

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, System Electrician L. V. Doney was untimely and unjustly suspended from the service of the Burlington Northern Railroad for a period of thirty (30) days, January 14 through February 12, 1987, following an unfair investigation held on January 26, 1987.

2. That accordingly, the Burlington Northern Railroad be ordered to compensate Electrician Doney for all wages, benefits rights and privileges he is entitled to under applicable laws, Rules or Agreements that were lost or adversely affected by the thirty (30) day suspension. That the Burlington Northern Railroad also remove all record of the subject investigation and assessed discipline from Electrician Doney's 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 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.

On January 13, 1987, at approximately 7:20 a.m, the Claimant and his Foreman, Mr. Harris, initially engaged in a verbal altercation that concluded in the two of them physically engaging and having to be pulled apart by fellow workers. The Claimant asked the Foreman if he had ordered certain materials. When the Foreman informed the Claimant that he had not the Claimant engaged the Foreman in an argument. The record indicates that the Claimant and the Foreman were mutually argumentative. The Foremen left the room where the verbal argument took place and the Claimant followed him into another room. The Foreman grabbed a hammer and raised it over his head while facing the Claimant. The Claimant grabbed the Foreman's arm and felled the hammer. Employees who witnessed the verbal altercation then pried the Claimant and the

Foreman apart. The Claimant was charged by the Carrier with violating Rule 563 of the Burlington Northern Safety and General Rules which provides that employees are to act courteously and safely in discharging their duties; the rule forbids boisterous, profane, sexist or vulgar language and prohibits employees from entering into altercations. As a result of these charges, an Investigation was conducted on January 21, 1987. The Investigation was for both the Claimant and the Foreman. As a result of this Investigation, the Foreman was dismissed from the service of the Carrier and the Claimant was assessed a thirty (30) day suspension.

The Organization contends that the Carrier arbitrarily and capriciously suspended the Claimant for thirty (30) days and, in doing so, abused its managerial discretion. The Organization alleges that the Carrier failed to provide a fair and impartial Hearing and thereby acted in violation of Rule 30. The Organization accuses the Carrier of denying the Organization's request to produce certain witnesses, statements, memorandum, and documents. The Organization also states that the charges against the Claimant were not precise and that the Carrier failed in its obligation to provide the Organization with a transcript reflective of the proceedings. The Organization also charges that the Carrier was not timely in assessing the discipline. Finally, the Organization charges the Carrier with not meeting its burden of proof in establishing a prima facie case against the Claimant.

The Carrier charges that the Claimant was insubordinate and that he said he was not going to take orders from the Foreman. According to the Carrier, the Claimant first engaged in physical contact with the Foreman by poking the Foreman with his finger. The Carrier charges the Claimant by provoking a fight with the Foreman. The Carrier also charges that the Claimant was absent without authorization when he left the property after the altercation.

The Board has reviewed the procedural objections raised by the Organization and finds that the Investigation was fair and that the Hearing was impartial. The transcript of the Hearing consists of 158 pages. The reading of that transcript indicates that three (3) eye witnesses in addition to the Claimant and the Foreman testified. Any additional testimony regarding the incident of January 21, 1987, would have been burdensome. Additionally, the relevancy of the documents requested by the Organization and the testimony from the additional witnesses that the Organization requested to testify was not established either prior to, during or after the Hearing either through documentation, letter or testimony.

It is the position of the Board that in order for the Organization's claim to be sustained, it would have to be established that the Claimant had clean hands throughout the entire affair. The Carrier has met its burden of proof in establishing that the Claimant and the Foreman engaged in both a verbal and physical altercation. The burden now shifts to the Organization to establish that there are provocative or mitigating circumstances which should reduce the discipline assessed by the Carrier. It is abundantly clear to the Board that the Claimant was not satisfied with the answers given him by the

Foreman when he asked the Foreman if materials had been ordered. In so doing, the Board rejects the Claimant's Representations that he was not excited and not loud. There is no doubt but that the Claimant was quarrelsome and provocative. At that point, however, it is the opinion of the Board that the Foreman should have taken control of the situation and given the Claimant a direct order to return to work. In the alternative, the Foreman should have secured the presence of another Supervisor who could have witnessed the Foreman either giving the Claimant a direct order or issuing discipline. The Foremen did neither. Instead, the Foreman responded to the Claimant's provocations by grabbing and raising a hammer toward the Claimant. The physical altercation that followed was the natural consequences of the Foreman's actions. For these actions the Foreman was discharged. For his provocation, the Claimant was suspended for thirty (30) days.

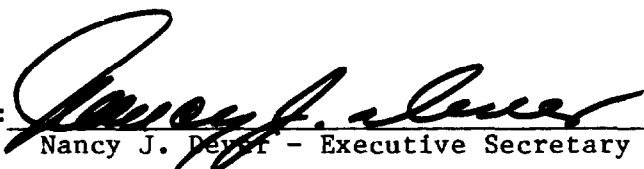
The Board relies on the testimony of the witnesses in determining that the Claimant was in fact boisterous and provocative and as such was in violation of Rule 563 of the Burlington Northern Safety and General Rules. However, the Board finds that the assessment of a thirty (30) day suspension, based on all the facts, was excessive and reduces that suspension to a five (5) day suspension. But for the fact that the Claimant had provoked the Supervisor, the Board would have recommended discipline greater than five (5) days. The suspension of thirty (30) days shall be reduced to a Suspension of five (5) days and the Claimant shall be made whole for all wages, benefits, rights and privileges he would otherwise have received as provided by the Agreement.

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 14th day of June 1989.