

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

Parties to Dispute: { System Federation No. 7, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Burlington Northern Inc.

Dispute: Claim of Employees:

1. That the Burlington Northern Inc. improperly withheld Carman Buckner, Cicero, Illinois from service July 10, 1976 pending investigation and unjustly dismissed him from service on August 6, 1976.
2. That accordingly the Burlington Northern Inc. be ordered to compensate Carman R. L. Buckner, Cicero, Illinois for all time lost from July 10, 1976 until he is restored to service, restoration of all fringe benefits, all seniority and vacation rights unimpaired; made whole for all health and welfare insurance benefits; made whole for pension benefits including Railroad Retirement and Unemployment Insurance and be made whole for any other benefits that he would have earned during the time he was held out of service.

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 discharged from his position as Carman at Cicero, Illinois following due notice and investigation into the following charges:

"*** alleged insubordination and use of vulgar language to Car Foreman J. A. Smelly, resulting in alleged altercation with Mr. Smelly, and conduct unbecoming an employee. Also your alleged failure to comply with instructions from Car Foreman J. A. Smelly at about 5:15 p.m., Friday, July 9, 1976, at the Western Avenue TOFC Ramp, Chicago, Illinois."

The evidence of record consists, for the most part, of directly conflicting testimony by Claimant and his foreman regarding a confrontation between them on July 10, 1976. The foreman's testimony, if believed, establishes that Claimant used profane language, provoked an altercation and struck the foreman when the latter

questioned him regarding his tardiness that day. It is not disputed that Claimant did report late for work that day. According to Claimant the foreman questioned him in an "arrogant manner" and stuck his fingers in Claimant's face.

The descriptions of the event are so dramatically opposed that it must be concluded that one or the other of these two sole witnesses is not telling the truth. Carrier's hearing officer, who assessed the discipline, obviously chose to believe the foreman's version. From the transcript of the investigation we cannot say that this conclusion was unsupported by the evidence or patently unreasonable. While we may have resolved the credibility conflict differently if we had the opportunity to observe demeanor and other factors relating to testimonial capacity, we do not have that opportunity under existing appellate procedures in this industry. Rather a long tradition of arbitral restraint in such cases has been firmly established by hundreds of awards by this and other grievance arbitration Boards operating under the Railway Labor Act. This approach is not of our making but it is so universally accepted and utilized by both parties that we cannot lightly cast it aside; notwithstanding its obvious limitations upon the pursuit of facts in a particular case.

There is on this record sufficient evidence, if believed, to support Carrier's conclusions regarding Claimant's culpability. Dismissal for such actions by an employee is not excessive or unreasonable discipline. Given the state of this record, therefore, we are constrained to deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March, 1980.