

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { International Association of Machinists
 { and Aerospace Workers
 {
 { Kansas City Southern Railway Company

Dispute: Claim of Employees:

1. That the Kansas City Southern Railway Company violated the controlling Agreement, particularly Rule 30, when they dismissed Machinist T. N. Beach from service for allegedly being insubordinate by striking his Foreman and using vile and abusive language towards his Foreman.
2. That, accordingly, the Kansas City Southern Railway Company be ordered to compensate Machinist T. N. Beach at the pro rata rate of pay for each work day beginning August 9, 1978, until he is reinstated to service. In addition, he shall receive all benefits accruing to any other employee in active service including vacation rights and seniority unimpaired.
3. Claim is also made for Machinist T. N. Beach's actual loss of payment of insurance on his dependents, and hospital benefits for himself, and that he be made whole for pension benefits, including Railroad Retirement and Unemployment Insurance.
4. In addition to the money claimed herein, the Carrier shall pay Machinist T. N. Beach an additional sum of 6% per annum, compounded annually on the anniversary date of said claim, in addition to any other wages earned elsewhere in order that he be made whole.

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 for being insubordinate on August 9, 1978, in that he allegedly struck his Foreman, used vile and abusive language toward said Foreman, and refused to comply with instructions which were issued by same.

Claimant's Organization argues that Claimant did not receive a fair hearing, as directed in Rule 30 of the parties' applicable agreement, in that: (1) Claimant was "indicted" rather than "charged", and his guilt, therefore, was "prejudged" prior to the hearing; (2) the charges leveled against Claimant were vague and lacked precision; (3) conduct of the hearing officer was improper in that said officer refused to permit evidence pertinent to Claimant's defense into the record; and, (4) transcription process was improper since the record of the investigatory hearing was transcribed by a company employee and was written in shorthand thus prohibiting Organization from personally recounting what had been stated by Company witnesses.

In addition to the procedural arguments which are posited above, Organization further contends that Claimant's discharge was unwarranted for reasons that:

- (1) Claimant's use of profanity toward his Foreman in this instance was not an act of insubordination since no direct order was given and, also, the language used was "shop talk" which is the normal, everyday habit of both this particular Foreman and his subordinates;
- (2) removal of Claimant from service prior to the investigation was a violation of Rule 30 since Claimant was neither violent nor was he a threat to his fellow workers or Carrier's property; and,
- (3) Claimant acted in self-defense as the Foreman was the instigator of the altercation and wanted to continue the altercation outside without witnesses present.

Carrier argues that Claimant's actions of August 9, 1980, were specifically violative of Carrier Rule "N" which reads:

"Employees must not enter into altercations, play practical jokes, scuffle or wrestle on Company property.

Employees must not be:

- (1) Careless of the safety of themselves and others.
- (2) Negligent.
- (3) Insubordinate.
- (4) Dishonest.
- (5) Immoral.
- (6) Quarrelsome, or otherwise vicious."

Claimant's actions, according to Carrier, were detrimental to good employee-employer relations and were of such a grievous nature that the penalty of discharge which has been assessed cannot be considered as being unwarranted or excessive.

Carrier further argues that Organization's contentions regarding the "shop talk" nature of Claimant's vulgarities which were directed toward his Foreman is an improper defense, since said vulgarities were not used in their "everyday accepted sense", but they were "...in fact a direct slander against the authority and character of..." the Foreman. Additionally, Carrier maintains that Organization's effort to characterize the Foreman as the aggressor in this incident is totally unsupported by the testimony of several creditable witnesses.

Lastly, regarding Organization's charge that the investigatory hearing was unfair, Carrier contends that said hearing was in fact fair and impartial in that Claimant was afforded the same contractual opportunities which are extended to any other employee.

This Board has carefully read and studied the entire record in this instant dispute and fails to find sufficient support for Organization's procedural objections regarding the conduct of the hearing or the precise statement of the charges which, otherwise, might warrant a dismissal of the charge which has been brought against Claimant.

As to the merits of this case, the record sufficiently establishes that Claimant directed vulgar language toward his Foreman, and that an altercation took place between Claimant and said Foreman.

Carrier contends that Claimant's language was vile and abusive, and, moreover, was not used in the everyday accepted sense as argued by Claimant's Organization. Though this Board cannot condone the usage of language such as that which is at issue herein, the Board is convinced that said language does comport with that which is generally described as "shop talk" since, inter alia: (1) the utterances were spontaneous outbursts; (2) Claimant's exact words were in no way a literal attack upon Foreman's familial relationship; and, (3) Claimant's statement was not made with the express purpose of demeaning the Foreman or diminishing the Foreman's authority in the eyes of the other employees.

Now to the matter of the altercation itself, and, once again, though this Board cannot condone or tolerate acts of physical violence of any type, particularly between employees and their supervisors, the record in this instant case suggests that the Foreman did provoke the incident to some extent, and he, therefore, must be made to bear a part of the responsibility for the development of this incident.

Claimant is an employee with approximately eight years of service with Carrier; and, with the exception of the incident at hand, Claimant's work record is, apparently, without any other serious infraction. Given these considerations, but, moreover, given the fact that the Foreman's actions to some degree provoked the incident itself, this Board believes that Claimant's discharge was excessive, and, therefore, improper.

This Board is well aware of the limitations of its appellate authority and has taken judicial notice of the many awards which Carrier has cited relative to this point. Insofar as this Board is of the opinion that Carrier's actions were excessive in this instant case, however, this determination is within the

bounds as prescribed in Carrier's citations. (See: First Division Award No. 14 863; Second Division Awards No. 5681 and 7399; Third Division Awards No. 21021 and 21442).

Let there be no mistake, the above conclusions regarding the excessiveness of the penalty in no way vindicates Claimant or justifies his actions. Claimant was the major perpetrator in this incident and his punishment will be commensurate with the seriousness of his proven offense. However, for the reasons posited above, Claimant deserves to be reinstated and given one last chance to demonstrate that he is a responsible employee who is deserving of continued employment by Carrier.

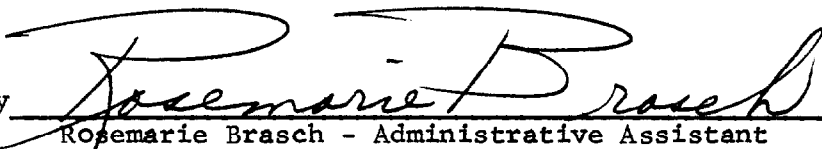
A W A R D

On the basis of the foregoing analysis and findings, this Board directs that Carrier reinstate Claimant. Seniority and all other contractually defined benefits which normally are applicable in situations such as this shall remain unimpaired; back pay, however, is 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 8th day of October, 1980.