Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10442
SECOND DIVISION Docket No. 10493
2-SPT-EW-'85

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

Parties to Dispute: ( International Brotherhood of Electrical Workers
( Southern Pacific Transportation Company

Dispute: Claim of Employes:

1. That under the current Agreement, Mechanical Department Electrician Helper P. J. Lathrop was unjustly treated when he was suspended from service for a period of twenty (20) days commencing November 19, 1981 through December 8, 1981, following investigation for alleged violation of portions of Rules 801 and 802 of the General Rules and Regulations of the Southern Pacific Transportation Company (Western Lines). Said alleged violation occurring on November 19, 1981.

2. That accordingly, the Southern Pacific Transportation Company (Western Lines) be ordered to:

(a) Compensate Electrician Helper P. J. Lathrop for all time lost during the twenty-day-suspension. Also, that he be reimbursed for loss of vacation, payment of hospital, medical insurance, group disability insurance, and railroad retirement contributions; and the loss of wages to include interest at the rate of six percent (6%) per annum.

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.

Electrician Helper P. J. Lathrop received a twenty-day suspension for alleged violation of Rules 801 and 802 November 19, 1981. Rule 801 states in relevant part that:

> "Employees will not be retained in service who are insubordinate ... quarrelsome or otherwise vicious or who conduct themselves in a manner which would subject the railroad to criticism."

Rule 802 stipulates:

> "Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other. Boisterous, profane or vulgar language is forbidden."

Electrician McClain testified that when he walked over to the blast area looking for parts, Claimant Lathrop showed him where they were -- in a small basket in the cold tank area. McClain then picked up the parts and placed them back in the bead blast area but Claimant told him that he would not bead blast them, that they would have to be degreased first. McClain replied that he already sent them to be degreased and that Claimant should clean them. According to McClain, Claimant started cursing. He pointed at Claimant and told him not to talk that way and to "shut up, boy". McClain asserted that Claimant then pushed him in the chest, crouched down and told him he was going to whip his butt. McClain then called a supervisor. McClain states that he did not curse Lathrop.

General Foreman Jamieson testified that, as he was passing near the bead blast area, he saw Claimant shove McClain.

Claimant Lathrop admits that he pushed McClain but said that he did not "think" he swore although he was mad.

According to Lathrop, after he handed McClain the basket of parts and told him to take them to the cold tank man, McClain told him not to touch his "f---ing parts", and threatened to "knock my f---ing teeth down my throat. He started banging me on the chest ... He had the basket of metal parts in one hand and I swear I thought he was going to hit me with them...."

An Electrician Helper saw McClain "pointing Lathrop in the chest with his hand" but did not see any banging. McClain's conduct, as observed by the General Foreman, only seconds after Lathrop said that he hit and cursed him, was unlike that of an aggressor. Not knowing what the Foreman had seen it is unlikely that he would have pursued his complaint to the Company against Lathrop if he had struck Claimant. The evidence shows that Claimant did not initially make any complaint about McClain's conduct to the Foreman, an action expected of an assault victim.

The evidence clearly establishes, and Lathrop concedes, that he struck McClain. There is insufficient evidence of provocation sufficient to justify the assault. The circumstances support the credibility findings of the hearing officer on this point and the Board will not substitute its judgment. See Second Division Awards: 10067, 9094, 8846.

The claim is denied.

Award No. 10442
Docket No. 10493
2-SPT-EW-'85

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. [illegible]er - Executive Secretary

Dated at Chicago, Illinois, this *5th day of June 1985.*