Award Number 5883
Docket Number 5676-I
2-D&TSL-I-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

JOHN F. WOZNICKI, Petitioner

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

Carman, John F. Woznicki, was wrongfully disqualified and discharged from the service of the Detroit and Toledo Shore Line Railroad Company on the 3rd day of July, 1967, and seeks reinstatement with full seniority unimpaired and with back pay for all lost time from the 3rd day of July, 1967 until the date of determination herein and for such other relief as is proper in the premises.

EMPLOYEE'S STATEMENT OF FACTS: John F. Woznicki entered the employ of The Detroit and Toledo Shore Line Railroad Company in Toledo, Ohio, the 17th day of May, 1949, after passing the required physical and medical examinations in connection with his application and subsequently passed all other required examinations prior to the time of his discharge. His first employment was that of a car inspector at Lang Yard, Toledo, Ohio. He has been a member in good standing of the Brotherhood Railway Carmen of America, System Federation No. 103, Railway Employees' Department, A.F.L.-C.I.O.—Carmen, since the time of his employment.

On the 13th day of June, 1967, the Claimant was working the third trick (11:00 P.M., June 13, 1967 to 7:00 A.M., June 14, 1967) in the freight yards of The Detroit and Toledo Shore Line Railroad Company. At approximately 11:35 P.M. the Claimant and Car Inspector, J. D. Calhoun, also an employee of the Detroit and Toledo Shore Line Railroad Company, were working out of the same Inspector's office. It was an extremely warm night, and an air conditioner, provided by the employer, was on and operating in the Inspector's office. It was found that if a cover plate was left off from the air conditioner that it distributed more cool air throughout the room. Inspector Calhoun wanted to put the cover back on the air conditioner, and the Claimant asked him not to because it would prevent the cool air from distributing sufficiently throughout the office. Inspector Calhoun insisted that he put the plate on, and an argument ensued. It was Mr. Woznicki's contention that all of the men could benefit from the cool air with the cover off, which contention seemed most logical. Mr. Calhoun said that he would not move his chair, but insisted upon covering up the machine. Mr. Calhoun got up from his chair and went at Mr. Woznicki in a belligerent mood, as stated by William R. Rose, Asst. Car Foreman.

The above cited correspondence shows beyond doubt, that all handling on the property, whether by claimants' representatives or by claimant personally, has been on the basis of leniency.

Any appeal now on a basis of pay for time lost and/or unjustified dismissal is untimely and directly contrary to the principles established and affirmed by this Honorable Board that a case appealed to this Board which is substantially at variance with the claim handled with the carrier must be dismissed and the instant case, based on the facts of record, merits a similar dismissal decision.

Article 19(d) of the agreement between the parties effective January 1, 1959 provides:

> "(d) This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted **within** nine (9) months of the date of the decision of the highest designated officer of the carrier." (Emphasis supplied)

The highest designated officer of the carrier is the Labor Relations Officer and his decision was rendered on August 16, 1967 and appeal to this Board was not made until **after** the time limit specified in Article 19(d) and again merits a denial award.

Finally, Attorney Kolby's letter of May 15, 1968 states that the Brotherhood of Railway Carmen of America is a party to the dispute and also that he, Attorney Kolby, is one of the "attorneys for the Employes." Both of these statements, made in Mr. Kolby's letter of May 15, 1968 to this Board, are **not** factual. The Carmen are not a party to this dispute and Attorney Kolby does not have the right to speak or act on behalf of the organization in this dispute. Please note that General Chairman White **did not sign** the letter of May 15, 1968 although a space was provided for this purpose.

The Carrier has shown:

1—Claimant Woznicki was responsible as charged.

2—Discipline was warranted.

3—Discipline of dismissal based on transcript of hearing and claimant's past record was proper and not arbitrary, capricious or discriminatory.

4—Claim as appealed is not proper as such claim was not handled on the property.

5—Claim was not appealed within the time limits specified in Article 19(d).

6—Statements made in May 15, 1968 of notice of intent to file claim with this Board are not factual.

Claim, in its entirety merits a denial award.

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.

On June 16, 1967, Claimant was given notice in writing by the Carrier to appear for a hearing to be held on June 22, and answer to the following charge:

"Charge: While on duty as lead carman inspector, commencing 11:00 P.M., June 13, 1967, and finishing tour of duty 7:00 A.M., June 14, 1967:

(1) Conduct unbecoming an employee at approximately 11:35 P.M., EDT, June 13, 1967, in being quarrelsome, vicious and using profane and abusive language to Mr. J. D. Calhoun, carman inspector.

(2) Threatening bodily harm to Carman Inspector J. D. Calhoun at approximately 11:35 P.M., EDT, June 13, 1967."

On July 3, 1967, the carrier advised claimant in writing that the transcript of the hearing sustained the charges made and that he was therefore dismissed from service as of the close of work that day.

The discipline assessed and imposed stemmed from an altercation between Claimant and Mr. J. D. Calhoun, a fellow employee, who was also tried and convicted on identical charges after appearing at the same hearing. Mr. Calhoun, however, was disciplined by suspension from duty of sixty days (July 4, 1967-September 2, 1967).

The evidence of record, and more particularly, the eye witness testimony shown by the transcript of the hearing, establishes that both participants in the altercation were guilty of the specific charges made against them. Both employed abusive and profane language; both engaged in threatening and provocative acts. Each lost control of himself over what has to be considered a trivial incident—an argument over the operation of an air conditioning machine. Both were veteran employes of this carrier with more than enough practical railroading experience to realize the consequences flowing from such conduct. Each should have governed himself accordingly but neither did.

The only question, then, is whether or not Claimant was discriminated against when the carrier dismissed him from service but only suspended Mr. Calhoun for sixty days. This difference in the degree of discipline assessed and imposed upon the two employes appears to have been based on two factors: First, Claimant was the only one of the two participants in the altercation who used a lethal weapon (an ice pick) after uttering a threat to kill the other; and, second, that Claimant's personal record of service with this Carrier (18 years in all) showed that on three prior occasions he had been disciplined by suspension from duty and reprimanded for the same type of conduct as was established here, i.e., using profane and abusive language in dealing with his fellow employes, and threatening them with physical assault. On the other hand, the personal record of Mr. Calhoun revealed no disciplinary action taken against him. As to the first factor, the Board finds from the available evidence that the circumstances prevailing at the time did not justify Claimant's resort to the use of a dangerous weapon which could have inflicted serious injury upon the person of Mr. Calhoun, if not his death as threatened by Claimant. At that particular time, the Claimant, although he had been threatened by Calhoun, was not being by the latter and was not physically in a position from which there was no escape. Accordingly, the doctrine of self-defense relied on by Claimant as justifying his use of the ice pick cannot properly be asserted under those circumstances.

In view of the foregoing, we find that the Carrier's dismissal of Claimant was not discriminatory, as alleged. Accordingly, the discipline imposed will not be set aside by the Board.

AWARD

Claimed denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 9th day of April, 1970.

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.