

The Second Division consisted of the regular members and in addition Referee Richard R. Kasher when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employees'
Department, A. F. of L. - C. I. O.
(Firemen & Oilers)
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That under the current agreement Laborer Dossie King was unjustly dismissed from the Carrier effective December 16, 1977.
2. That accordingly the Carrier be ordered to reinstate this employee with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired and compensated for all lost time plus 10% (ten percent) interest annual on all lost wages, also, reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been held out of service.

Findings:

The Second 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 waived right of appearance at hearing thereon.

On October 3, 1977 Claimant was involved in an incident that cost him his job. While the parties make a number of conflicting statements and allegations as to what occurred this much is clear:

On the morning of October 3, 1977 four employees were standing on the platform in the St. Louis Roundhouse. The Claimant walked up to the platform and said something to one of the other employees, a machinist. Whatever the statement was, the machinist responded by inviting the Claimant to "kiss his (expletive deleted)". Then the Claimant, who is black, turned to one of the other employees, who is also black, and who, according to the Claimant, was laughing. The Claimant said something to the other employee concerning his hanging around with "honkies".

The Claimant had, by this time, walked away from the group and the employee he had addressed began walking toward him. The employee told the Claimant that he didn't have to take "none of your (expletive deleted)" and may have also stated "(expletive deleted) I will beat your brains in". At this point the employee and the three other workers all noticed something in the Claimant's hand. There was conflicting testimony as to whether the object was a knife or a nail file and as to whether it was in the Claimant's hand from the outset of the incident.

There was a heated exchange during which the Claimant may have threatened to cut the other employee and during which the other employee may have retorted that he would then shoot the Claimant. The other employee then went into the office to speak with a supervisor while the Claimant went back to his regular duties.

An investigation was scheduled for November 9, 1977 and then postponed to November 15, 1977. The hearing was held and, on December 16, 1977, the Claimant was dismissed from all service with the Carrier for his responsibility in connection with an altercation which occurred at approximately 7:10 a.m. October 3, 1977.

When he was discharged, the Claimant had thirty-three years of service with only one incident on his record (based on what was apparently a minor accident with a company truck).

It is the Organization's position that the Claimant did not receive a fair and impartial hearing as guaranteed under Rule 10 of the Agreement; punishment was assessed unequally; and, in light of the constant joking and profanity common in the roundhouse area, the Carrier failed to meet its burden of proving the charge.

In protesting the fairness of the hearing, the Organization points out that the hearing did not occur until twenty-three (23) days after the incident. As a result of this delay, the Organization claims it was impossible at the hearing to fully establish what occurred on the platform. The Organization points both to uncertainty that the witnesses expressed concerning their testimony and to conflicting versions of what actually occurred. The Organization acknowledges that the Agreement does not spell out a time limit for bringing charges but claims that the responsibility to investigate expeditiously still existed and that, in any event, the result was an improper hearing.

It is also claimed, by the Organization, that the presence of a police lieutenant at the hearing was a harassment to the Claimant and affected the hearing's fairness and impartiality.

The Organization protests the fact that only the Claimant was disciplined. The Organization argues that the Carrier's failure to discipline the other employee is an indication that the incident was not as egregious as the Carrier claims.

In claiming that the Carrier failed to meet its burden of proof, the Organization details conflicting testimony concerning whether the Claimant had

a knife in his hand and whether the Claimant threatened the other employee. The Organization cites the testimony of two witnesses that the instrument could have been a finger-nail file; the testimony of the Claimant that he had been cleaning his finger nails; and, the testimony of all the employees that the Claimant did not try to cut or harm the other employee. The Organization also cites testimony that there have been such run-ins in the past and that the profane language used was commonplace. It is likely, according to the Organization that the Claimant just assumed the other employees were playing and joking.

The Organization rejects the Carrier's argument that it can not have so potentially dangerous an employee on its property. The Organization notes that the Claimant remained in service and that charges were not brought for twenty-three (23) days. Normally, the Organization argues, the Carrier will immediately remove an employee when it, the Carrier, believes that employee is dangerous.

The fact that the Claimant worked for the Carrier for thirty-three (33) years without incident should, the Organization argues, stand as further proof that the Claimant was not of a hostile nature. In conclusion, the Organization states that the Claimant was only proven guilty of cleaning his fingernails and some usual and customary joking in the roundhouse area.

In discussing damages, the Organization states that the Claimant should be made whole for lost wages, interest and other benefits. In its rebuttal, the Organization rejects the Carrier's argument that the claim is vague and ambiguous. The Organization cites a number of cases standing for the principle that interest may be awarded as part of damages.

Initially, the Carrier asserts that the Organization's claim is so vague and ambiguous and lacking in specifics that it is not possible to determine the extent or merits of the claim. The Carrier terms the Organization's request for 10% interest and benefits in addition to full back wages to be "nothing more than 'buckshot' pleading". The Carrier cites the language of Rule 10 as clearly providing that an employee shall only be compensated for wage loss, if any, suffered by him.

The Carrier asserts that the hearing was fair. The Carrier states that there was opportunity to present testimony and to cross-examine witnesses. It is also noted that, during the hearing, the Organization did not indicate that it was not ready to proceed. The Carrier explains the delay in presenting charges as a result of the fact that some of the witnesses were on vacation. However, the Carrier notes that the Agreement is silent regarding time limits.

On the merits, the Carrier quotes testimony which, it claims, demonstrates that an altercation took place; that the Claimant was the aggressor; that the Claimant had a knife in his hand; and, that the Claimant threatened another employee bodily harm with the knife. Despite conflict over the description of the knife, the Carrier asserts that credible testimony has established the above facts and that no evidence demonstrates that the testimony was offered in bad faith. The Carrier also notes that it would be impossible for the witnesses not to express some uncertainty over what occurred and that, regardless of whether or not there actually was a knife, the threat was immediate -- analogous to a bank robber who uses a toy gun.

The Carrier defends the discharge, stating that company property is no place to settle personal differences and that it cannot condone threats of violence on the property. The Carrier argues that the Claimant's taking matters into his own hands presents a continual hazard to his fellow workers.

Thus, the Carrier concludes that the Claimant's right to due process and a fair and impartial hearing was observed; there was substantive evidence to support the Carrier's findings of guilt; and, that the discipline was not harsh or excessive.

In response to the Organization's argument that no one saw the Claimant pull a knife from his pocket, the Carrier asserts that he did have a knife in his hand and threatened to cut a fellow worker.

In conclusion, the Carrier states that the incident was no joke. The Carrier comments that the way a statement is made effects the mood of a situation; in this case, the "mood was bad" and the situation dangerous.

Before reaching the merits of this case it is necessary to consider the Organization's charges of procedural irregularity. The Organization claims that, after twenty-three days, it was not possible to have a fair hearing.

It is likely that the delay contributed to the conflicting testimony in this case. However, neither the conflicts in testimony nor the presence of the police lieutenant were demonstrated to have prejudiced the Claimant's rights and this Board will not hold the Carrier to a time limit where none is stated in the contract and delay in conducting the investigation was not unreasonable.

The Carrier's threshold argument that the Organization's claim is vague and ambiguous is not supported by the record. The Organization specified the damages called for and the claim was sufficiently described during the handling of this case.

Turning to the merits, it is clear that the case is not as simple as either party makes it out to be. The Carrier, in seeking to meet its burden of proof, asserts that the Claimant physically threatened another employee with a knife and that the Claimant's continued employment constituted a hazard to other employees. By contrast, the Organization characterizes the incident as "usual and customary joking".

The testimony by two of the four witnesses that what they took to be the Claimant's knife might have been a nail file is at least convincing that the Carrier failed to prove that the Claimant had a knife in his hand. Still, by the testimony of all four witnesses, it is clear that some heated words were exchanged. They used expressions such as "shouting match", "hollering", "arguing and cursing hot and heavy", and all made reference to what they thought was a knife.

Even with a discounting, as shop talk, of the language that was alleged to have been used, it is clear that the Claimant's actions on the morning of

October 3, 1977 to not constitute acceptable behavior. Despite the Claimant's feeling that the other employees were only joking, it has been demonstrated that strong words were exchanged and that his holding what he claims was a nail file was perceived as threatening. However, it was not demonstrated that discharge was warranted as the penalty in this case.

If the Carrier truly saw the Claimant as dangerous we feel its response and Claimant's removal would have been more immediate. The Claimant's thirty-three year record without violent incident is further proof that his presence did not pose an immediate threat to other employees.

Still, the Claimant must be made to understand that his behavior, even as a joke, is not acceptable on company property. Indeed, if it had been demonstrated that he used a knife in a threatening manner, his good record would have been of no avail.

Accordingly, the Claimant is ordered reinstated with back pay, from January 1, 1979, less outside earnings. The length of this suspension should stand as an indication of the seriousness of the Claimant's actions.

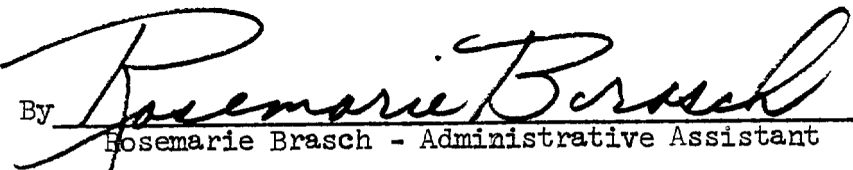
A W A R D

The Claimant is ordered reinstated with partial back pay as provided above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of April, 1980.