

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22636
Docket Number MW-22208

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Butte, Anaconda & Pacific Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Track Laborer R. A. Duxbury was without just and sufficient cause and was unduly severe and wholly disproportionate to the severity of the offense with which charged (System File Grievance #53/BA&P-R. A. Duxbury).

(2) The Carrier shall now reinstate Claimant Duxbury to service and extend to him all the benefits of Agreement Rule 19(b)."

OPINION OF BOARD: Following an on the job incident on March 9, 1976 Track Laborer R. A. Duxbury was dismissed from Carrier's service for alleged "insubordination and possibly inflicting bodily harm to his immediate supervisor, Section Foreman George M. Friez." Upon proper request by the Organization, Claimant was accorded a formal hearing into the charges following which Carrier found him guilty of charges and sustained the discharge. Some procedural objections were raised on the property but later abandoned and the matter comes to us solely on the question whether Carrier had sufficient evidence to support the findings of guilt and whether the penalty is appropriate.

In March 1976 Claimant was working as a member of Section Gang No. 5 out of Butte, Montana under the supervision of Foreman Friez. Claimant and one or two other employees had been working for three days cleaning track near an acid plant. That work site was relatively isolated and Claimant objected to the assignment, asserted that it was discriminating and unjust and also complained about the working conditions. It is not refuted that Claimant was working at a slow pace and had to be corrected on two occasions for not cleaning switches. Foreman Friez interpreted Claimant's slow and unsatisfactory performance as a protest although the Organization suggests that weather and poor conditions required a slower than normal pace. In any event, instead of confronting the employee, Friez telephoned M.W. & S. Supervisor Young on March 9, 1976 and asked him to come to the job site and "straighten out" the Claimant.

Young and Fries walked up to Claimant as he was working on the track. Young initiated the conversation by asking Claimant if he had same kind of problem. According to Claimant Young said "What the hell is your problem?" According to Young he said to Duxbury, "I hear you have a personality problem with your Foreman." In any event, the record is clear that Friez said nothing while Young and Duxbury engaged in an animated conversation. While the record is also in conflict regarding subsequent physical contact, there is no doubt that Duxbury suddenly lunged toward Friez in a hostile manner. Friez backed away, throwing up his arms in a protective gesture. According to Duxbury he was merely shaking his finger at Fries for emphasis, no contact was made and he had no intention of striking the Foreman. Fries swore that Claimant came at him with clenched fists and struck or grabbed his left wrist.. Young testified that Claimant jumped toward Friez with a grabbing motion but he could not tell if contact was made. Another employee standing some 60 feet away saw Claimant gesticulating toward Friez in an angry manner but could not tell if contact was made. At that point Friez told Duxbury, "You're fired" and Young backed him up whereupon Duxbury was terminated.

Although supervisory discretion might well have prevented the confrontation in this case, there is no way to escape Claimant's culpability. Insubordination does not consist solely in the flat refusal to perform assigned work. On the facts before us, the acts of insubordination was completed when Claimant made the unprovoked physical lunge toward the Foreman during the discussion about the work assignment. Nor is the seriousness of the offense substantially mitigated by the apparently incidental touching or grabbing of the Foreman's arm which we are convinced did occur. At best his actions constituted an assault and possibly assault and battery. The apparently minor nature of the unwarranted physical contact cannot be determinative of his guilt. To condone even such minimal insubordinate physical aggression would be an invitation to greater violence. Carrier does not have to countenance such conduct until a supervisor is actually injured or hospitalized. The record supports a conclusion that Claimant committed an unprovoked and insubordinate assault on his duly authorized supervisor. Given the nature of the offense and his past discipline record we cannot find Carrier's actions in dismissing him to be unreasonable.

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 Agreement was **not** violated.

A W A R D

claim denied.

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

ATTEST :

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1979.