

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: ( System Council No. 8  
( International Brotherhood of Electrical Workers  
(  
( Chicago, Milwaukee, St. Paul & Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the current agreement when First Class Lineman John J. Schultz was unjustly dismissed from service on February 22, 1979, for alleged insubordination, disrespect and assault of a supervisor on February 8, 1979.
2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to make First Class Lineman John J. Schultz whole by reinstating him to service with all seniority and other rights unimpaired and repaying all lost wages and benefits and his record cleared.

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 February 9, 1979, the Carrier directed the Claimant to attend an investigation to be held February 14, 1979. The letter read in pertinent part:

"...Formal investigation will be held at 9:00 AM the 14th day of February, 1979, in the Milwaukee Railroad Dept at Savanna, IL. for the purpose of developing the facts and circumstances in connection with your being relieved from your job at the close of work at 5:00 PM on February 8, 1979, for allegedly:

1. Assaulting a superior officer, Mr. Ray Stuckey, Gen. Supervisor - Sig. and Comm. Lines, with the intent to do bodily harm and threatening his life at approximately 10:30 AM, Feb. 8, 1979.

- "2. Being disrespectful to a superior officer, Mr. Ray Stuckey, by directing to him abusive and obscene language at approximately 10:30 AM, February 8, 1979.
3. Being insubordinate to a superior officer, Mr. Ray Stuckey, when you failed and refused to return to work when so directed at approximately 10:30 AM, Feb. 8, 1979."

The investigation was held as scheduled and subsequent to the investigation, the Claimant was dismissed.

The Petitioner submits that the dismissal was arbitrary and capricious. In respect to the first charge, they believe it to be totally false and unproven. They direct attention to Mr. Stuckey's testimony and the testimony of other witnesses which indicated that the Claimant never struck Stuckey. In respect to the second portion of the charge, the Union submits that there was nothing present, outside of Stuckey's conflicting testimony, to support the charge. In respect to the third charge, the Union similarly submits that it, too, is unfounded. They direct attention to the testimony of Mr. Jurgerson, the Claimant's immediate supervisor, who testified that the Claimant went back to work when instructed by Stuckey. They also direct attention to the testimony of Employees Bailer and Schultz to corroborate this.

The Carrier argues that the testimony clearly shows the Claimant's culpability in connection with each charge. They rely primarily on the following testimony of Mr. Stuckey:

"12.A Approximately 130 feet apart. I noticed that Schultz had come down off the pole and was trying to run and fell in the snow and when he got out in the middle of the track he threw his belt and hooks off and started running toward me hollering and yelling. So as he got close within probably a span of me he was swearing and cussing and then I knew there was something wrong and when he got within 15 ft. of me he pulled out two letters he had in his pocket and said to me, 'I am going to take these God Damn letters and jam them down your throat.' I said, 'John, let's calm down a little bit. What is your problem?' He kept cussing and swearing because he had received these bills from a collecting agency.

\* \* \*

14.A At this point he said, 'You son of a bitch, I am going to take and shoot you and throw your body in the Mississippi river.' And I told him at this point, 'John when you make statements like this you are going to get yourself in serious trouble.' At this point he ordered me to take my glasses off and I said, 'John I am not taking my glasses off.' He said, 'I'll hammer your God damned head right into this snow bank.' So we walked down the track and he was ahead of me talking about how he wouldn't send his vacation in and he told me his wife was the boss and if I wanted his vacation I would have to talk to his wife and get his

"vacation. At that point I said, 'John, I am not calling your wife for your vacation.' At this point he again threatened to shoot me, and used the words son of a bitch I will shoot you and throw your body in the Mississippi, again -- the second time. At that point, I told him, 'John, put on your hooks. Let's get up on the pole and go to work.' He refused to go to work and at this point Foreman Jurgenson was walking down the track and told foreman Jurgenson to take this man and put him to work. At that point foreman Jurgenson took John and took him down and made him put his hooks on and go back to work. Approximately 10 - 15 minutes later when John was on the pole he made mention again that he was going to hammer my head, when he was working on the pole. I did not answer him. That concludes my conversation with John Schultz on this date."

The Carrier also notes that it is not necessary to show that Schultz struck Stuckey in order to establish assault. According to the Carrier, assault is the intent, attempt or offer to do violence to another. They also argue that they have an obligation to provide a safe working place for all its employees; and thus, the discharge was not arbitrary or capricious.

The Board after reviewing the evidence, notes that much of the evidence is in conflict and that the hearing officer had to make material assessments of credibility in order to resolve these conflicts. It is well established that due to the appellate nature of these proceedings that resolutions of conflicts and assessment of credibility are reserved to the hearing officer. The function of the Board as a reviewing body is not to resolve credibility in conflicts but to review the evidence as a whole to determine if the record, including the resolution of conflicts and credibility issues, is supported by substantial evidence.

In this case, it is our determination that there is substantial evidence to support the hearing officer's decision to resolve the credibility issues in conflict in the manner in which he did.

It would appear from the transcript that there were no witnesses who could testify that they heard the initial confrontation between the Claimant and Mr. Stuckey. However, there were witnesses to Mr. Schultz's words when Stuckey approached him 10 to 15 minutes later. The Claimant's words at this time, as reported by the witnesses and by his own testimony, make believable Stuckey's testimony about the Claimant's initial behavior which included threats to shoot Mr. Stuckey and throw his body in the Mississippi River. Regarding the second conversation, Jurgenson testified that "...I heard him say the next time you come out, you'd better bring your iron along or he (Schultz) would beat your head (Stuckey's) into the snow." The Claimant when confronted with this testimony, testified as follows:

"Q. Mr. Schultz, you have heard the testimony of Mr. Stuckey, and Mr. Jurgenson wherein they both indicated that your words were, 'the next time you come out, you'd better bring your iron along, or he'd beat your head into the snow.' Did you use those words?

Mr. Halkyn to Mr. Peterson:

Could we call a brief recess here. I would like to advise him how to answer these questions. He seems to be confused.

"Mr. Peterson to Mr. Halkyn:

It's really very simple. All he has to do is say 'yes' or 'no', he didn't.

Mr. Schultz:

A. The answer to the question is yes."

The Claimant's own testimony at other points during the hearing established he was in an angered state and tried to provoke Stuckey. This again makes believable Stuckey's testimony and provides a substantial basis for the hearing officer's decision to give controlling weight to Stuckey's testimony. Pertinent testimony in this respect by Schultz is as follows:

"104. Q. The previous testimony stated that you ordered Mr. Stuckey to take off his glasses. For what purpose?

104. A. I will say that I did not order him -- I asked him to take his glasses off to be a man and have a fist fight if he wanted to. \* \* \*

109. Q. Get back to the original question -- for what purpose did you request Mr. Stuckey to take his glasses off?

109. A. For what purpose to have him take his glasses off? -- to provoke him to anger."

The above review of the evidence convinces us that there is substantial evidence to support, at a minimum, the first and second charges against the Claimant. The Carrier is correct--physical harm or action is not necessary to establish assault against a supervisor. The assault on Mr. Stuckey by the Claimant, even though verbal, is a serious transgression of his employment responsibilities.

In respect to the quantum of discipline, it cannot be ignored that such behavior is extremely serious. The Carrier should not be required to tolerate this kind of abuse and threats of bodily harm on supervisors. It is also noticed that not only was Mr. Schultz' initial confrontation unprovoked, but that he persisted in his threats of bodily harm toward Mr. Stuckey. It is therefore our conclusion that we will not disturb the discipline.

A W A R D

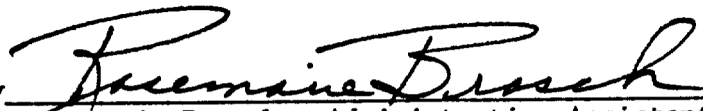
Claim denied.

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Award No. 9549  
Docket No. 9098  
2-CMStP&P-EW-'83

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of July, 1983.