

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That the Carrier's action in dismissing Laborer Bob Estep from its service after formal hearing on April 10, 1984, was indeed harsh, out of proportion, excessive and constituted an abuse of managerial discretion.

2. That accordingly, the Burlington-Northern, Inc. restore Laborer Bob Estep to service -

- (a) with his seniority rights unimpaired;
- (b) compensation for all time lost;
- (c) Make whole all vacation rights;
- (d) pay premium for his group life insurance for all time 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 employee or employees involved in this dispute are respectively carrier and employees 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.

A Carrier Foreman was walking to his office when he noticed that Claimant was standing near an elevator. The Foreman inquired of Claimant as to what he was doing. An altercation followed and as a result the Claimant was charged with:

"Violation of Carrier Rules 563 and 564 which read in pertinent part:

563 - Employees must not enter into altercation with any person regardless of provocation . . .

564 - Employees will not be retained in service who are insubordinate, quarrelsome or otherwise vicious. . . "

As a result of the evidence adduced at the Investigation the Investigating Officer found that the charges had been proved and based on this dismissed Claimant from the Carrier's service.

The Foreman testified that after he inquired of Claimant's activities, Claimant responded by telling him that it was none of his business. He testified that shortly thereafter Claimant threatened him. After receiving this threat the Foreman three times directed Claimant to accompany him to his office. Two times he refused this order, but the third time he complied.

Much of the testimony in the transcript is devoted to a safety meeting which had occurred some days before. There was conflicting testimony concerning whether this Foreman had made a derogatory remark about the Claimant. The obvious point of this testimony is to attempt to establish a pattern of harassment by the Foreman to the Claimant. There was also much testimony establishing that there was much "kidding" in the workplace between the Claimant and the Foreman. However, the overall evidence establishes that neither party thought this incident occurred in jest.

The testimony of the Foreman, if credited, established both that Claimant threatened physical harm to the Foreman and that he initially refused the direct order to go to the office. The Investigating Officer chose to credit the testimony of the Foreman. A one-on-one incident, as this, will likely have testimony that is diametrically opposed. An Appellate Board must credit the findings of the decision maker unless there is evidence in the record to show that his findings are arbitrary and capricious or that he was substantially prejudiced to the Claimant so as to deny him the fair and impartial Investigation necessitated by the Rule. There is nothing in the record from this Investigation to establish either of these exceptions. Therefore, this Board will defer to the credibility findings of the Investigating Officer. He was present to observe the demeanor of the witnesses and to listen to the tenor of their testimony, valuable observations in the assessment of credibility.

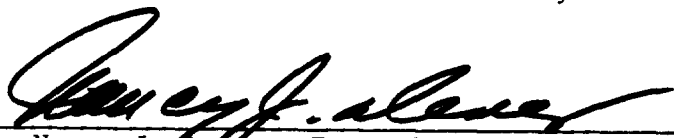
The incidents are serious in themselves. However, they become more serious in light of the past disciplinary record of Claimant. He has been dismissed two previous times and on both occasions was reinstated on a leniency basis. It is obvious to this Board that the employment relationship between Claimant and Carrier cannot be mutually respected therefore, we find that the Carrier was justified in assessing dismissal after these offenses.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1986.