Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8935
SECOND DIVISION Docket No. 8842
2-CR-FO-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That, in violation of the current agreement, Laborer J. R. Anderson was unjustly suspended and dismissed from service of the Carrier following trial held on March 5, 1979.

2. That, accordingly, the Carrier be ordered to make the aforementioned J. R. Anderson whole by restoring him to Carrier's service, 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 ten (10%) percent interest annually 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 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.

This case arose out of an incident on February 28, 1979, at the work place cafeteria, involving an altercation between Claimant and a co-employee. On March 1, 1979 Claimant was charged with fighting on Company property and notified to appear at a trial to be held on March 5, 1979. On March 16, 1979 Claimant was notified, that pursuant to the results of such trial he was dismissed from Carrier's service.

In its submission the Organization contended that the few days between the March 1, 1979 charge against Claimant and the investigative trial held on March 5, 1979 did not amount to "the reasonable advance notice ... of the exact offense for which he is to be tried" to which Rule 20(d) entitles Claimant. The Organization asserts that the only three full days which existed between March 1st and March 5th did not avail Claimant and his representatives a reasonable time to prepare Claimant's defense to the charge directed against him.

In the first place, it may be pointed out that the procedural propriety of raising this argument, now, is dubious since such objection was not raised at the investigative trial itself. Indeed, if Claimant and/or his representatives had believed they'd not had adequate time to prepare a defense they might have been expected to have requested a postponement of the trial, when it was held. That they did not tends to suggest that there was enough time to prepare Claimant's defense. Also, the charge was clearly stated, viz; "fighting on company property" so there could have been no confusion in Claimant's mind as to exactly what type of allegations he would have to be defending against. Additionally, since the altercation incident, underlying the charge in this matter, happened but three days prior to the date on which Claimant was charged, and since it was, as the testimony at the hearing showed, a rather sharply defined incident of very short duration, Claimant would have had no trouble in assembling those recollections and resources which would have been useful to his defense. Thus, even aside from the question of the propriety of Organization later raising a procedural objection which was not adverted to, on Claimant's behalf, at the trial, it clearly appears that, on the merits of this question, Claimant was accorded that "reasonable advance notice" required by Rule 20(d).

The record indicates that the incident underlying this matter evolved out of a situation in the work place cafeteria at approximately 7:00 P.M. on the evening of March 28, 1979. Claimant was apparently waiting in a line leading to a machine which returned a dollar's worth of change for a proper dollar. It seems that his co-employee, Morgan, who had been talking to another employee who was waiting in this line, but in front of Claimant, then tried to insert himself in front of Claimant, at the change machine itself, after the person he'd been speaking with had completed using it. Claimant apparently removed Morgan's dollar bill from the machine and words were exchanged regarding Claimant's charge that Morgan had tried to "crash" the line, as it were. Morgan testified that, as the words were being exchanged, he did not lay a hand on Claimant and backed off when Claimant evinced a high degree of indignation at Morgan's attempt to use the machine before him. Further, Claimant admits that he referred to Morgan as an "asshole" while Morgan was urging Claimant not to get excited. However, Claimant contends that Morgan then pushed him and Claimant swung his own arm to knock Morgan's away. Claimant admits that he and Morgan then scuffled, hitting each other in the chest and abdomen.

Three witnesses testified as to the nature of the physical altercation to which both Claimant and Morgan admit. In substance, the first of these witnesses testified that Morgan pushed Claimant first. The gist of the testimony of the second of these witnesses was that he saw both men wrestling around with Morgan having a grip on Claimant. The third of these witnesses testified that it seemed to him, as if Morgan had pushed Claimant.

Distilling the testimony of these witnesses, as well as other evidence, an effort to arrive at a fair picture of what transpired, suggests the following scenario. The Claimant did not initiate the chain of events which eventuated in his physical altercation with Morgan. Things were started off when Morgan, attempted to break into a line ahead of Claimant who'd been waiting on the line. Words were exchanged, things escalated, Morgan pushed Claimant, the latter

swung his arm to thrust aside the push, the men then closed, scuffled, jostled and wrestled with each other, with blows and thrusts being struck at their respective chest and abdominal areas. (Morgan, alone of those who testified at the hearing, asserted that he had been struck a facial blow by Claimant). The entire physical interchange seems to have lasted but approximately 15-30 seconds before being broken up by another employee.

Thus, the sum and substance of what took place seem to have been that Claimant was physically provoked, by Morgan's push into responding physically against Morgan. However, it should be noted that Claimant called Morgan an "asshole" at a time when Morgan seemed to be trying to modulate their verbal disagreement. Also simply because Claimant may not have struck the initial blow does not mean that he was not seriously blameworthy respecting development of the incident into an active physical altercation. As was stated in Award No. 21068, Third Division:

> "... we are inclined to find that the actions of both employees showed a willingness to engage in rather severe misconduct ... In every (such) instance ... it is safe to say that one of the parties ignited the spark. But it is equally safe to state that both parties had ample opportunity to restore a sense of propriety to the matter before it became totally uncontrollable."

Thus, simply because Morgan, rather than Claimant seems to have ignited the spark of the first physical contact it may not be inferred that Claimant did not constribute to the generation of a context in which a physical fracas seemed almost natural. Claimant's blameworthiness, in the physical aspect of the entire incident, is heightened by the fact that by that time he should have known better. In view of the fact that he had been previously suspended for 30 days, in 1977, for striking another employee, Claimant might well have been expected to have made every possible effort to avoid again being implicated in the offense of fighting on the job. Indeed, in view of this previous fighting incident it is the Carrier's contention that remedial discipline respecting this type of activity has failed in Claimant's case, and therefore, the discipline of discharge, assessed against him, in the instant matter, is appropriate.

There is force in this position but, it must be remembered, also that words are different in kind, not just in degree, from blows and that striking the first blow is often the key trigger in a more extensive physical altercation. Once one man is struck by another, there are many cultural and social contexts in which he who has been struck is seen as having little choice if he's to maintain "face" in that milieu, but to strike back. Consequently, it is felt that the fact that Claimant was not the physical provocator but, rather, the party provoked should serve as, at least, somewhat of a mitigating factor respecting his subsequent physical response.

Accordingly, since Claimant's basically blameworthy conduct was mitigated in character by his having been provoked to engage in it the Board feels that Claimant should be reinstated to service with the understanding that any conduct

resembling, to any degree, the type of behavior for which Claimant was here disciplined would meet with immediate dismissal without any recourse on the basis of mitigating factors, excuse, etc. Additionally, Claimant should receive no compensation for any wages lost, or credited respecting any fringe benefits, such as vacation rights, holidays, sick leave benefits, etc. which would have accrued in the period between dismissal and reinstatement.

A W A R D

Claim sustained, but only to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie D. Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 24th day of February, 1982.