

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: { International Association of Machinists and
Aerospace Workers
{ Chesapeake and Ohio Railway Company

Dispute: Claim of Employees:

1. That, under the current Agreement, the Chesapeake and Ohio Railway Company unjustly dismissed from service Machinist F. L. Lomax from the date January 6, 1979.
2. That, accordingly, the Chesapeake and Ohio Railway Company be ordered to reinstate Machinist F. L. Lomax to his former position, compensate him for all time lost from January 6, 1979, until restored to service with seniority unimpaired, made whole for all vacation rights, and payment for Health and Welfare and Death Benefits, under Travelers Insurance Policy GA-23000, and Railroad Employees' National Dental Plan GP-12000.

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.

An investigation was held on December 6 and 7, 1978 to determine whether Claimant engaged in physical altercation with Locomotive Engineer Jack VerMurlen in the locker room of Crew Dispatchers' Office Roadhouse, at approximately 7:50 P.M. on August 26, 1978 at Grand Rapids, Michigan. Based on the investigative record, Carrier concluded that he was guilty of this offense and dismissed him from service, effective January 6, 1979. This disposition was appealed.

In defense of his petition, Claimant contends that he did not initiate the altercation as charged by Locomotive Engineer VerMurlen, but defended himself, when VerMurlen attacked him. He argues that his position is persuasively supported by the contradictory statements proffered by witnesses favorable to VerMurlen's version of the incident, which differed from their written statements prepared immediately after the altercation. He asserts that Carrier found him guilty on flimsy and insubstantial evidence and predicated its finding more on his past disciplinary record than the substantive facts developed at the hearing.

Carrier contends that Claimant was in an unauthorized area when he was using a telephone to make a personal call and blocked Locomotive Engineer VerMurlen from reaching the Engineers' Bulletin Books, when he was resting his arm on a Bulletin Book. It argues that when VerMurlen asked Claimant for the second time to move so that he could read the Engineers' Book, Claimant began striking him in the stomach, which was verified by Brakemen R. J. Dill and J. B. Henry and Engineer W. W. Bateson, who testified Claimant engaged in physical altercation with VerMurlen. It avers that his past disciplinary record, which consists of a ten (10) day suspension for fighting in a cab of a locomotive in 1971, a ten (10) day suspension for excessive absenteeism and numerous wage garnishments were used to assess the appropriate penalty determination, only after it was clearly established that he was guilty of the instant charge.

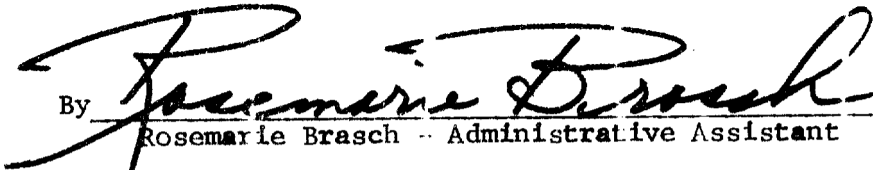
In our review of this case, we concur with Carrier's position. The record shows that Claimant was in an unauthorized area at the time of the incident and precipitated the actual physical altercation. The testimony and written statements of the eyewitnesses, which Claimant contends are contradictory, reflect more DeMinimus variations than substantive inconsistencies and collectively indicate that Claimant initiated the fight. It may well be that Engineer VerMurlen's demeanor was antagonistic, particularly, his method of approaching Claimant, but there is no direct evidence that he shoved and struck Claimant first. Moreover, even assuming arguendo, that he was verbally provocative, it does not excuse or mitigate physical belligerency. Claimant's deportment was potentially detrimental to rail operations as well as a blatant violation of Carrier's safety rules and it cannot be lightly treated. As a rule, we would invariably sustain Carrier's decision, since it was premised upon a competent and definable record, but we believe that Claimant should be reinstated on a last chance basis, because of the minimal contributory influences present. His actions were spontaneous, not premeditative or deliberate, but they were plainly wrong under the circumstances. We will reinstate him, in accordance with this finding, without back pay, with the explicit understanding that we will affirm a dismissal decision if he is disciplined for cause again.

A W A R D

Claim sustained to the extent expressed herein.

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 27th day of January, 1982.