

Robert W. McAllister, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Seaboard Coast Line Railroad Company

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

(1) The dismissal of Trackman A. E. Brinson for alleged violation of 'Rule 18' was without just and sufficient cause (System File 37-SCL-81-3/12-39(81-10) G).

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

OPINION OF BOARD: Trackman A. E. Brinson, the Claimant, was employed by the Carrier on October 12, 1976. On December 16, 1980, the Claimant was assigned to the job of tamping cross ties with a portable vibrator. An incident ensued between the Claimant and Section Foreman Miller which resulted in Claimant being withheld from service. An investigation was held on December 21, 1980, and, thereafter, the Claimant was dismissed by the Carrier effective January 15, 1981, for striking Section Foreman Miller.

Essentially, the record discloses Foreman Miller was dissatisfied with the Claimant's method of operating the portable vibrator. The Claimant and three other witnesses dispute this judgment. Notwithstanding, Foreman Miller undisputedly took the vibrator from the Claimant and began demonstrating how he wanted the work done. It is at this point the Claimant admits he struck Foreman Miller once which caused him to fall to the ground. The Organization focuses its argument upon Foreman Miller's asserted unnecessary intervention concerning how the work should be performed and the claim he pushed the Claimant just prior to grabbing the vibrator.

This Board notes the Claimant did not deny striking Foreman Miller. Secondly, the record clearly establishes that Miller began demonstrating how he wished the work to be performed before the blow was struck. The same source of testimony, three employee witnesses, stated that Foreman Miller pushed the Claimant in order to gain control of the vibrator.

The Board's review of the evidence finds no basis to dispute the Carrier's findings that the Claimant struck Section Foreman Miller. Notwithstanding, that same record clearly establishes Foreman Miller either pushed or shoved the Claimant when he took control of the portable vibrator. The Carrier has proven the charges lodged against the Claimant. Nevertheless, the foreman's conduct was not taken into consideration, and, as a result, we find the circumstances as they existed on December 16, 1980, do not warrant dismissal. There is no justification for assaulting a supervisor or any Carrier employee. Herein, we find the foreman's conduct a mitigating circumstance, and, hereby, reduce the Claimant's dismissal to a disciplinary suspension. He is to be reinstated to service without back pay and with no loss of seniority.

FINDINGS: The Third Division of the Adjustment Board, after given the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

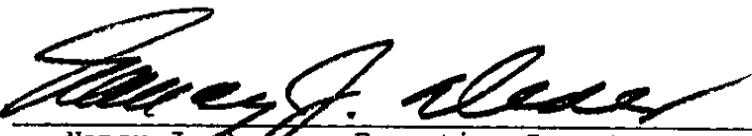
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 8th day of June, 1984