

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
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(National Railroad Passenger Corporation

Dispute: Claim of Employees:

1. Thomas J. Chase, Laborer, Amtrak, 16th Street Facility, Chicago, Illinois, was unjustly dismissed for the following charge:

"Violation of Rules 'I' and 'J' of the Amtrak Rules of Conduct in that on August 31, 1981, you were instructed by your Foreman, Emil Saleh to use the fork lift to relocate a skid load of car oil drums, at which time you became very insubordinate, resulting in your being held out of service pending investigation."
2. That, accordingly, the Carrier be ordered to make the aforementioned Thomas J. Chase whole by restoring him to Carrier's service, with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been 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 employes 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, Thomas J. Chase, an employe of the Carrier since August 16, 1976, was working as a laborer/fork lift operator on August 31, 1981. His Foreman, Mr. Emil Saleh, asked him to use his fork lift to move a skid of oil drums and Claimant did not follow the instructions. His Foreman, Mr. Saleh, testified that Claimant said he would not perform the duty. Saleh testified that Claimant then became vulgar and argumentative and uttered a profanity toward his Supervisor. The Foreman gave Claimant a second chance to perform and Claimant continued to behave disorderly and refused the instruction. The Foreman sent him home and he was later dismissed from the service.

The Organization contends that the Claimant did not receive a fair hearing and that there was insufficient evidence to warrant a dismissal. The Organization argues that the investigating officer "allowed Carrier witness, Saleh, to elaborate

and evade a direct question." Moreover, the Organization contends that a Carrier officer who had knowledge of the incident was not presented for examination. In addition, the Organization argues that the burden of proof was not met in that the Carrier did not present sufficient evidence to support a finding of insubordination and abusive and vulgar behavior. The Organization argues that the evidence is conflicting and amounts to the word of the Supervisor against the word of the Claimant. Finally, the Organization also contends that the discharge of the Claimant is too severe under the circumstances.

The Carrier argues that a proper hearing was held and the Claimant was represented by a member of the Organization who was permitted to cross-examine witnesses and present evidence in behalf of the Claimant. The Carrier points out that the investigation was recessed until the following day to enable the Claimant to obtain a witness. Moreover, the Carrier argues that the investigation was fair and impartial and that even the Claimant stated at the end of the hearing, "I think it was a very fair trial."

The Board finds that the hearing was fair. It is well settled that once a Claimant or the Organization acknowledges at the hearing that the hearing was fair, that the Claimant cannot later contend that the hearing was not fair. (See Second Division Awards Nos. 7452 (Brennan), 6188 (Dugan), 6004 (Gilden), and 3874 (Anrod).)

The Carrier also argues that it proved its case that Claimant was insubordinate and abusive. The Claimant's Foreman testified that when he requested that Mr. Chase move the skid he "just said he wouldn't." The Carrier points out that even the Claimant's own witness testified that the Claimant told the Foreman he wanted to finish another task. Finally, the Foreman stated that he walked over to the Claimant and gave him another chance and that is when the Claimant uttered the profanity. Although the exact profanity was not repeated at the hearing, it is contained in the Foreman's report of the incident included with the Carrier's exhibits. Finally, the Carrier points out that at no time did the Organization take the position that the Claimant was innocent.

This case, as it often does, boils down to a question of the credibility of the testimony given by the witnesses. The Board finds that the hearing officer was in the best position to determine the credibility of the witnesses. It is not the Board's function to weigh conflicting evidence. When there is direct conflict in the evidence, the Board is in no position to resolve the conflict. The credibility of witnesses and the weight to be given their testimony is for the trier of the facts to determine. If there is evidence of a substantial character in the record which supports the action of the Carrier, and it appears that a fair hearing has been afforded the employee charge, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established. Reasonable grounds exist to sustain the determination of guilt made by the Carrier in this case.

Insubordination is often treated as a dismissable offense; so is directing vulgar and insulting language toward a foreman. The Board generally will not set aside the discipline imposed by the Carrier unless it appears to be arbitrary or unreasonable. It is well established by numerous awards that a disciplinary action of a Carrier will not be disturbed if substantial evidence of probative value is adduced and the investigation rules have been followed, the action of the Carrier is neither arbitrary nor capricious, and the penalty invoked is neither excessive nor unreasonable.

It is also well settled that Carriers attempt to follow a program of progressive discipline. Usually when a discharge of an employee occurs, the Carrier supports the action taken against the Claimant with evidence of previous wrongdoing and the failure of the Claimant to improve his performance after warnings and suspensions. This is not the case when the incident involved is so serious as to warrant immediate discharge. However, when there are some conflicts in the evidence and the actions of the Claimant are not so outrageous as to warrant immediate discharge, the Carrier is expected to present evidence of previous performance in order to support its action.

The record in this case shows no previous discipline of the Claimant. Claimant had been in the employ of the Carrier for five years prior to the incident in question. Certainly that record of service and no previous discipline in the record makes it somewhat unreasonable and seemingly excessive to dismiss the Claimant on the facts before the Board without giving him a chance to reform his conduct.

This Board finds that there was sufficient reason in the record to hold the Claimant out of service for a lengthy period. However, Claimant does deserve another chance to reform and recognize that supervisors must be treated with respect. Hence, he will be reinstated.

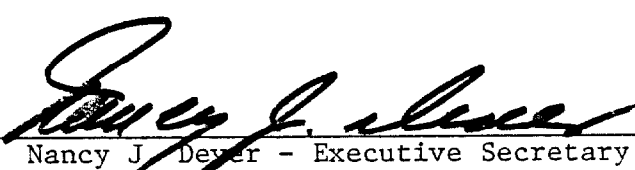
Claimant is to be reinstated with full seniority but without back pay or other benefits. The period of time of Claimant's termination shall be treated as a lengthy suspension without pay or benefits.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: _____


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 11th day of April, 1984.