

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31783
Docket No. MW-32090
96-3-94-3-473

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Illinois Central Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman W. Hamilton because he allegedly violated Rule I of the Illinois Central Railroad Rules for Maintenance of Way and Structures when he got into a scuffle with Mr. R. Lopez at Bridgeport on November 3, 1993 was arbitrary, unwarranted and disparate. (Carrier's File 219 MofW)

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with full seniority, the discipline assessed shall be reduced to read the same as Mr. Lopez's and he shall be paid for all days lost after fifteen (15) working days' suspension."

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 facts of the instant case are not in dispute. On November 3, 1993, Claimant and another employee got into a shoving match, which resulted in a broken window. During the Investigation, both employees admitted engaging in the behavior, and both expressed regret. As a result of the Investigation, the other employee involved in the scuffle was assessed a 15 day actual suspension, and Claimant was discharged. Thus, the only issue before this Board concerns the quantum of discipline.

It is the position of the Carrier that the discipline assessed was appropriate in Claimant's case, in light of Claimant's prior discipline record. The Carrier points out that the employee assessed a 15 day suspension had a clear discipline record over the 23 years of his employment. By contrast, Claimant had a poor personal work record.

The Organization contends that Claimant's alleged "poor personal work record" cannot support the amount of discipline assessed. It notes that in Claimant's 23 years of service he was assessed only two major suspensions. The remaining 10 disciplines he received over that period of time were minor -- warnings, letters of reprimands, and short suspensions. Moreover, none of the discipline was the result of an incident in any way similar to the one which precipitated his discharge. Thus, the Organization feels that the discipline meted out to Claimant was vastly disproportionate to the other employee's 15 day suspension.

As noted above, there is no doubt concerning Claimant's culpability. It is well established on this and other Boards, that a Board is reluctant to "second guess" a Carrier's assessment of discipline once the Claimant has been proven guilty of the alleged infraction. (See Second Division Awards 7451, 12850, 12851.) In this particular case, however, the vast disparity in the discipline assessed the two employees requires the Board's review. It is apparent from the record before the Board that each employee was equally at fault. (See Third Division Award 28005.) Moreover, although Claimant's record is far from "clean," his infractions were primarily minor in nature, and occurred at the rate of only one every two years. Finally, the discipline assessed the other employee, even in light of his "perfect" personal work record, was atypically lenient in view of the nature of the offense. Accordingly, in the peculiar circumstances of this case, and limited to this particular set of facts, the Board finds that the Claimant should be reinstated with seniority unimpaired, but without backpay.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of November 1996.