



Award No. 15544
Docket No. CL-15034

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE UNION TERMINAL COMPANY
(Dallas, Texas)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5555), that:

(a) The Carrier violated the current Clerks' Agreement when on May 13, 1963, it dismissed Tractor Driver John H. Rhodes from the service without affording him a fair and impartial hearing as contemplated by the rules.

(b) The Carrier violated the provisions of Article V of the National Agreement of August 21, 1954 when it failed to render a decision on appeal within the prescribed time limits.

(c) That Tractor Driver John H. Rhodes be paid a day's pay for each work day of the assignment he held on May 13, 1963, the date he was first withheld from service, to and including November 12, 1963, the date he was restored to service.

EMPLOYEES' STATEMENT OF FACTS: John H. Rhodes was employed by The Union Terminal Company as a porter on September 22, 1947, and he continued to hold an assignment in the Mail Department until May 13, 1963, when he was arrested and removed from the job by police officers of the Dallas, Texas Police Department, and carried to the city jail account of complaint received from Union Terminal Company Special Agent Mr. R. W. Tillery.

Mr. E. F. Ahrens, Mail, Baggage and Ticket Agent of The Union Terminal Company wrote Mr. Rhodes a letter dated Dallas, Texas, May 16, 1963, reading as follows:

"You are charged with using vulgar and profane language to Yardmaster E. C. Green in a threatening manner, with an open knife in your hand, at about 9:00 P.M., Monday, May 13, 1963.

6. Claimant Rhodes testified. He confirmed that he had a conversation with Green, but claims the worst he said was "I wish you'd go tell them fellows to quit that damn hollering." (Tr. p. 38.) He said he told Officer Fox:

"No; whoever said I pulled a knife on Mr. Green is a damn liar, whoever said it." (Tr. p. 39.)

He said he gave Fox his knife. He said Green used no profanity, and said (Tr. 42) he told Green he "wished he'd tell them damn fellows down there to keep their mouths shut." He denied everything else relevant to the charge. He said he did not even take his knife out of his pocket. He even denied seeing or talking with Smotherman.

On the basis of the evidence, claimant was found guilty, and was dismissed from the service. He was later offered reinstatement, after some six months out of service. In fact, he was reinstated to his employe status, but has never performed further service for the Carrier due to the fact that he was found, by uncontested medical examination and evidence, to be suffering two disqualifying defects, the most alarming (and probably the most pertinent here) of which is hypertension — blood pressure 240/130.

Claimant knows, as does Petitioner, that he is eligible to perform service when it is safe for him to do so. Part (c) of their claim, in fact, reads:

"(c) That Tractor Driver John H. Rhodes be paid a day's pay for each work day of the assignment he held on May 13, 1963, the date he was first withheld from service, to and including November 12, 1963, the date he was restored to service." (Emphasis ours.)

OPINION OF BOARD: Petitioner moves that the Claim be allowed as presented on the grounds that Carrier's highest officer failed to disallow it within 60 days, as prescribed in Article V, 1 (a) and (c) of the National Agreement of August 21, 1954. It computes the number of days from the date which the General Chairman's letter of appeal bears. The computation of the sixty days, it has been held, runs from the date of receipt. National Disputes Committee Decision 16; also, Award Nos. 13780, 14695 and 15443. The record does not reveal the date of receipt. We, therefore, are unable to determine whether the disallowance was or was not timely. Motion denied.

Carrier moves that the Claim be dismissed on the grounds that the Claim was not submitted "to the officer of Carrier authorized to receive same", as required by Article V, 1 (a) of the August 21, 1954 Agreement. Carrier adduced no evidence to support its averment as to designation of the authorized officer. Petitioner avers that the Claim was handled on the property in the usual manner in compliance with Title I, Section 3, First (i) of the Railway Labor Act. Carrier had the burden of proof. It failed to meet it. Motion denied.

Carrier addressed the following letter to Claimant under date of May 16, 1963:

"You are charged with using vulgar and profane language to Yardmaster E. C. Green in a threatening manner, with an open knife in your hand, at about 9:00 P. M., Monday, May 13, 1963.

Arrange to be present at formal investigation to be held in connection with these charges at 9:30 A. M., Tuesday, May 21, 1963, in Board Room, Third Floor, Union Station."

At the request of Claimant the hearing was postponed to May 28, 1963.

Following the hearing Carrier, under date of June 5, 1963, informed Claimant:

"This refers to formal investigation held May 28, 1963 in connection with your being charged with using vulgar and profane language to Yardmaster E. C. Green in a threatening manner, with an open knife in your hand, at about 9:00 P. M., Monday, May 13, 1963.

Facts developed in the investigation proved that you were guilty as charged, and you are hereby notified of your dismissal from service with The Union Terminal Company.

Arrange to turn in company property in your possession to the undersigned."

The burden of proving that Claimant was guilty as charged rested with Carrier. To meet the burden, the transcript of the hearing must contain substantial material and relevant evidence of probative value supporting Carrier's findings.

Concerning the incident, Yardmaster Green testified:

"Q. Would you please state in your own words what transpired that evening?

* * * * *

A. I heard Mr. Miller whistle and hollering for Mr. Rhodes to stop his truck, and he stopped between eight and nine, and I got back to the north crossing in the meantime. Mr. Rhodes got off his truck, came back over to where I was at on Track No. 4 and used profane language to me, talked very bad, and I noticed that Mr. Rhodes had an open knife in his hand. I turned around and walked away, went back to the rear end of the Rock Island engine. Mr. Rhodes then turned around and went back to his tractor and proceeded on to delivering his mail to the train.

* * * * *

Q. You state that he did use profane language —

A. Yes, sir.

Q. — toward you. Did he make any comment about the knife or threaten you with it?

A. No; he just cussed me, used profane language. And, when I glanced down and saw the knife in his hand, I didn't say anything to him because I turned around and, like I said, walked back down toward the Rock Island — taken me by surprise.

* * * * *

Q. Could you quote what he said?

* * * * *

Q. [By Mr. Gates] Am I correct in understanding that you do not remember the exact words of profanity he used?

A. Well, he called me, he said, 'God damn you,' I remember that; 'that you can't holler at me'; that 'I'm a man just like you are'; and that 'you God damn people are not going to run over me'; and 'do you understand', and he used some more profane language that I don't recall just what it was. Like I said, I was kind of shocked at the present.

Q. I believe you testified that Mr. Rhodes had a knife in his hand?

A. Yes, sir; he had a knife opened in his hand.

Q. Did he threaten you with that knife in any way whatsoever?

A. He didn't say he was going to cut me with the knife, or anything like that; he just had it open. As I said, when he was talking to me he had his knife open in his hand."

Other witnesses called by Carrier testified that Claimant had an open knife in his hand when he approached Green, but none of them testified that Claimant threatened Green. These witnesses did testify that the use of profanity was common on the job; indeed, one of Carrier's own witnesses used the words "God damn" in his testimony.

Claimant denied that he had an open knife in his hand, or that he used profanity; but, even assuming that he did, we find no evidence in the record—even in Green's testimony—that Claimant acted in a threatening manner. Therefore, we find that Carrier failed to prove the precise charge. In arriving at this conclusion we have made no assessment of credibility. We have merely weighed Carrier's direct case in its best light and have found it wanting.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claims (a) and (c) are sustained. Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of May 1967.

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