

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24812

Docket Number MW-24452

George V. Boyle, Referee

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:

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(The Chesapeake and Ohio Railway Company

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

(1) The discipline (ten days overhead suspension and six (6) months probation) imposed upon Trackmen T. C. Criss, M. L. Royster, J. D. Pressley, B. R. McGuire, G. F. Cunningham, Jr., L. G. Branch, M. E. Morris, J. R. Robinson, C. I. Hayes and O. R. Johnson for alleged "refusal to perform duties and leaving Company property without permission from your foreman at approximately 8:05 a.m., September 25, 1980" was without just and sufficient cause and on the basis of unproven charges (System Files C-D1031/MG-2943, C-D-1030/MG-2942, C-D-1032/MG-2937, C-D-1033/MG-2936, C-D-1034/MG-2935, C-D-1035/MG-2934, C-D-1026/MG-2941, C-D-1027/MG-2940, C-D-1029/MG-2939 and C-D-1028/MG-2938).

(2) The claimants' records be cleared and they shall be compensated for all wage loss suffered.

OPINION OF BOARD: The Claimants arrived for work in Brems, Virginia on September 25, 1980 at 7:00 A.M. and were bussed with eleven others approximately two (2) miles to their work site. It was raining and some of the men, in the group, approached the foreman and requested permission to return to the camp car due to the weather. The foreman was on the phone to secure work authority at the time. The Claimants aver that either directly or indirectly they received such permission. The foreman denies that he gave it to anyone. In any event they returned via company bus and were disciplined as noted above.

The Organization on behalf of the Claimants, assert that the Carrier erred: (1) in assessing a disciplinary penalty of ten (10) days overhead suspension and six (6) months probation since it failed to sustain the burden of proof and (2) for violation of Rule 21(b), Discipline and Grievances in that the Claimants were charged with one offense and disciplined for another. Moreover they contend that two witnesses, the Assistant Supervisor and the Bus Driver, should have been called as witnesses and were not.

Dealing with this last assertion first, if the testimony of the two witnesses was critical for the case of the Claimants it was within their rights and the rules of investigation to procure them. This they failed to do. When asked for a list of witnesses at each separate hearing neither the Bus Driver nor the Assistant Supervisor were named by the Organization representative.

With respect to the violation of Rule 21(b), Discipline and Grievances. The Rules reads "(b) Advice of Cause - The Employee involved will be notified in writing of the charge against him, not less than (10) days before date of hearing, with copy of such notice to the General Chairman". In this instance the initial notice of September 26 reads "You are charged with responsibility in connection with absenting yourself from duty without permission from the proper authority..." The notification of disciplinary action reads "This has reference to investigation held in Richmond, Va.,...for the purpose of determining the material facts in connection with your alleged refusal to perform duties and leaving Company property without permission from your foreman..."

"As a result of this investigation, you were found to be at fault and discipline applied..."

But the Carrier amended those charges by letter of September 29 to conform to the subsequent specific offenses noted in its disciplinary notice. In this there is nothing improper.

But the Board is not in doubt nor should the Claimants be in error that, "leaving Company property without permission from your foreman," equates with "absenting yourself from duty without permission from the proper authority."

The question to be decided is whether or not the Carrier sustained the burden of proof. From the testimony the Board holds that the Carrier did not do so.

If it were merely a question of resolving conflicts in testimony between the single Carrier witness and the self serving testimony of the Claimants the Board would sustain the discipline since the Board cannot rule on questions of credibility and conflicting statements.

However, in this case, there is more than a little doubt regarding events which transpired even within the testimony of the Carrier's witness, e.g. Foreman Robertson testifies:

"Q. (31) Did Mr. Branch leave Company property before completing a day's work?

A. (31) Yes

Q. (32) Did you authorize Mr. Branch to leave?

A. (32) No, because they were in a group...

Q. (34) Mr. Robertson, was Mr. Branch in the group of men that approached you on September 25 concerning going home?

A. (34) Yes.

Q. (35) Did you tell Mr. Branch not to leave on this particular day?

A. (35) No.

Q. (36) Did you make any attempt to stop the bus?

A. (36) No.

Q. (37) Did Mr. Branch leave Strathmore on this particular morning riding in a Company bus with the nine other trackmen assigned to your force?

A. (37) Yes. "

(Emphasis added.)

In some instances the Claimants asserted that they had permission to leave; in others they asserted that word had been passed to them that they could depart. Still others indicated that they simply followed the other men's lead. When no effort was made to reverse their departure nor to hold the bus, it could be fairly assumed that the men were not leaving without permission.

There is sufficient variation in testimony from the Claimants to warrant a good faith doubt that, "one lied and the others swore to it."

Statement of Orlando R. Johnson.

"Questions by the Board

Q. (16) Did you personally ask Mr. Robertson for authority to leave that day?

A. (16) Yes

Q. (17) And when you personally asked Mr. Robertson for permission to leave, what did he say to you personally?

A. (17) He said he had to stay but you go on...

Q. (29) Was the bus close enough that Mr. Robertson could have easily stopped you if he didn't want you to leave.

A. (29) Oh yeah,"

Statement of John R. Robison, Trackman.

"Questions by the Board

Q. (12) Did you leave Company property prior to completing your tour of duty?

A. (12) I left with permission.

Q. (13) Who did you have permission from?

A. (13) Bill Robertson.

Q. (14) Did you ask Foreman Bill Robertson for permission to leave?

A. (14) Yes, sir.

Q. (15) What did Foreman Robertson say to you?

A. (15) He say it be alright. I had been working for two or three weeks with rheumatism to arm and I said I didn't want to get wet and the foreman said it would be alright."

From these and other variations in testimony it is apparent to this Board that there was not a concerted refusal to work. Nor was there clarity in the minds of the Claimants that the foreman had not given permission. Quite to the contrary, it seemed to them that either by direct permission or inaction their departure was approved by the foreman. Thus the Carrier has not furnished the required burden of proof that the Claimants' actions were improper and therefore the claim is sustained.

Since the Claimants did not work the full day of the 25th they are entitled only to such payment from any hours worked but no more. They have already been reimbursed for the 26th. The suspension and probation are to be expunged for each Claimant.

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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th of May, 1984