed about one hour of work. Even if travel time and the time the surveillance was interrupted is added to the hour, Claimant, at best, worked three and one-half hours. The testimony of the Special Agents as well as their report is persuasive when compared to Claimant's blanket denials and his inability to recall what work he performed. In resolving this credibility conflict, the Carrier's hearing officer could reasonably attach more weight to the Special Agents' report than to Claimant's denials.

Claimant, as an inherent condition of his employment, is obligated to perform a day's work for a day's pay. He is not excused from working merely because his fellow workers are not satisfying their responsibilities. Claimant's violation was flagrant. For more than one half day, he performed no work of any value to the Carrier.

We find no justification for reducing the assessed discipline. The penalty was commensurate with the seriousness of Claimant's offense. Claimant knew or should have known, without any warning, that he was expected to perform a full day's work. The other members of the crew had accumulated many years of service with the Carrier which was a legitimate basis for reducing their discipline. Given Claimant's short length of service, the penalty was neither arbitrary nor excessive.

Since we are denying this case on its merits, we need not decide if the claim was filed with this Board beyond the nine month time limit set forth in Rule 21(c).

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

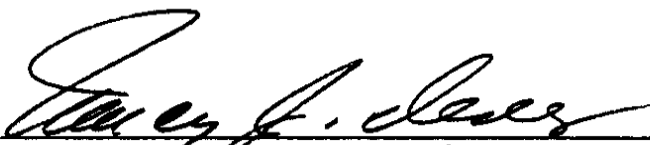
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of November, 1983