

Award No. 4001

Docket No. 3979

2-UP-FO-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'

**UNION PACIFIC RAILROAD COMPANY
DEPARTMENT, A. F. of L. - C. I. O. (Firemen & Oilers)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under provisions of the current Agreement Sand Drier Vernal Cunningham was discriminated against and unjustly suspended on August 30, 1960, and subsequently unjustly dismissed from the service of the Carrier on September 22, 1960; and

2. That accordingly, Carrier be ordered to reinstate him with all rights of employment and compensation for all time lost retroactive to August 30, 1960.

EMPLOYEES' STATEMENT OF FACTS: The Union Pacific Railroad Company, hereinafter referred to as the carrier, employed Sand Drier Vernal Cunningham, hereinafter referred to as the claimant, on the third shift in its LaGrande, Oregon Shops. The claimant had been in the service of the carrier working in various classifications of the firemen and oilers craft in a satisfactory manner since his date of employment on March 5, 1942, without any discipline ever being assessed against his service record.

The carrier's Enginehouse Foreman Mr. J. H. Diehl requested the claimant to report at the district foreman's office on September 2, 1960, for investigation and hearing on charges he was in violation of Rules 700 and 701 of the Rules and Instructions of the Motive Power and Machinery Department. Alleging the claimant at about 3:40 A.M. on the morning of August 30, 1960 he became argumentative and struck foreman when it was called to his attention of taking an excessive length of time for lunch.

Carrier's investigators Master Mechanic J. E. Pickett summoned as his witnesses at the investigation and hearing held on September 6, 1960 (hearing postponed by request of claimant): Messrs. W. C. Miller, Enginehouse Foreman; J. H. Diehl, Enginehouse Foreman; B. J. Gibson, Engine Wiper; E. E. White, Engine Wiper, and which the aforementioned appellations are contained in the stenographic transcript of the investigation and hearing.

Under these circumstances, the claimant was properly discharged from service and there is no basis under the provisions of the agreement for his reinstatement to service or for allowing pay for time lost. Accordingly, the claim should be denied in its entirety.

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 were given due notice of hearing thereon.

The Claimant, Vernal Cunningham, was employed as a Sand Drier on the 11:30 P. M. to 7:30 A. M. shift at the Carrier's LaGrande (Oregon) Shops at the time here relevant.

On August 30, 1960, he was assigned together with Engine Wiper Gibson and Hostler Attendant White to service train No. 126. The three employes completed their assignment at about 3:05 A. M. and then took their meal period scheduled for twenty minutes. When they returned, Enginehouse Foreman W. C. Miller, who was in charge of the night shift, told them they had overstayed the meal period. The Claimant denied this and an argument ensued between him and Foreman Miller. The parties are in disagreement as to the exact content of the argument. However, it is undisputed that it ended with the Claimant striking the Foreman at the point of chin which resulted in a slight dislocation of the latter's left jaw requiring medical treatment. Foreman Miller did not strike back and stated he would not fight with Claimant (See: Organization Exhibit No. 1, p. 10). He then instructed the Claimant to go home.

The Claimant was immediately suspended from service. After a formal investigation hearing, he was dismissed, effective as of September 22, 1960, in accordance with Rules 700 and 701 of the Rules and Instructions of the MP & M Department.

He filed the instant claim in which he requests re-instatement with all rights unimpaired and compensation for all time lost. For the reasons hereinafter stated, we are of the opinion that the claim is without merit.

1. At the investigation hearing, the Claimant's representative requested that the witnesses be excluded from the hearing room until each had testified. Since the hearing officer denied this request, the Claimant contends that he was not afforded a fair and impartial hearing as provided in Rule 10 of the Labor agreement. The flaw in this contention is that Rule 10 does not require the exclusion of witnesses from the hearing room during the testimony of other witnesses. The matter is left to the discretion of the hearing officer. Thus, the latter's refusal to grant the request for the exclusion of witnesses did not violate Rule 10 or make the investigation unfair and partial. See Awards 18179 of the First Division and 5061 of the Third Division.

2. The Claimant complains that Master Mechanic J. E. Pickett who acted as the hearing officer at the investigation was also the responsible official of

the Carrier who dismissed him. Hence, the Claimant argues that Pickett acted in the dual capacity of judge and prosecutor and that this fact is incompatible with the requirement of a fair and impartial hearing within the purview of Rule 10. We disagree. In the absence of a specific prohibition in the labor agreement, and particularly in Rule 10 thereof, the designation of Pickett as the hearing officer was within the Carrier's managerial discretion. It was not, therefore, violative of the Claimant's contractual right to a fair and impartial hearing. See: Awards 14965 of the First Division and 10355 of the Third Division. In addition, the basic test to be applied in determining whether an investigation hearing was fair and impartial consistent with the requirements of due process is not **who** conducted it but **how** it was conducted. A careful reading of the stenographic transcript of the hearing in question has satisfied us that Pickett conducted it fairly and impartially and that he afforded the Claimant every opportunity to present all evidence desired by the Claimant, including the examination and cross-examination of witnesses. Hence, we fail to see any violation of the Claimant's right to a fair and impartial hearing.

3. The Claimant objects to the undisputed fact that the Carrier contacted his two fellow employes (Gibson and White) prior to the investigation hearing and secured signed statements from them as to what they saw and heard regarding the altercation under consideration. We can see no fault with the Carrier's procedure. On the contrary, after the Carrier had received Foreman Miller's report, it was its duty carefully to investigate the incident before it took any definite action against the Claimant. The record is devoid of any indication that the Carrier brought pressure to bear upon Gibson or White in an effort to secure statements from them which were favorable to it or unfavorable to the Claimant. Its attempt to ascertain objectively all pertinent facts rather than merely rely on the subjective statements of the two participants in the altercation (Miller and the Claimant) cannot validly be challenged as a violation of the Claimant's contractual right to a fair and impartial hearing.

4. It is well settled in the law of labor relations that a physical assault upon a supervisor is a grave offense which cannot be condoned, except under the most extenuating circumstances, such as manifest self-defense or obvious provocation. See: Award 4350 of the Third Division; Arbitration Award in re Southwestern Bell Telephone Co., 22 LA 501 (1954); and Lawrence Stessin, **Employee Discipline**, Washington, D. C., BNA Incorporated, 1960, pp. 62-63 and arbitration awards cited therein.

The basic question requiring decision is whether the Claimant acted in justifiable self-defense or was obviously provoked by Foreman Miller when he struck the latter. The Claimant contends that this was the case while the Carrier denies it. A thorough examination of the record has convinced us that the preponderance of the available evidence supports the Carrier's position. Specifically, we have been influenced by the following:

If the Claimant believed that he was unjustly dealt with by Foreman Miller when the latter accused him of having overstayed the meal period, the only recourse available to him was to file a grievance under Rule 11 of the agreement—a procedure which with he was admittedly familiar (see: Organization Exhibit 1, p. 8). Instead, he started quarrelling with Miller, accusing the latter of "raw-hiding" or "riding" him. Yet the record does not disclose that Miller had singled out the Claimant for discriminatory treatment at this or any other time. In other words, the Claimant displayed an insubordinate and hostile attitude towards Miller for which we have failed to discover any

justifiable reason. Furthermore, the Claimant's assertion, which is strenuously disputed by Miller, that the latter called him a "god damn liar" and also threw up his hands in an apparent attempt to strike him is not supported by any convincing evidence other than his own self-serving statement. Since the Claimant was in an agitated and irritated state of mind, we cannot accept his own version as adequate proof that Miller provoked the physical assault upon himself. Finally, we are particularly impressed by the undisputed fact that the Claimant struck the first blow and that Miller did not strike back but expressly refused to engage in a fight. In summary, the evidence on the record considered as a whole has convinced us that the Claimant was the aggressor. Therefore, his action constituted an unjustified assault upon Foreman Miller.

5. The Carrier's right to take disciplinary action against the Claimant under such circumstances is beyond doubt. We have consistently held that a Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Award 3874 of the Second Division and other Awards cited therein. In view of the seriousness of the Claimant's offense, we are unable to find that his dismissal from service was influenced by such unreasonable considerations on the part of the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May, 1962.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4001

The evidence contained in the transcript fails to support the conclusion of the majority that the claimant was the aggressor and that he acted without provocation.

The transcript contains unrefuted testimony of the Foreman's previous discriminatory treatment of the claimant and of the objections to this treatment made by the claimant in accordance with the provisions of the Agreement. It also contains the admission of the Foreman that he lost his composure and waved his arms in the claimant's face while standing quite close to him. There is no justification for a denial award.

James B. Zink
C. E. Bagwell
E. J. McDermott
T. E. Losey
R. E. Stenzinger