

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 Electrical Workers  
( Consolidated Rail Corporation (Conrail)  
(Metro-North Commuter Railroad)

Dispute: Claim of Employes:

1. That under the current Agreement the Consolidated Rail Corporation (Conrail) has unjustly dismissed Third Railman D. A. Lincks from service effective March 18, 1982.
2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Third Railman D. A. Lincks to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service at the applicable Third Railman's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation - and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his 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 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, D. A. Lincks, was employed as a third railman for the Electric Traction Department and was headquartered at Conrail's Grand Central Terminal facility in New York City. Claimant entered the service of the Carrier on July 16, 1974.

On February 24, 1982, Claimant received a notice to attend a trial in connection with the following charge:

"Violation of Rule 'E,' 'Rules of Transportation Department,' and Rule 3013, 'Conrail Safety Rules,' S7-C, (Effective 6/1/81) inasmuch as you were involved in an altercation with Track Foreman M. Garramone at approximately 10:45 a.m. on Tuesday, February 23, 1982, in the vicinity of Switch 372 in Grand Central Terminal, which resulted in a personal injury to yourself and M. Garramone."

Rule E states:

"Gambling, fighting, or participating in any illegal, immoral, or unauthorized activity while on duty or on Company property is prohibited."

Rule 3013 states:

"Personal conduct must be free from scuffling, practical jokes, or horseplay while on duty on Company property."

The trial was held on March 1, 1982. Following the trial, Claimant was notified that he had been found guilty as charged and he was being dismissed from the service.

The Organization contends that the hearing officer failed to receive all of the relevant evidence which would have shown that Track Foreman M. Garramone physically and verbally abused the Claimant and insulted Claimant's mother thereby provoking the altercation with Claimant in which Claimant had no alternative but to defend himself.

The Organization contends that Carrier has the burden to prove Claimant was engaged in an altercation with Track Foreman M. Garramone for reasons other than to defend himself and that Carrier failed in that burden. Since the conducting officer failed to resolve the credibility issues, the Organization argues, Claimant's rights have been violated and he must be reinstated to his former position.

Carrier argues that although the testimony elicited at the Claimant's trial produced a great deal of conflicting evidence, the fact remains that there was an altercation between Track Foreman M. Garramone and Claimant on February 23, 1982, despite three attempts to break it up. Both of the participants required medical attention.

Carrier argues further that Claimant admits that he struck the foreman and that he called the foreman a derogatory and vulgar name. Since fighting is a dismissable offense, which often threatens the safety of employees as well as undermines the discipline of the workplace, Carrier argues that it was justified in terminating the Claimant.

Carrier argues further that even if Track Foreman M. Garramone began the incident, Claimant used force far in excess of that called for under the circumstances and made no genuine attempt to avoid the confrontation.

This Board has reviewed the extensive record in this case. It is evident that there are substantial differences in the testimony as to what occurred between the Claimant and his foreman on the day in question. Although this Board generally will not set aside the findings of a hearing officer, in this case the evidence is so conflicting that it is unreasonable and arbitrary to dismiss the Claimant based upon it.

There is substantial testimony that the foreman was the person who had the responsibility for beginning the altercation. However, there is also substantial evidence demonstrating that the Claimant was the instigator. Given that conflicting evidence, this Board finds that it was improper on the part of the Carrier as well as unreasonable to dismiss the Claimant.

On the other hand, the Claimant must recognize his obligations when such an altercation occurs no matter who is at fault. Regardless of who starts an altercation, the proper behavior of an employee is to use one's best effort to avoid it. Since there is evidence that Claimant did not walk away from this fight and attempt to end it but continued on in pursuing it, we hereby find that although Claimant should be reinstated, he should not receive any back pay. Consequently, the Claimant will be reinstated to service with seniority unimpaired but without back pay. The period that Claimant was off will be treated as a lengthy suspension.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1984.