Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7968
SECOND DIVISION Docket No. 7858
2-N&W-CM-'79

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Carrier violated the Agreement of September 1, 1949, as subsequently amended when on July 27, 1976, Car Repairer G. E. Cullins was given a formal investigation for charges that were not specific, resulting in dismissal from all services of the Carrier on August 5, 1976.

2. That the investigation was improperly arrived at and represents unjust treatment within the meaning of Rule No. 37 of the controlling Agreement.

3. That because of such violation and capricious action, Carrier be ordered to return Car Repairer G. E. Cullins to service with seniority unimpaired and compensated for all time lost, plus seven (7) per cent interest.

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.

Claimant was dismissed from service of the Carrier effective August 5, 1976 following a formal investigation held on July 27, 1976, wherein Claimant was adjudged guilty of engaging in horseplay on the premises of Carrier in violation of Safety Rule 1004.

Charge against Claimant arose from an incident occurring on July 6, 1976 on Carrier's property, the Portlock Yard, located at Norfolk, Virginia. The following account ostensibly appears to be a fair representation of what actually occurred, in the face of conflicting testimony contained in the

evidentiary record. At approximately 2:55 P.M., five minutes prior to official quitting time for employees working first shift, the Claimant and a fellow employee were involved in some type of altercation in the parking lot which resulted in injuries to the other employee. As reflected in the evidentiary record, actual quitting time and official time signalling the end of the shift are often at variance, since some days employees work past the official time of 3:00 P.M., without payment for overtime, while other days they work short of 3:00 P.M. Therefore, it is unclear whether both the Claimant and the other employee were off duty at the time of the altercation, though each employee has indicated that at 2:55 P.M. that day of July 6, 1976 they were, in fact, off-duty. According to the other employee involved in the incident, he had left the locker room almost immediately after Claimant and noticed Claimant was walking at a very fast pace toward the parking lot. As the other employee neared his car, he noticed the Claimant approaching him in the same fast paced walk and noticed Claimant had a lug wrench in his hand. The other employee testified at the hearing that Claimant grabbed him by the shirt, pulled him from the car and sort of threw him on top of the car all in one motion. What ensued next was a detailed description by the other employee recounting his effort to free himself of the Claimant so he could get in his car and go home. It was during this scuffle the other employee sustained his injuries, when according to him, both the Claimant and he ended up on the ground and the lug wrench came down on him. Immediately following the altercation, the other employee who had sustained bleeding injuries of cuts to his nose, lip and right arm reported to the Assistant Car Foreman that he had been attacked by the Claimant. The Assistant Car Foreman promptly proceeded to the locker room, whereupon finding Claimant, he informed both the Claimant and the other employee they were relieved from duty for fighting on Company property. Several minutes later, following the Assistant Car Foreman's return to his office, the Claimant and the other employee arrived, whereupon both men indicated they had not been fighting but rather were only playing in the parking lot. After conferring with the Car Foreman on the matter, the Assistant Car Foreman decided to charge both the Claimant and the other employee with horseplay and allowed both men to return to work the following day, July 7, 1976. On date of July 7, 1976, both the Claimant and the other employee were given written notification to attend a formal investigation scheduled for July 20, 1976 and each was charged with having engaged in horseplay in violation of Safety Rule 1004. Upon request of the Organization, the investigation was postponed for one week to allow Claimant to complete his scheduled vacation.

In addition to several alleged procedural defects, the Organization takes the position that while Claimant may have been guilty of horseplay, Carrier in fact dismissed Claimant for reasons other than horseplay for which he was charged. As Claimant cannot have been found guilty of fighting, as testified to by the other employee involved in the incident of July 6, 1976, the Organization submits the discipline of dismissal assessed Claimant was therefore not justified and, in fact, was arbitrary, capricious and unreasonable. In substantiation that dismissal was unwarranted the Organization points out the discipline assessed the other employee involved was a ten day

deferred suspension while Claimant was dismissed from service. The Organization asserts that such disparity in discipline for the same offense is unfair, especially so, in view of Claimant's twenty-five (25) years of service as compared to a little over two years of service for the other employee.

The Carrier takes the position that Claimant was afforded a fair and impartial investigation that was free of any and all procedural improprieties or deficiencies as so alleged by the Organization. Carrier asserts that testimony from the evidentiary record is substantial and more than adequately shows that the altercation which took place in the parking lot on July 6, 1976 was considerably more serious than horseplaying. Carrier argues that conduct of the nature exhibited by Claimant cannot be tolerated on Company property and contends it matters not whether or not Claimant was on duty at the time. Carrier asserts the finding of guilt on the part of Claimant is well supported by remarks made at the hearing by the Local Chairman of the Organization. Furthermore, Carrier declares it acted properly when it undertook a review of Claimant's past record. This review revealed Claimant had been given three (3) prior investigations for which he was assessed discipline over his twenty-five (25) years of service with the Carrier. In fact the last previous investigation, Claimant was given a thirty (30) day suspension in lieu of dismissal for almost a similar offense as the one he was involved in on July 6, 1976. Carrier argues that in view of Claimant's past disciplinary record coupled with the severity of the offenses involved, his dismissal was warranted and was not assessed in an arbitrary, capricious or discriminatory manner.

Upon close examination of the entire record this Board finds the following:

(1) There is no merit to any of the procedural issues raised and we therefore rule to dismiss them;

(2) The record is substantial in support of the finding of Claimant's guilt adduced at the investigation conducted by Carrier on July 27, 1976;

(3) However, we have attached great weight to Claimant's twenty-five (25) years of service with the Carrier and also given due consideration to the disparity in discipline levied between the Claimant and the other employee involved in the incident of July 6, 1976. We rule therefore the discipline of dismissal assessed Claimant excessive and accordingly direct Carrier to reinstate Claimant without back pay or other benefits, both monetary and non-monetary in nature, but with all other rights restored.

In so ruling, this Board has concluded that Claimant's break in service with the Carrier since his dismissal on August 5, 1976 shall serve as his discipline for his part in the incident of July 6, 1976.

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A W A R D

Claim disposed of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1979.