

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13193
Docket No. 13091
98-2-95-2-111**

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

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Burlington Northern Railroad Company violated the terms of Rule 35 of the current Agreement.

2. That, accordingly, the Burlington Northern Railroad Company be ordered to reinstate 14th Street, Chicago, Illinois Carman Kirvan A. Audain who was dismissed from active service resulting from an investigation accorded him August 23, 1994 and compensate him for eight (8) hours at the straight time rate of pay commencing August 15, 1995. We also requested the following:

- 1) Compensate him for all wages lost;**
- 2) Make him whole for all vacation rights;**
- 3) Make him whole for all health and welfare insurance benefits;**
- 4) Make him whole for all pension benefits, including Railroad Retirement and Unemployment Insurance;**
- 5) Make him whole for any and all other benefits that he would have earned during the time withheld from service;**

- 6) Any record of this arbitrary and unjust disciplinary action be expunged from his personal record."

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 were given due notice of hearing thereon.

As a result of an Investigation held on August 23, 1994, the Claimant was charged with failing to comply with his Foreman's instructions in violation of General Rule 576, insubordination in violation of General Rule 564, and racial harassment of his Foreman in violation of Safety Rule 19 for conduct occurring on August 15, 1994. His dismissal from service is protested by the instant claim.

The record reveals that Claimant is a Carman with 15 years of service, and on August 15, 1994 he was working at the Suburban Mechanical facility at 14th Street in Chicago under the direction of Mechanical Supervisor Jose Cardenas. Cardenas testified that at about 10:50 A.M. he saw Claimant drive by on the Cushman vehicle which he stated was only to be used in cases of emergency or with a Supervisor's permission. Cardenas called Claimant on his radio and asked to see him. Claimant left the Cushman and reported to Cardenas in the pit where a conversation ensued. There were no other witnesses to this conversation. Cardenas testified that he told Claimant to leave the vehicle and continue his duties without it. Claimant testified that he told him to park the vehicle. In either case, both agree that Claimant stated that the Cushman was not a White or Hispanic vehicle, indicating some perception of unfairness on his part based upon his being Black and Cardenas being Hispanic. Cardenas testified that Claimant looked angry, wild-eyed and stressed and waved the radio in his right hand within 3 feet of Cardenas' face, stating that he was going to talk to Shop

Superintendent Zeilmann. Claimant testified that he tried to explain that everyone else is allowed to use the Cushman, but Cardenas was belligerent to his attempted explanation.

It is undisputed that Claimant left the area, got back on the Cushman, and drove it around the boxcar on track 3 and parked it where he had gotten it in front of the upholstery shop. Cardenas indicated that Claimant drove the Cushman about two and one-half car lengths before parking it. Claimant indicated that it was closer to one car length, explaining that he had left it in foul of track 3 when he responded to Cardenas' urgent summons, and had to move it to avoid creating a safety hazard. Cardenas did not recall the Cushman fouling track 3 at the time.

Cardenas followed the Claimant into the shop. Cardenas testified that he told the Claimant to accompany him to see Zeilmann, and the Claimant responded that he was not going to tell Zeilmann anything and to get out of his face, waving his left hand within inches of Cardenas' face. Claimant testified that he did not hear any direction from Cardenas to accompany him to see Zeilmann, and he left the shop area. Cardenas testified that the Claimant exhibited threatening behavior, and he apparently called for special agents to escort the Claimant off the property. The record reflects that Cardenas is 80 pounds heavier than the Claimant.

Three witnesses testified that they saw the Claimant that morning after this incident and that he did not appear to be angry, nor exhibited any disgruntled or threatening behavior. Foreman Cousin testified that the Claimant came to her work area and admitted that he had called Cardenas a racist, which he shouldn't have, but indicated that he had asked for forgiveness spiritually and did not need to apologize.

Cardenas testified that the Cushman is only to be used for emergency situations or if there is no other vehicle, and that permission is to be received from the Foreman. It is undisputed that the Claimant did not receive permission to use the Cushman that morning, and that he was operating it with an unauthorized key. Two other Carman testified that they had used the Cushman to transport materials in the past and that they had asked Cardenas for the key on those occasions. Claimant testified that the Cushman was regularly used for non-emergency situations and that Cardenas had instructed others to use it to carry material. It appears that the Kaboda tractor, which is the vehicle normally used to transport material to the yard, was in use by another Carman that morning and was not available at the time. When Cardenas told Claimant to stop

using the Cushman, he did not inquire as to whether the Kaboda was available or whether Claimant had permission to use the Cushman.

Carrier argues that it was justified in dismissing Claimant for insubordination and refusal to follow Supervisor's directions, citing Second Division Awards 9074, 9222, 10597, 10840, 11856, 12107, 12797, as well as withholding him from service, Second Division Award 12117. It also notes that Claimant admittedly violated Rule 19 prohibiting racial harassment. Carrier contends that it properly relied upon Claimant's past record including a 15 day suspension for insubordination in 1982, a censure for submitting a false time card in 1989 and a censure for improper inspection in 1991, citing Public Law Board No. 5068, Award 34; Second Division Award 12080.

The Organization contends that at most Carrier proved a disagreement and misunderstanding between Claimant and his Foreman, to which there were no witnesses. It alleges that Cardenas overreacted to Claimant's comments, that Claimant had a reasonable explanation for moving the Cushman, and that Claimant could not disobey a direct order he did not hear. The Organization avers that there was no reasonable basis for Cardenas' apprehension since he was much bigger than Claimant and others testified that his demeanor was normal and not threatening that morning after the incident in question. It argues that the penalty imposed was excessive and arbitrary, citing Second Division Award 9073, and that Claimant's prior record was improperly considered since it was not introduced into the record at the Investigation.

A careful review of the record leads the Board to conclude that Carrier has sustained its burden of proving a violation of Rule 19 in Claimant's admittedly racial comment to Cardenas. With respect to the allegations of insubordination and failure to follow a direct order, we are unable to conclude that the Hearing Officer's determination that Cardenas' account should be credited over that of Claimant is arbitrary or capricious, and thus find the existence of evidence to support Carrier's charges. However, considering the reasonable explanation given by Claimant for moving the Cushman, albeit not far, and his testimony that he did not hear Cardenas' order to accompany him to the Superintendent's office, as well as the weight differential between the two and the fact that there was no additional evidence supporting an inference that Claimant was acting in a threatening or disruptive manner after the exchange, we must conclude that Claimant failed to engage in the type of conduct which would itself warrant immediate dismissal from service.

With respect to the appropriateness of the penalty, and without undermining Carrier's right to rely upon his past disciplinary record, we are "... mindful of the need to ensure that the the punishment fits the transgression." Second Division Awards 8033, 9073. Under the specific circumstances of this case, we find that dismissal was excessive and unwarranted, and constitutes an abuse of discretion on the part of Carrier. This is true even considering Claimant's prior record, which contains a 15 day suspension for insubordination over 12 years earlier. This record is unlike those in the cases relied upon by Carrier, since it does not exhibit a continuous, current problem with Claimant following directions, but rather reveals a long period of service where such issue has not arisen. Like the Board in Second Division Award 12117, we find that the appropriate penalty in this case would be to return the Claimant to service with seniority rights unimpaired but without back pay. All other remedy requests contained in the claim are denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 11th day of February 1998.