



Award No. 5888

Docket No. 5838

2-IC-EW-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 95,
RAILWAY EMPLOYES' DEPARTMENT, A.F.L.-C.I.O.
(ELECTRICAL WORKERS)**

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That in violation of the current Agreement, Electrician R. E. Carder was unjustly suspended on September 26, 1968 and arbitrarily dismissed from the service of the Carrier on October 11, 1968.
2. That accordingly, the Carrier be ordered to reinstate the aforementioned Electrician to service with all benefits, rights or privileges unimpaired and that he be compensated for all time lost subsequent to September 26, 1968.

EMPLOYEE'S STATEMENT OF FACTS: Electrician R. E. Carder, hereinafter referred to as the claimant, was employed by the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the carrier, at carrier's Lincoln Diesel Shop, Lincoln, Nebraska. The claimant had been in the service of the carrier since November 11, 1950 and maintained his carrier employment with a clear disciplinary record.

On September 26, 1968 at approximately 8:30 a.m., Terminal General Foreman E. E. Williams instructed Electrical Foreman G. E. Taeger to bring the claimant and electrician helper apprentice G. R. Silverstrand to his office after an altercation had occurred at the Lincoln Diesel Shop. After questioning these mentioned employees, Terminal General Foreman E. E. Williams instructed them to go home informing them that they were held out of service pending results of an investigation.

The claimant received an unsigned notice dated September 27, 1968, instructing him to appear for investigation at the master mechanic's office at Lincoln, Nebraska at 10 A.M., October 1, 1968, to allegedly determine his responsibility in connection with an altercation. The investigation was held as scheduled and the claimant subsequently was dismissed from carrier service. Since I.B.E.W. Vice General Chairman J. J. Shannon represented the claimant in the capacity of being the duly authorized representative at the investigation proceedings, he initiated a claim in behalf of the claimant and Electrician Helper R. G. Silverstrand on October 10, 1968. Vice General Chairman J. J. Shannon also addressed another letter to the carrier on October 10, 1968, wherein he protested an error found on page 13 of the transcript of

can rightfully be awarded this claimant for the reasons set forth herein, should such a decision be considered, attention is directed to paragraph (g) of investigation rule 31 between the parties which reads:

"(g) If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension, less any amount earned during such period the disciplinary action was in effect." (Emphasis added)

In this connection it was stated in Second Division Award 1638 with Referee Edward F. Carter that—

"Whatever the method of calculating the compensation may be, a deduction of outside earnings is required * * * *"

Also in First Division Award 15756 with Referee Edward F. Carter, statement is made under "Findings" in part as follows:

"Claimant is therefore entitled to recover the amount he would have received as wages had the contract been performed from July 12, 1950 to December 10, 1950, less what he earned in other employment during that period, or what he might by reasonable diligence have earned in other employment during such period."

Also see First Division Awards 15258 and 16558 making similar rulings.

The carrier therefor asserts that in the event the board considers the matter of compensation to the claimant for time lost, it is incumbent upon the board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

In summary the carrier asserts:

1. The claimant was afforded a fair and impartial hearing.
2. There was substantial evidence adduced at the hearing to support the charges preferred against the claimant, including his admission.
3. When considered in relation to the gravity of the offense with which the Claimant was charged, the discipline assessed was not arbitrary, capricious nor an abuse of managerial discretion.

For these reasons the claim should be denied.

FINDINGS: The Second 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 employe 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.

In this discipline case, Claimant was dismissed from Carrier's service for being in violation of Safety Rule No. 47, Rules A, B, C and D.

Rule 47 provides:

"Wrestling, fighting, throwing of material, fooling and practical joking by air pressure, electric shock or other appliances, feats of strength and circus performances, while on Company property, are prohibited."

Rules A, B, C and D read:

"A. Safety is of first importance in the discharge of duty.

"B. Obedience to the rules is essential to safety.

"C. To enter or remain in the service is an assurance of willingness to obey the rules.

"D. The service demands the faithful, intelligent and courteous discharge of duty."

The record discloses that on September 26, 1968 at approximately 8:30 A.M., in Carrier's Lincoln Diesel Shop, Lincoln, Nebraska, Claimant, an Electrician, while on duty, was involved in a physical encounter with another employe, G. R. Silverstrand, an Electrician Helper Apprentice; that on the date in question Claimant admitted calling said employe Silverstrand a name resulting in employe Silverstrand striking Claimant; that Claimant received a slight injury to his left eye and cheek as the result of said altercation.

The Organization raises procedural defects, namely: (1) that Claimant was dismissed without investigation; (2) that Claimant was given a four-days' advance notice rather than five days as required by Rule 31 of the Agreement, thus denying Claimant of sufficient time to make preparation for representation at the hearing; (3) that the Local Chairman, B. Wiese, received a verbal rather than a written advance investigation notice in violation of said Rule 31; (4) that Carrier refused to grant a continuance as requested by Local Chairman, B. Wiese, in violation of said Rule 31.

Concerning the first procedural defect, Carrier had the right to hold Claimant out of service pending investigation inasmuch as we feel that serious infractions of the rules were involved herein. In regard to the other alleged procedural defects, it is seen that Claimant was not prejudiced thereby inasmuch as no request for a continuance was made at the hearing by either claimant or his representatives. We do not agree with the Organization that the discussion that Mr. Wiese had with Carrier's S. F. Kuzma was a specific request for a continuance. Therefore, the Organization's allegations in regard to said procedural defects are without merit and must be denied.

As to the merits, it is seen by employe G. R. Silverstrand's own testimony that he struck the first blow in the fight. However, Claimant admits that he did call Silverstrand an "obscene" name which precipitated the altercation. Then, the question revolves it down to whether or not Claimant can be found guilty of "fighting" in violation of said Rule 47 when he did not strike the first blow but called the aggressor a vile name. Or, to put it another way, is provoking a fight the same as "fighting" so as to establish that Claimant was thus guilty of "fighting" as specified in said Rule 47.

We do not think it did amount to "fighting" in this instance as contemplated by said Rule 47. Claimant didn't assault employe Silverstrand, but on the contrary Silverstrand by his own admission, struck and started the fighting with Claimant. Further, both Silverstrand's testimony as well as Claimant's shows Claimant was attempting to apologize to Silverstrand for having called him a vile name. Further, there was no evidence that showed that Claimant struck back at his opponent. Mr. Silverstrand stated that Claim-

ant was in the process of trying to kick him. He didn't state that Claimant did kick him. Further, Claimant could have reacted justifiably in self defense to defend himself against the assault of a fellow employe.

We therefore do not feel that the single vile explicative word that Claimant used in this instance amounted to an assault or "fighting" as the word means in said Rule 47. Nothing in the rules refers to the calling a fellow employe vile names, although we do not condone such name calling. We cannot conclude that when Claimant called fellow employe Silverstrand a single "obscene" name that he was the aggressor wherein he voluntarily and culpably provoked the altercation with Mr. Silverstrand so as to reasonably anticipate that his name calling would be met with forcible resistance.

Therefore, for the aforesaid reasons, we are thus compelled to sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April, 1970.