

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { International Association of Machinists and
Aerospace Workers
{
{ Denver and Rio Grande Western Railroad Company

Dispute: Claim of Employees:

1. That under the terms of the Agreement, L. O. Tinsley was unjustly dismissed from service of the Denver & Rio Grande Western Railroad Company on December 14, 1978, after being suspended on November 27, 1978.
2. That, accordingly, the Carrier be ordered to reinstate Claimant to his former position with seniority rights unimpaired, made whole for all vacation rights, pay premiums on Group Life Insurance, Hospital Association dues, premiums for all pension benefits, and pay for all time lost from Carrier service retroactive to November 27, 1978.

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 charged with fighting with another employe which caused injury to the other employe. He was suspended from service on November 27, 1978 pending the outcome of an investigation on December 7, 1978. At the time of the alleged misconduct, claimant, a machinist helper, was assigned duties as a tool room attendant. At the investigation, the claimant was tried as a co-principal with Mr. Clark, the employe with whom he purportedly fought. Both principals were found guilty and dismissed from service.

The organization raises several procedural defects in the hearing process. First, the notice provided to the claimant failed to adequately inform the claimant of the nature of the charges against him. Second, Rule 32 does not contemplate a joint trial where there is more than one respondent. Lastly, the investigation was conducted with two Board officers. On the merits, the organization's primary argument is that the carrier discriminated against the claimant when it exercised leniency in favor of Clark (he was reinstated within thirty days after his

discharge) but declined to reinstate the claimant. The organization also asserts that claimant was instructed to keep other employees out of the tool room. Since the fighting incident arose out of claimant's attempt to bar Clark from the tool room, his misconduct should be excused. The carrier argues that the charge was sustained at a fair and regular hearing. Furthermore, the carrier argues that it has the absolute right to invoke leniency on a case by case basis regardless of whether the carrier's actions result in disparate treatment among employees.

We first turn to the organization's contentions that the claimant was denied a fair hearing. The December 4, 1978 notice sent to claimant clearly apprised the claimant that he was charged with an altercation in the tool room on November 23, 1978. The notice of charges complies with Rule 32, if it alerts the claimant to the nature of the case. Second Division Award No. 8034 (Roukis). The instant notice contained all the critical allegations accusing the claimant with fighting with another employee. The claimant was fully aware of the accusation brought against him. As to the joint trial, the carrier assumes grave risks when it conducts a hearing with multiple respondents. The most obvious hazard arising out of an investigation involving more than one principal is that overwhelming evidence against one principal will taint the evaluation of another principal's culpability. Therefore, the hearing officer has the difficult task of independently weighing the evidence against each respondent. This Board must carefully scrutinize the record for any use of evidence against the other principal which improperly prejudiced the claimant. In this case, both principals were charged with identical offenses arising out of the same set of facts. The record discloses no evidence admitted against the other principal which tainted a fair adjudication of the charges against the claimant. Without a showing of such prejudice, we affirm the carrier's use of a joint hearing in this case. Finally, we see no interference with the hearing due to the mere presence of an assistant hearing officer at the investigation.

While we have examined the substance of the organization's procedural objections, we note that the claimant, at the commencement of the investigation expressly elected to proceed with the hearing. While the claimant's willingness to proceed is not a per se waiver of the adequacy of the notice or the joint trial, it is an indication that the claimant was not vitally concerned with any procedural problems. In any event, we have found that the claimant was given a fair hearing.

On November 27, 1978, the claimant was involved in a physical altercation with Clark outside of the tool room. The fight arose after a profane verbal exchange between the claimant and Clark. While the record is not entirely clear, it seems the claimant called Clark his name and Clark shouted his response. Clark left the tool room and claimant followed him. According to the claimant, Clark returned to confront the claimant and the claimant thought Clark would hit him. Claimant admits that he threw the first punch:

"(Q) Who initiated the physical contact?

(A) (Claimant) I did, but I would like to make a comment if I may. Mr. Clark was a very enthusiastic participant. I felt if I hadn't tried to hold him, he would have struck me."

Claimant also testified:

"(Q) Did you repeatedly strike Mr. Clark?

(A) (Claimant) About three times."

As a result of the quarrel, Clark suffered bruises and minor facial lacerations. Clark reported the incident to both principal's supervisor.

Even if the claimant had instructions to forbid other employes from entering the tool room, he must enforce the instructions without resorting to any self-help including physical violence. If Clark was in the tool room without authorization, the claimant should have reported the matter to his supervisor. Also, the claimant only selectively enforced the rule since he had regularly permitted another employe in the tool room. Indeed, another employe was present, in the room, when Clark entered. When the dispute developed into a physical confrontation, the claimant, even if he sincerely believed Clark was ready to hit him, had ample opportunity to retreat. Instead, the claimant aggressively attacked his fellow employe which could have resulted in severe injuries to both antagonists. This Board has ruled on numerous occasions that fighting is grounds for discharge. Second Division Award No. 6106 (Simons); and see also Third Division Award No. 19538 (Lieberman). In this case, claimant repeatedly battered his fellow employe and such gross misconduct warrants dismissal.

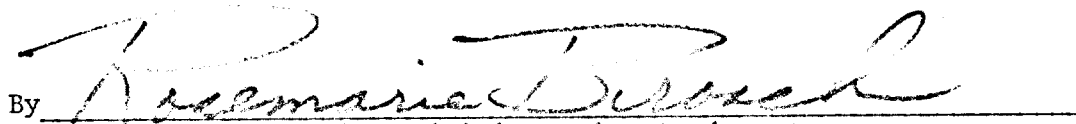
We are precluded from considering the organization's contention that the carrier discriminated against the claimant by reinstating Clark, on the basis of leniency, without conferring the same benefit on the claimant. Leniency is within the sole discretion of the carrier. See Award 73 of Public Law Board 391 (Sempliner). We may not review the carrier's decision not to extend leniency to the claimant.

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 7th day of January, 1981.