



Award No. 5889
Docket No. 5837
2-CB&Q-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 EMPLOYEES' 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 Helper G. R. Silverstrand 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 Helper to service with all benefits, rights, or privileges unimpaired and that he be compensated for all time lost subsequent to September 26, 1968.

EMPLOYEES' STATEMENT OF FACTS: Electrician Helper G. R. Silverstrand, 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 23, 1956, 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 R. E. Carder to his office after an altercation had occurred at the Lincoln Diesel Shop. After questioning these mentioned employes, Terminal Foreman E. E. Williams instructed them to go home informing them that they were being 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 10:00 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 R. E. Carder on October 10, 1968.

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.

The factual situation in this claim is similar to and set forth in Award 5888.

The Organization has raised procedural defects as set forth in said Award 5888 and for the reasons iterated therein, we find the allegations of the Organization in regard to said procedural defects to be without merit and are denied.

Concerning the merits, we find that Claimant was the aggressor in the fight which ensued with fellow employe Carder. Carder expressed displeasure with the manner and attitude in which Claimant was performing his work duties, and expressed said displeasure to not only Claimant but also to Mr. Carder's immediate supervisor, which he had not only the right but the duty to do inasmuch as Claimant was working for and directly under the jurisdiction and control of Mr. Carder. When Claimant was called a vile name, he was not justified under any circumstances of resorting to "striking" said name caller. As was said in 2 Ruling Case Law 554:

"Words or acts which in their nature tend generally to excite the angry passions of men are admitted in evidence as an extension, but never as a justification or defense either in a criminal prosecution or in a civil action. If the rule were otherwise the slightest provocation might well become the cover for a serious beating. Peace and good order and the rules of civilized society forbid that individuals shall right their own wrongs. Hence mere words, or acts, not amounting to an assault, however gross and abusive, and although spoken or performed for the purpose of provoking an assault are no defense to a criminal prosecution or a civil action."

Therefore, no language that Mr. Carder, Claimant's immediate supervisor, may have addressed to Claimant, however insulting or opprobrious, justified or excused Claimant in striking and fighting with fellow employe Carder.

It is apparent that Claimant's own testimony conclusively shows that he had no justification whatsoever for assaulting and striking Mr. Carder; thus it being established that Claimant committed an unjustified assault and battery upon a fellow employe, Claimant therefore is guilty of "fighting" within the intent and meaning of Rule 47 of the agreement.

In regard to the penalty of dismissal, the Organization contends that Carrier's act in dismissing Claimant from its service was arbitrary, unjust, unreasonable and therefore an excessive penalty because Claimant is not of a vicious nature and is not a danger to himself or his fellow employes.

As we have previously set out, Claimant, by his acts, clearly subjected himself to discipline by Carrier. The record shows that Carrier offered to

return Claimant to service on the basis of leniency by letter dated April 17, 1969. However, Claimant refused said offer of leniency.

As this Board in Award No. 1843, without a referee, stated:

“Discipline in this case was justified. However, we believe the Carrier’s subsequent offer to reinstate the Claimant without pay was and is a just disposition of this case and should have been accepted.”

We likewise feel that Carrier’s offer in this instance should have been accepted. We further feel that the layoff Claimant has received from the date of his dismissal to the present is a sufficient discipline for his violation of the rules involved herein, and Carrier is ordered to reinstate Claimant with seniority and vacation rights unimpaired but without back pay for time lost.

A W A R D

Claim partly sustained and partly denied in accordance with the aforesaid opinion.

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.