

Award No. 13485

Docket No. PM-14959

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Levi M. **Hall**, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

CHICAGO, **BURLINGTON & QUINCY RAILROAD** COMPANY

STATEMENT OF CLAIM: . . . for and in behalf of G. I. **B.** Smith, who is presently employed by the Chicago, **Burlington &** Quincy Railroad. in the dining car department, as a cook.

Because the Chicago, Burlington & Quincy Railroad Company did, through Mr. P. M. Scott, Manager of Dining Car Service of the Chicago, Burlington & Quincy Railroad, take **disciplinary** action against Mr. Smith under date of September 26, 1968, in which disciplinary action as contained in the statement submitted to G. I. B. Smith for his signature, the following is contained:

Censured for engaging in an altercation with a fellow employe while working as second cook on Train No. **36** between **Macomb** and Galesburg, Illinois, August 28, 1963 * * * . Personally interviewed by the Manager of Dining Car Service, **appropriately** reprimanded for his conduct in this instance and advised that only as a matter of extreme **managerial** leniency, with the distinct understanding that there **will** be no claim progressed nor payment made for wages **lost** as a result of being withheld from service pending this **decision** and that **his** conduct at **all** times in the future **will** be above reproach, is he being permitted to resume service.

And further, because as a result of this unusual disciplinary action quoted in the statement above, Mr. Smith originally lost seventeen (**17**) days as a result of being held out of service pending the investigation, and lost approximately ten (**10**) to twelve (12) **more** days while the Management was insisting upon withholding him from the service until he signed the **above-**mentioned statement, which resulted in his not being allowed to go back to work until the Organization appealed from the decision above set forth to the General Manager of the Chicago, Burlington & Quincy Railroad.

And further, because these penalties were exacted of G. I. **B.** Smith were not supported **by** the evidence **of** record in the case; and **further**, that he was subjected to crude and arbitrary intimidations as a result of this action taken and **was** not allowed to return to the service because he would **not** sign the above-mentioned statement and did not get back on his job until the **case was** appealed to the General Manager, who allowed Mr. Smith to return to the service but sustained the action as contained in the above-mentioned statement.

And further, for the record of G. I. B. Smith to be cleared of the charge in this case and for him to be reimbursed for all time **lost** as a result of this **unjust** and arbitrary action on **the** part of Management.

OPINION OF BOARD: This is a **discipline** case.

E. Brown and G. I. B. Smith were employees in the Dining **Car** Department **of** the Carrier, both classified as cook chefs. There was an altercation between them which occurred in the kitchen of the dining car on Train No. **36**, August 28, 1963; the Claimant G. I. B. Smith had been in the employ of the Carrier for forty **years**.

Subsequently, Claimant Smith received the following notice:

"Chicago August 29, 1963

"Mr. G.I.B. Smith:

This will confirm my verbal advise today.

"You are being suspended today pending **further** investigation of **an altercation** between you and Chef Brown on Train No. 36 August 28th.

"/s/ H. G. Mott

"H. G. Mott

"Supervisor, Crew Personnel"

An investigation was called for September 9, 1963, for the purpose of **ascertaining** the facts and responsibility in connection with this altercation and testimony was taken from witnesses, Claimant **conceding** that the investigation had been conducted in a fair and impartial manner. On September 26, 1963, the following entry was made on the Service Record of the **Claimant:**

"September **25**, 1963. Censured for engaging **in** an altercation with a fellow **employee** while working **as** second cook on Train No. **36** between **Macomb** and Galesburg, Illinois, August 28, 1963, as disclosed by investigation accorded him September 9, 1963. Personally interviewed by the Manager of Dining **Car** Service, appropriately reprimanded for his conduct in this instance and advised that only as a matter of extreme managerial leniency, with the distinct understanding that there will be no claim progressed **nor** payment made for wages lost as a result of being withheld from service pending **this** decision and that his conduct at all times in the future will be above reproach, is he be he (sic) being permitted to resume service."

Prior to this time at a conference at which the Manager of the Dining **Car Service, an Officer** of the Organization and the Claimant Smith were present it was **suggested** that Carrier was willing to return Claimant to the service if the Organization would agree that the time he had been held out of service pending the investigation would be considered as a **penalty** and Petitioner would make no **claim** by reason thereof. On September 27, 1963, Claimant was given the decision of the Manager Dining Car Service when he was handed a copy of the disciplinary action taken on September 25 (heretofore cited) and asked **him** to acknowledge the receipt of it **which** he failed **to** do.

Claimant contends that **this** disciplinary action was unusual in his not **being** allowed to return to work until he agreed not to appeal from the decision of the Carrier; that he was subjected to arbitrary and unjust intimidation as a result of the action taken and asks that he be reimbursed for all time **lost as the result** of the **unprecedented** arbitrary action and unjust discipline **of the Carrier**.

It is the Carrier position that the Claimant was not intimidated that the Claimant's primary responsibility for the altercation was firmly established at the investigation by the testimony of disinterested witnesses; that the discipline assessed against Claimant was moderate in view of the serious nature of the offense; that his record of service was considered in determining the measure of discipline.

That portion **of** the notice **of** discipline which referred to an "understanding **that** there will be **no** claim progressed nor payment made for **wages** lost as a result of being withheld from service" was not accepted by the Claimant. If it had been accepted this **claim** would not now be before this Board. If there had been an attempt to intimidate Claimant it was not successful as he did progress the claim.

There is nothing in the Agreement as to just how punishment is to be administered by Carrier in discipline cases. It must be remembered that on September 27 when Claimant received notice of the Carrier's **decision** he was out of service. There was substantial evidence adduced at the investigation on September 9 that substantiated Carrier's contention that Smith was the aggressor in the altercation between Brown and himself.

The real issue in this case is whether or not arbitrary and unjust discipline was assessed against Claimant. (The fact that he was later returned to service is no help to Claimant because at the same time this occurred the discipline **assessed** was upheld **by** the same Carrier officer). Severe discipline may be meted out in cases of **employee** fighting on duty. In Second Division Award **2191—Wenke** we note the following:

"There is another and far more important reason why carrier's **act** of dismissing McBride, under the circumstances here shown, was justified. It is the duty of a carrier to protect its **employees** while on duty from the risk of being physically **assaulted** by a **fellow employee** when it knows the latter has such propensities. **If** such should **occur there** is a possibility that liability may accrue to the carrier for injuries received by an **employee** under such circumstances."

Dismissal awards for fighting were also upheld **in** Award **9936—Weston**; Award **11170—Coburn**; Award **11327—Dolnick**.

It is apparent that what Carrier was offering Claimant Smith was an opportunity to compromise the discipline to be levied against him when the evidence at the investigation might have supported a much more severe penalty.

In view of the foregoing, the entry of censure on his Personnel Record **and the loss** of pay by Claimant while he **was held** out of service **cannot be construed** as unfair and unjust **discipline** in any respect.

FINDINGS: The Third Division of the Adjustment Board, after giving **the parties** to this dispute due notice of hearing thereon, and upon the whole **record** and all the evidence, finds and holds:

That the Carrier and the **Employees** involved in this **dispute** are **respectively** Carrier and Employee within the meaning of the **Railway** Labor Act, **as** approved June 21, 1934;

That **this Division** of the Adjustment Board has jurisdiction over the **dispute** involved herein; and

That the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at **Chicago**, Illinois, this **27th** day of **April** 1965.