

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23084
Docket Number MS-23280

Paul C. Carter, Referee

PARTIES TO DISPUTE: { (Ruben Montiel and Leo Lucero
{ (The Denver and Rio Grands Western Railroad Company

STATEMENT OF CLAIM:

1. The **dismissal of Ruben Montiel and Leo Lucero from service on November 7, 1978, was without just and sufficient cause, was discriminatory, arbitrary, capricious, and unreasonable in** abuse of the discretion of the Carrier and based **upon** unproven and unsupported charges.

2. The **formal investigation held** on the question of the dismissal of **Ruben Montiel and Leo Lucero** was a sham and mockery, **deprived the employees of their rights, was not pursuant to the Collective Bargaining Agreement and was otherwise a deprivation of rights of said employees.**

3. The Union did not **fairly and adequately represent the employees,** violating its duty of fair representation, including, but not **limited to failing to prepare** for the formal investigation representing adverse interests at said **investigation where** there was a clear **conflict of interests and otherwise** not representing the employees properly.

4. **Leo Lucero and Ruben Montiel should now be reinstated with seniority, vacation, and all other rights and benefits unimpaired and be reimbursed for losses, wages and otherwise in conformance with the provisions of the Agreement between the Carrier and the Union.**

OPINION OF BOARD: The record shows that claimants were formerly employed as section laborers on Carrier's Pueblo Section. During the afternoon of October 31, 1978, while on duty, claimant Leo Lucero and another laborer, K. R. Meek, engaged in two minor altercations and were separated by other crew members.

After the crew finished the day's work, had returned to the headquarters point, and at least some of them had washed up, another altercation occurred, which could aptly be described as a brawl. On November 1, 1978, the two claimants herein, and laborers K. R. Meek, L. J. Martinez, P. J. Cordova and J. Mondragon were notified in writing, in accordance with the provisions or time applicable collective bargaining agreement, to attend a formal **investigation** as Principals to be held at 10:00 A.M., Thursday, November 2, 1978:

" to determine facts and place responsibility **if** any **in** connection with altercation resulting in personal injury to K. R. Meek and possibly other employees on the Pueblo Section **Oct 31ST, 1978.**

Your presence as Principal is required at this investigation together with a representative if desired.

If **you desire** any witnesses to appear in your behalf, notify the undersigned promptly."

The letter was signed by Carrier's Superintendent.

The formal investigation was held as scheduled, and a transcript has been made a part of the record. On November **7, 1978**, the claimants herein and laborers **K. R. Meek, L. J. Martinez** and J. Mondragon were notified of their **dismissal** from the **service**. Following their dismissal **from the service**, claims in behalf of the two claimants were progressed in the **usual** manner by representative of the Brotherhood of **Maintenance of Way Employees**, **the duly** authorized representative of the craft **in** which claimants were formerly employed, to the highest officer of the Carrier designated to handle disputes, requesting that claimants be **re-**stored to the service with seniority and all other rights unimpaired and that they be **compensated** for all wage loss suffered from November 1, **1978**. The claims were **denied** at each level of appeal by the Carrier,

The **Carrier** contends that Parts (2) and **(3)** of the claim submitted to the Board were never presented or handled in the usual manner on the **property as** required under Section 3, **First** (i) of the Railway Labor Act. The record before the Board bears out the Carrier's contention in this respect, and these portions of the claim **will** be dismissed.

If Part (2) of the claim were properly before the Board, It would be denied. We have studied the transcript of the investigation and find that it was conducted in a fair **and** impartial manner, and in accordance with the provisions of the collective bargaining Agreement. Claimants were present throughout the investigation, were **permitted** to present **witnesses** if they desired, and **were represented** as provided for in the Agreement. The Board **had** held that:

"**Disciplinary** proceedings are not court proceedings, where strict adherence to rules of evidence is required . . ." (Third Division Award **19993**).

and:

"An investigation is not a criminal proceeding and strict rules of evidence do **not** apply." (First Division Award 18119).

If Part (3) of the claim were properly before the Board, it would be dismissed as the **Board is** without jurisdiction of disputes between employees and their Organization.

As to Parts (1) and (4) of the claim, the Board finds that there was substantial evidence adduced at the investigation to support the discipline imposed on claimants. While there were some conflicts in the testimony, it is not the function of this Board to weigh evidence, attempt to resolve conflicts therein, or to pees upon the credibility of witnesses. Such functions are reserved to the hearing officer. The Carrier's rules forbid employee to:

" enter into altercations with any person."

and Give notice that employees who are:

"careless of the safety of themselves or others
. . . . or guilty of acts of willful
neglect of duty, inexcusable violation of the
rules will be subject to dismissal."

The Carrier is not required to continue in its service employees who engage in altercations or brawls.

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 **Employees** within the meaning of the Railway **Labor** Act, es 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

Parts (1) and (4) of the claim are denied.

Parts (2) **and** (3) of the claim are dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls

Dated at Chicago, Illinois, this 15th day of December 1980.