

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23378
Docket Number MS-23410

John B. LaRocco, Referee

PARTIES TO DISPUTE: (Richard A. Davis
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(Burlington Northern Inc.

STATEMENT OF CLAIM: "Whether the employer, Burlington Northern, had just cause to discharge grievant on February 21, 1979.

By agreement of the employer, the union, BRAC, and the grievant, the latter was reinstated without backpay on or about February 21, 1980. The agreement to reinstate the grievant was with the understanding that he could pursue the question of just cause and penalty to either the Special Board of Adjustment created by the union and the employer, or to Division 3 of the National Railroad Adjustment Board."

OPINION OF BOARD: Claimant, an industrial shipping clerk at Everett, Washington, was charged with using abusive language and threatening the Assistant Terminal Agent. After a Rule 56 investigation held on February 2, 1979, the Carrier discharged the claimant for engaging in the charged misconduct in violation of Safety Rules 661 and 664. Subsequently, the Carrier offered to reinstate the claimant on a leniency basis which effectively reduced the discipline to a one year suspension. Claimant accepted the offer and returned to work on or about February 21, 1980. As part of the reinstatement agreement, claimant retained the right to appeal his case to the appropriate tribunal and the claimant has properly brought his claim for back wages and other retroactive benefits to this Board.

The fundamental facts are contested. The claimant testified that, on January 29, 1979 at 9:15 a.m., he entered the Assistant Terminal Agent's office to inform the agent that a shortage of hopper cars would be rectified. Claimant denied discussing any other subject with the agent and he specifically denied using threatening or vulgar language. In direct conflict, the Carrier's Assistant Terminal Agent testified that claimant rushed into the agent's office to complain about a promotion award which had just been announced because an employe with less seniority than claimant's wife and two other clerks was selected for a relief clerk position. There were no other witnesses to the events in the agent's office.

The claimant contends that the Carrier failed to satisfy its burden of proving claimant committed any misconduct on January 29, 1979. Alternatively, assuming the Carrier met its burden of proof, the claimant asserts that the discipline assessed was excessive. The Carrier urges us to sustain the discipline based on the evidence in the record which, except for claimant's self serving denials, demonstrates that the claimant verbally abused and threatened his supervisor. The Carrier argues that the offense was sufficiently serious to justify a one year suspension.

For two compelling reasons, we find substantial evidence in the record to demonstrate that claimant spoke threatening and abusive language to the Assistant Terminal Agent on January 29, 1979. First, the record presents a direct conflict between the testimony of claimant and the agent. As an appellate tribunal, we must refrain from judging the credibility of witnesses. Credibility determinations are best left to the hearing officer who observed the demeanor of witnesses. In addition, the record lacks any independent evidence to discredit the Assistant Terminal Agent's testimony. Therefore, we cannot reverse the hearing officer's decision to attach a great amount of probative value to the agent's testimony and to discount claimant's denials. Second, from the circumstances surrounding this incident, we can draw a reasonable inference that the conversation in the agent's office concerned Carrier promotion practices. Immediately prior to entering the agent's office, the claimant had a discussion with several other clerks about the award of the relief clerk position to a junior employee. From the record, it is clear that claimant was upset by the award (especially since his spouse was one of the more senior bidders). It is reasonable to infer that claimant continued his objections to the promotion award when he entered the agent's office. The circumstances support the agent's rendition of the events. Thus, the record contains substantial evidence showing that claimant committed misconduct in violation of Carrier safety rules.

The next issue is whether the assessed discipline was commensurate with the proven offense. We will not substitute our judgment for that of the Carrier in determining the appropriate penalty unless the discipline was arbitrary, excessive or unduly harsh. In this case, the claimant's language went far beyond the use of mere profanity. The claimant used words which not only manifested disrespect for his supervisor but he also threatened the agent. Regardless of claimant's motive for making the threat, such misconduct cannot be tolerated. Due to the seriousness of the offense, a one year suspension was not excessive.

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, as approved June 21, 1934;

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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. Paulson*
Executive Secretary

Dated at Chicago, Illinois, this **15th** day of **September 1981**.