

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37486
Docket No. MW-37861
05-3-03-3-235

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The sixty (60) day suspension of Foreman C. T. Jones for his alleged violation of Engineering Department Instructional Notice – Clean Up on June 24, 2002 when his assigned work area was found to be in violation thereof was without just and sufficient cause, based on an unproven charge, arbitrary, capricious and in violation of the Agreement (Carrier’s File MW-02-010).
- (2) Foreman C. T. Jones shall now be allowed the remedy prescribed in Rule 25, Section 4.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, a Track Foreman with more than 23 years of seniority, was in charge of a small track gang on the 7:00 A.M. to 3:00 P.M. shift on June 24, 2002. When the gang finished work for the day, the Claimant knew that additional work would be required on the switch/turnout the following day, when his gang was scheduled to return to complete the project. Before leaving the work site on June 24, the Claimant ensured that the track area and adjacent road were free of obvious obstacles.

The following day at about 10:30 A.M., Assistant Production Engineer J. C. Majeski stopped by the area where the Claimant's gang had been working. He noticed that the Claimant was in a vehicle, his gang was not working, and debris, including cups, stones left in piles and bolts and anchors, had been strewn all about the area. When Majeski asked the Claimant to get the debris cleaned up, he immediately did so.

By letter dated July 1, 2002 the Carrier notified the Claimant of an Investigation on July 10 to determine his responsibility, if any, in connection with his alleged failure to comply with Engineering Department Instructional Notice – Clean Up, which provided in pertinent part:

“To: All Engineering Department Employees

In touring the property over the past two weeks I have noticed that it is very evident where we work. When you look at the job sites you will notice the following left lying on the ground or in the walkways.

- (1) Rail, frogs, switch points, ties or timber**
- (2) Bars, bolts, anchors or spikes**
- (3) Track wire, long bonds**
- (4) Water bottles or rags**

**This Practice Will Cease Immediately
No Exceptions**

Before leaving your job site, all scrap and surplus material must be removed from job site. Material will not be left along side track;

remove it from walkways. CLEAN UP is part of a successful job. Make sure it is part of your job."

Following the Investigation, which was postponed until August 12 at the Organization's request, the Carrier notified the Claimant by letter dated August 23, 2002 that he was assessed a 60-day actual suspension. In a letter dated September 4, 2002 the Organization appealed the discipline. The Carrier denied the appeal, and, because the parties were unable to resolve the dispute on the property, it was submitted to the Board for final and binding resolution.

In response to the Organization's contention that Assistant Supervisor L. H. Gonzales instructed the Claimant not to do a thorough clean-up until a project was finished and, in the meantime, to push debris aside at the end of each day, the Carrier argues that the posted Clean-Up Notice was intended to supersede oral instructions like those from Gonzales. Moreover, the Carrier urges that it was for the Organization to call Gonzales as a witness to support its defense. The Board disagrees. The Claimant testified credibly that Gonzales had instructed him to direct his gang to perform a thorough clean-up only at the end of a project, and to ensure only that the track and adjacent road were clear at the end of the day if the project had not been completed. In order to satisfy its burden of proof, it was incumbent upon the Carrier to produce Gonzales as a witness to rebut the Claimant's testimony. In the absence of such a rebuttal, the Board concludes that the Claimant reasonably followed Gonzales' instructions, ensuring that the track and adjacent road were clear of debris at the close of the day on June 24, 2002.

Because the Carrier failed to satisfy its burden of proof, the Board sustains the claim. Accordingly, the Carrier will be required to pay the Claimant backpay covering the 60-day suspension and to expunge from his personnel record all reference to the suspension. Because the Claimant's August 23, 2002 discharge was upheld in a companion case (Third Division Award 37487) there will be no order of reinstatement.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of April 2005.