

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12882
Docket No. 12826
95-2-93-2-195

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen and
(Oilers
(
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

"(1) That under the current and controlling agreement, Fireman and Oiler A. J. Eaton, ID No. 521292, was unjustly dismissed from service on March 4, 1993 by C.S.X.

(2) That accordingly, Fireman and Oiler A. J. Eaton be restored to his position with the C.S.X. Transportation, Inc., be made whole for all lost time, with seniority rights unimpaired, vacation, health and welfare, hospital and life insurance benefits be paid effective March 4, 1993, the payment of 10% interest rate added thereto."

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 employee 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 was arrested at 2:12AM on February 28, 1993 in a 7-11 parking lot by the local police and charged with aggravated assault and the unlawful use of weapons.

The Carrier learned of the arrest through Claimant who advised his Supervisor of the need for time off to have his shoulder checked as he alleged that he was hit with a ball bat.

The Carrier immediately investigated Claimant's story and upon confirmation, suspended Claimant from service and advised him that he was being charged with:

"... conduct unbecoming a CSX Transportation employee in that you have been arrested ... for the felony crimes of aggravated assault and unlawful use of a weapon...."

Following the Investigation, Claimant was notified that he was dismissed.

The Organization raised four defensive arguments in an effort to overturn the dismissal, but only one has merit:

"1. Carrier has not satisfied the burden of proof by a preponderance of creditable evidence."

During the Investigation, it was readily established that:

1. Claimant did have a loaded gun in his car when he was arrested by the police in the 7-11 parking lot.
2. That Claimant was not a registered gun owner in Illinois although he said he was registered in Ohio.
3. That Claimant did seek medical treatment for his shoulder.

It was also established that Claimant was arrested and charged with the two acts listed in the Notice of Investigation, but he was not charged with being in possession of an unregistered weapon.

Claimant's story, which was not rebutted, is that after he finished work, he went home, showered, changed clothes, and stopped at the 7-11 store on his way to get something to eat.

When he got out of his car, he was assaulted by two thugs who had robbery on their minds. Some activity took place that is unknown, but it is known that Claimant resisted whereupon he was attacked and hit on the shoulder with a ball bat. Claimant successfully fended off the attackers by threatening to get his gun which was in the front seat of his car. (Claimant stated that he placed the gun in the car immediately prior to leaving home.)

Claimant further alleged that when the police arrived at the 7-11 store, the two attempted robbers reappeared and told the Officers that Claimant had pointed a gun at them.

The local police officers, after retrieving the gun from the Claimant's car, wrote up Claimant on the two charges, with the aggravated assault flowing from the alleged act of pointing his gun at the two would be robbers.

The story gets even more complex as the police, writing up Claimant, asked to see the driver's license of one of the two alleged robbers. The license had expired whereupon the officer issued the alleged assailant a ticket for having no valid driver's license. The would be robber then went ballistic and was, subsequently charged with disorderly conduct.

Claimant was arrested, but he was not found guilty as the two would be robbers failed to show up in Court and since they were the complaining witnesses, the charges were dismissed.

The Board is fully aware of the spreading violence in the work place and Carrier's obligation to provide a safe work place. This Board is also aware that prior Awards have supported dismissal when employees have been found guilty of being in possession of either a loaded or empty hand gun while on Carrier's property and it has even sanctioned dismissal when a loaded hand gun was found in an employee's car which was parked on company property.

But in this case, there is absolutely no shred of evidence that Claimant had the loaded gun in his possession while on Carrier property nor that he used the gun unlawfully or that he was in any way, involved or participated in an aggravated assault.

There is no evidence that this arrest in any way interfered with or caused Carrier any embarrassment, nor is there any evidence that Claimant's peers were in any way reluctant to work with Claimant or even were aware of the arrest.

All supporting Awards furnished by the Carrier involve incidents wherein the Claimant either pleaded guilty or pleaded nolo contendere while the Organization cited sustaining Awards in cases somewhat parallel to this case. See Second Division Award 7130, Third Division Award 21499, Award 10, Public Law Board No. 4245.

The Carrier did not sustain its burden of furnishing substantial evidence to justify dismissing Claimant. He is to be returned to service (subject to the usual examinations required of others being out of service as long as Claimant has been) with his seniority rights unimpaired and he is to be compensated for all wages lost in accordance with the practice between the parties. There is no interest assessed by this Board, nor any other assessment other than to be made whole for all wages lost.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 17th day of April 1995.