

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Burlington-Northern, Inc.

Dispute: Claim of Employees:

- 1) That Carman Apprentice M. J. Christen, St. Cloud Shop, was improperly suspended from service for a period of thirty (30) days commencing February 16, 1979 through and including March 17, 1979.
- 2) That accordingly, the Carrier be ordered to reimburse Claimant M. J. Christen for all wages lost, vacation rights, and all other benefits that are a condition of employment and made whole. Further to have this stricken from his personal record.

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.

At approximately 7:30 AM on February 15, 1979, Claimant, a Carman's Apprentice at Carrier's St. Cloud, Minnesota Car Shop, was observed by his supervisor, Car Foreman C. Forner, "...away from his work location" and Forner "...waved to him (Claimant) to return to it". Shortly thereafter, at approximately 8AM, Forner returned to the general area and again observed Claimant away from his work location. At that point, Forner confronted Claimant and as the two men stood on opposite sides of a box car talking through the open doors, a brief though allegedly heated conversation took place. As the conversation ended, Forner told Claimant "...you're supposed to stay at your station where you work" and "...to go back to his car". Forner then turned and began walking away at which point Claimant allegedly called him a "dumb son-of-a-bitch".

Throughout most of this exchange another Car Foreman, T. Gaughan, had come onto the scene and was standing behind Claimant. Forner asked Gaughan if he had heard Claimant's last remark and Gaughan stated that he did. At that point Forner took Claimant into his office, wrote out a SC-61 Form, and sent Claimant back out to his assignment.

Later that same morning a second incident occurred between Claimant and Gaughan. According to Gaughan, as he was passing Claimant's work station Claimant called out to him and referred to him as a "trouble making son-of-a-bitch". Gaughan further alleges that Claimant, in reference to Gaughan's son who had recently been named to an All-State Football Team, stated that "...he wished my son would break both of his f----- legs; and also when Gaughan asked Claimant to repeat his last statement Claimant told Gaughan "...to get the shit out of my ears".

Claimant denies all of the statement which are attributed to him. He does admit, however, that he walked back to where Gaughan was standing and stated "...Tom, why you...you are a trouble maker".

Sometime that same day Claimant was verbally advised that he was being withheld from service, and he was also sent a Notice of Investigation and directed to "(A)ttend investigation on Thursday, February 22, 1979, for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged violation of Rule 661...at 8:10 AM and 10:30 AM, on February 15, 1979".

On the following day, February 16, 1979, Claimant was further notified by letter that he was being withheld from service due to "insubordinate conduct... pending results of an investigation".

Said hearing was conducted as scheduled and as a result thereof Claimant was adjudged guilty as charged and was assessed a thirty (30) day suspension "...effective February 16, 1979, through and including March 17, 1979".

Initially, Organization argues that Carrier's processing of this matter is procedurally defective in that: (1) Claimant was withheld from service without a hearing in violation of Rule 35(a) and the matter itself was not a "serious infraction" and thus exempted under the language of Rule 36(b); (2) The Organizational representative did not receive a copy of Carrier's decision within 30 days following the investigation hearing as specified in Rule 35(d); and (3) Carrier has been inconsistent in that Claimant was first charged with "insubordinate conduct", then with violation of Rule 661, and then at the hearing Carrier focused upon Claimant's alleged use of "profanity" which is a violation of Rule 664.

Turning to the merits of the instant case, Organization contends that Carrier has failed to produce the requisite amount of substantial evidence which would be necessary to establish guilt. In support of its aforesated position Organization maintains that: (1) Carrier's evidence is based upon hearsay testimony; (2) the charge of insubordination is totally without foundation since Claimant did return to his work assignment when directed to do so by Foreman Former; (3) Mr. Former's account of the incident is unreliable since he could not hear Claimant's statements because of shop noise and because he (Former) was probably wearing ear plugs at the time; and (4) the type of language which is alleged to have been used in the instant case is language which is not uncommon at the work place and the supervisors themselves used similar language in this incident (Third Division 21291).

Carrier's position in this dispute is that: (1)"...the case involved a serious infraction of the rules and under Rule 35(b)...an employee may be withheld from service pending investigation under these circumstances"; (2) Organization was originally sent a copy of Carrier's decision following the

investigation as well as an additional copy of same which was forwarded when Carrier was informed by Organization that it had not yet received its copy of said decision; and (3) Claimant's Investigation Notice specifically cited Rule 661 as being the basis for the investigation which sufficiently takes into account the infraction with which Claimant was charged.

Carrier also submits that there is substantial evidence of record to support Claimant's guilt in this matter (Second Division Award 6444) and that, under such circumstances, the Board should not disturb Carrier's decision since it is apparent that said decision was neither arbitrary or capricious (Second Division Awards 3081 and 6443), and further because Carrier has the right to make final determinations when substantial though conflicting testimony exists in the record (Second Division Awards 6955 and 8280).

After carefully reading and studying the complete record which has been presented herein, the Board is convinced that none of the procedural objections which have been raised by Organization are sufficient to serve as a forfeiture in this matter. First, Carrier's decision was rendered within the prescribed thirty (30) day time limit and a written notice of same was issued to Claimant in a timely manner. The fact that Organization may not have received its copy of said decision, which Carrier contends was sent on March 9, 1979, and the fact that a second copy of same was sent to Organization's representative on March 28, 1979, when the matter was brought to Carrier's attention, certainly did not prejudice Claimant in any manner and thus is deemed to have been adequate. Second, Carrier's statement of charges and rule citations sufficiently reflected both the scope and focus of the matter which was to be pursued by Carrier at the investigation. And third, while it might appear to some observers to be unwise for Carrier to withhold an employee from service at any time in advance of a hearing, the fact remains that Rule 35(b) of the parties' controlling agreement gives Carrier the right to hold an employee out of service "...in cases involving serious infractions of the rules pending investigation"; and, in light of the facts of the instant case, Carrier's preinvestigation determination that the matter was a "serious infraction" was certainly not an unjustified or unreasonable conclusion at the time.

Having determined the above, our attention now turns to a consideration of the merits of this case and, in this regard, the Board is of the opinion that, in light of Claimant's admissions concerning his statement to Foreman Gaughan, there is sufficient evidence in the record to support the conclusion that Claimant is guilty of the infraction as charged. If Claimant was innocent of the initial confrontation with Foreman Forner, why would he have gone out of his way to again resurrect the issue with Forman Gaughan some two and one-half hours later? Claimant surely could not have expected to have gained support for his cause by these actions; and, by pursuing the matter in the manner and degree which he did, this fact alone amply convinces the Board that there was significantly more to this incident than Claimant would now have us to believe.

Despite the foregoing, we have concluded that the discipline assessed by Carrier in the instant matter went well beyond the normal bounds in its effect upon Claimant, and we will, therefore, reduce Claimant's suspension to twenty-five (25) days without pay.

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Award No. 9182
Docket No. 8712
2-BN-CM-'82

It should be noted that this action in no manner absolves Claimant for his improper conduct to his supervisors.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.