

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24962

Docket Number MW-2472

Robert W. McAllister, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Colorado and Southern Railway Company

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

(1) The dismissal of Track Laborer L. E. Garcia for alleged violation of 'Rules 661, 664 and 667' was without just and sufficient cause and an abuse of justice and discretion by the Carrier (System File C-11-81/MW-436).

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

OPINION OF BOARD: The Claimant, L. E. Garcia, at the time of his dismissal, was employed as a track laborer. As a result of an incident on April 14, 1981, he was charged with insubordination and the performance of unsafe acts. An investigation was held, and Claimant's dismissal was formalized by letter of April 30, 1981.

The Organization protests the Carrier's actions and argues that, even if Carrier's view of the incident was accepted, the transcript firmly establishes the Claimant's actions were provoked by the foreman. On April 14, the Claimant was assigned to the task of cleaning off ties with a shovel. At about 10:00 A.M., he was seen in a standing position and told by the foreman to clean the ties off. This order was repeated several times. The Claimant testified he was waiting because people were in his way. Foreman Theret's testimony confirms this statement. Notwithstanding, the Claimant, according to Theret, started cursing and threw his shovel down. The Claimant stated he told Theret "... well how in the f--- am I supposed to clean that goddamn track when there's three f----- men on there." The Claimant charges that, at this point, the foreman told him he was fired and admits he got "pretty upset".

The Organization views this incident as provocation by the foreman and a reaction by Claimant. Even assuming the transcript supports the Organization's belief the foreman was impatient and the Claimant had a reasonable basis for being unable to immediately comply with the foreman's orders, the Board is unable to conclude the Claimant's reactions were justified. The evidence clearly establishes the Claimant threw his shovel down and that it struck a rail and bounced back in the air. Secondly, the Claimant, by his own admission, directed abusive language at Foreman Theret and testified he was "ready for fighting". When viewed in its entirety, the Claimant's conduct cannot be termed to be other than insubordinate. If, as asserted, the foreman's impatience to get a job done was unreasonable under the circumstances, the only avenue of correction was the filing of a grievance. The Claimant may have been frustrated, but his reactions were inordinate to the situation. His language was foul and abusive. Throwing his shovel was an act which risked the safety of bystanders. The Claimant is

a relatively short term employe. There is no basis upon which to condone his actions, which, in totality, constitute insubordination. The record substantially supports the action taken by the Carrier.

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 Employes involved in this dispute are respectively Carrier and Employes 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

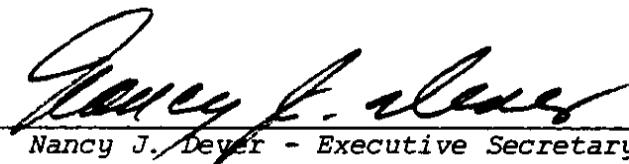
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 14th day of August 1984.

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