

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

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

(1) The five (5) working day suspension assessed Track Laborer P. W. Cave for allegedly violating Rule 566 was arbitrary, capricious, based on unproven charges and in violation of the Agreement (System File C #09-89 CMP).

(2) As a consequence of the afore-stated violation, the Claimant shall be compensated for all wage loss suffered from November 16 through 22, 1988 at his track laborer's rate of pay."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimant worked as a Laborer for the Carrier. On July 12, 1989, a Hearing was held, at the request of the Organization to develop facts and the circumstances surrounding the five day suspension the Claimant had received for allegedly violating Rule 566, which reads:

"Rule 566: CONDUCT: Employes must not be:

- A. Careless of the Safety
of themselves or others;
- B. Negligent;
- C. Insubordinate;
- D. Dishonest;
- E. Immoral; or
- F. Quarrelsome."

The incident cited by the Carrier occurred on November 15, 1988. The Claimant was a Laborer on Rail Gang R87. After he had finished work at the front end of the job, he was supposed to report to the rear end to work there. Enroute toward the back, he was stopped by another employee who asked to use his claw bar. While he was waiting, his Supervisor asked him why he was standing around. He replied he was waiting for his claw bar. There is a dispute as to what happened then. According to the Claimant, the Supervisor spoke to him in a vulgar manner, snatched the claw bar out of the other employee's hand, handed it to him and directed him to get to work. (The next day the Claimant told the Roadmaster that the Foreman had yelled at him, "get your ass back to work.")

According to the Supervisor's testimony, the Claimant was standing around and he asked him what he was doing. To this the Claimant responded he was waiting for a tool. In turn the Supervisor told him to find a tool and get to the back where there was work to do. Later on, the Assistant Foreman working at the rear of the Gang, reported that the Claimant refused to do any work. Therefore, when the Gang was tied up for the night, the Supervisor approached the Claimant and questioned him about his refusal to work. At that point, the two men began arguing with each other and the Claimant swore at the Supervisor several times. He continued his verbal assault, but, allegedly refused to discuss the reason he would not work. He did say he was angry at the Supervisor who he claimed swore at him earlier. The Supervisor claimed he had not sworn at the Claimant at any time.

The Organization contends the Claimant was treated arbitrarily, capriciously, and unfairly. This was adequately proven by the Claimant's witness and the sworn statements submitted by two other employees who were present during the confrontations. The Carrier erred when it did not give credence to those witnesses. The Supervisor's testimony was inconsistent and incredible. The Supervisor should have been punished for his part in the incident, but he was not, therefore, the Claimant, who was provoked by the Supervisor should also be exonerated. He should be made whole for all the time lost as a result of his unjust suspension.

The Carrier believes the evidence presented fully supports the five day suspension they issued the Claimant. He was insubordinate in his behavior. He refused to do his work, he was verbally abusive toward his Supervisor and he refused to discuss the incident with his Supervisor the next day. The Claimant's witnesses did not substantiate his position. The written statements were self serving and should be given little weight. The claim should be denied.

The Board has reviewed the evidence presented at the Hearing very carefully. There is sufficient evidence to support the charges against the Claimant. Even his witness testified that he was verbally abusive to the Supervisor. He further testified that he never saw the Supervisor grab or put his hands on the Claimant, as the Claimant had testified. Finally, he verified that the Assistant Foreman tried repeatedly to get the Claimant to calm

down. On the other hand, the Claimant submitted signed statements of two other employees. Even though the Hearing Officer admitted the statements, he did so under objection. It is common arbitral opinion that such statements can be given little probative value. First and foremost, they cannot be cross-examined, secondly, it is impossible to determine the credibility of a written statement.

After reviewing the evidence, the Board is convinced the Claimant was guilty of the charges and the five day suspension was for Cause.

In addition to the above arguments, the Organization raised a procedural issue before the Board. They contended the discipline should be overturned because the Hearing Officer did not issue the discipline after reviewing the transcript of the Investigation, but rather, another officer of the Carrier, who had not attended the Hearing, made the decision. The Organization raises a very salient point. However, a review of the relevant correspondence between the Parties, does not show that the issue was raised on the property. Therefore, it is not properly before this Board and has not been considered.

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 7th day of May 1992.