

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Award Number 22283**  
**Docket Number CL-22131**

**Rolf Valtin, Referee**

**PARTIES TO DISPUTE:** { **Brotherhood of Railway, Airline and  
steamship Clerks, Freight Handlers,  
Express and station Employees**  
{ **Burlington Northern Inc.**

**STATEMENT OF CLAIM:** **Claim of the System Committee of the Brotherhood  
GL-8390, that:**

"(1) Carrier violated and continues to violate Rule 39 and other rules of the Agreement, the provisions of the investigation and hearing procedures and acted in an arbitrary and capricious and prejudicial manner when it dismissed Mr. Andrew Demenko as a result of an investigation held on June 11, 1976.

(2). Carrier shall now be required to compensate Mr. Andrew Demenko for all wage loss incurred including overtime and all benefits he is entitled to under the existing Agreements beginning June 5, 1976 and continuing until Mr. Demenko is returned to service with all seniority rights and privileges unimpaired.

(3) Carrier shall also be required to compensate Mr. Demenko ten (10%) percent interest per annum to become effective thirty (30) days from the date Mr. Demenko was withheld from service."

**OPINION OF BOARD:** **At the time of his dismissal, the claimant had accumulated about 25 years of service with the carrier. There had been no prior disciplinary action against him. The substance of the letter dismissing him (dated June 18, 1976) reads as follows:**

"...you are hereby dismissed from the services of the Burlington Northern, Inc. for violation of the Rules 661, 664 and 667 of the BN Safety Rules by your physical altercation with Mr. H. J. Hajek, Manager, House 10 and for your insubordinate and quarrelsome conduct unbecoming that of a Burlington Northern employee and for Your failure to comply with instructions from proper authority at about 12:05 A.M., June 4, 1976 while assigned as Working Foreman, House #10, Chicago, Illinois."

The record in the case is of substantial length and contains numerous contentions and countercontentions, both procedural and substantive. We have come to a series of conclusions and will move directly to them.

The evidence as to what happened on the night in question is sharply in conflict. We deduce the following to have been the essence of the incident. The claimant was engaged in loading Cleveland trailers for the Universal Carloading Superintendent. At a stage at which fifteen trailers had been loaded and two more trailers were yet to be loaded, BN Manager Hajek asked the claimant to load a carton into an N&W trailer. The claimant resisted the instructions, resentfully indicating that he had more pressing work to do. Hajek went off to report the matter to the Warehouse Foreman. By the time he (Hajek) came back to re-order the claimant to load the carton into the N&W trailer, both he and the claimant were in a huff. The claimant, however, decided to comply with the instructions. Hajek, on the other hand, decided to walk alongside the claimant to make certain that the claimant would comply. The claimant was on his way toward the N&W trailer with a four-wheeled cart when one of the wheels went over Hajek's foot. Hajek pushed the cart aside, and the claimant thereupon became profane and physically assaulted Hajek. We find that there was a hard shove with raised hands, but we are not prepared additionally to find that the claimant struck Hajek on the jaw with a closed fist.

On these findings, we must hold that the claimant was guilty of a serious offense. In our opinion, however, it is equally true that there were a number of mitigating circumstances. One lies in the fact that the claimant in a very real sense had two bosses on the night in question and that he was in effect asked to interrupt an assignment which he had previously been given and which he was anxious to complete. Another lies in the fact that the claimant is of imperfect command of the English language and that Hajek, had he kept awareness of this and inquired as to why the claimant was resisting his request, might well have been content to defer the loading of the carton into the N&W trailer. And yet another lies in the fact that Hajek chose to walk alongside the claimant to make certain that the claimant would carry out the order. In the light of the claimant's long and excellent service with the Carrier, this was an insulting posture. Further, the obvious fact is that the cart would not have gone over Hajek's foot had Hajek stayed away from the claimant.

When these things are put together, it seems to us that Hajek cannot realistically or fairly be held blameless. We find that the incident **was marked** by shared culpability. And **when** this, **in turn, is** joined **with 25** years of unblemished service, **we** do not believe that the discharge penalty can be accepted as appropriate.

Overturning the discharge on the merits, **we** view it as unnecessary to deal with the **procedural** objections **which** the Organization **has** raised **with** respect to the predischarge investigation. We do, **however, want** to go on record as sharing the Organization's concern for the **narrowness** of the scope of **inquiry which the hearing** officer insisted on -- thus precluding the Organization **from** introducing testimony respecting Hajek's attitude on prior occasions **and the possibility that attitudinal problems on Hajek's part** may have been at the root of the incident on the night in question. We do not believe that an investigation involving an **employee's** dismissal is intended to be confined to the **immediate** facts of the incident precipitating the dismissal.

We **are converting** the claimant's discharge to a suspension **of 4-month** duration, **directing that the** claimant be reinstated without impairment of seniority rights and with reimbursement for lost **wages** starting **with** October **4, 1976** (without payment of interest and without **makeup** of health-and-welfare insurance **coverage, but with offset** applicability of **outside** earnings). In **coming** to this result, we have been influenced by the facts that the **Organization, in early** August, **1976, turned down a Carrier** offer to reinstate the **claimant without back pay** on leniency grounds and that the **Carrier, by** early September, **1976, had in its possession an Organization** offer by which the claimant **would have been reinstated forthwith and** the back-pay question would have been **separately** processed.

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

That the parties valued 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**;

Award Number 22283  
Docket Number CL-22131

Page 4

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

That the Agreement **was violated.**

A W A R D

Claim sustained as per Opinion.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

**ATTEST:** *A. W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this **12th** day of **January 1979.**