NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26584

THIRD DIVISION Docket Number MW-26901

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employee
(
(The Kansas City Southern Railway Company
((Milwaukee-Kansas City Southern Joint Agency)

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

(1) The dismissal of B&B Foreman J. F. Hayes for 'responsibility in connection with a physical altercation between J. F. Hayes, B&B Foreman and Mr. Carlos Esteban, Section Laborer, while on duty and on Company property on November 28, 1984', was without just and sufficient cause and excessive (Carrier's file 013.31-314).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant had 38 years of service with the Carrier. At the time of the incident involved in this matter, Claimant was a B&B Foreman at the Carrier's B&B Shop at the Kansas City, Missouri Yards.

On November 28, 1984, Claimant was involved in an altercation with another employee involving the placement of a motor from a post hole digger. Extra Gang Foreman L. J. Favoroso testified that he and two other employees, R. Green and C. Esteban, were returning a motorized post hole digger (consisting of a motor and an auger) to the B&B Shop. Favoroso asked Claimant to open the shop. At the time, according to Favoroso, Claimant kept his own personal duck decoys In the Shop. Favoroso instructed Green and Esteban to place the equipment in the Shop. A question arose specifically where the two pieces should be placed. According to Favoroso, Claimant replied "anywhere there would be alright." Favoroso testified that Esteban put the machine on Claimant's duck decoys. Favoroso was of the opinion from his observation of the events that Esteban's actions were "possibly'* Intentional. Favoroso removed the equipment from the decoys. According to Favoroso, Claimant told Esteban that he would have to pay for any broken decoys. Esteban replied that he would not, asserting that the decoys were not the Carrier's materials and therefore did not belong on the Carrier's property. Claimant replied that Esteban would pay, "one way or another or I kick your little ass." According to Favoroso, further words were exchanged and:

> "Then I turned and Mr. Hayes had grabbed Mr. Esteban in the doorway, with his hands around his neck. I then grabbed Mr. Hayes to pull him off Mr. Esteban and calm him down. The reason is why I pulled him

> off because I didn't want to see him hurt anyone and that under the circumstances and the time he [Claimant] was going through I kind of understood, with his daughter. [B]ecause she was going to have brain surgery."

Favoroso testified that Claimant did not strike Esteban but grabbed him and pushed him toward the doorway entrance. Favoroso estimated that the altercation lasted ten seconds. Favoroso and Green successfully separated Claimant and Esteban, and according to Favoroso, Claimant stated "[j]ust that he was sorry, and wish It hadn't happened, because he likes Carlos [Esteban]."

Green's and Esteban's accounts cf the incident were similar. Green (corroborated by Favoroso) also testified that other space approximately two feet from the location Esteban chose to place the motor was available for placement of the equipment. Green estimated that the incident lasted no more than 30 seconds. Esteban approximates that the event lasted 15 to 20 seconds and claimed to have a neck strain as a result. Estsban lost no work time as a result of the alleged Injury. Esteban admits that he placed the motor on the decoys, but claims he did so accidentally.

Claimant's version of the Incident (which Is at odds in certain respect from Esteban's) adds:

> "Then he [Esteban] said so what, what are you going tc do about it. And I said, I'll catch you off company property and kick your little ass. At this point he at the door, still inside, he turned and faced me and said F... you. At this time I caught him by the shoulders and neck. My intentions was to shake him a little he went back against the door facing. I realized that this wasn't right and heard Leo Favoroso say No Jim, not that. I released Carlos, Leo came over and put his hand on my shoulder. Said forget It Jim, and I walked cut."

Claimant, contrary to Esteban, testified that the event lasted "about 2 or 4 seconds." In a statement received during the Hearing, Claimant explained:

> "May I say that under normal circumstances I would have handled the situation differently, because I know not to put my hands on anyone. But I have been under pressure lately. My daugher In Tucson Arizona was about to be operated on for brain cancer. The doctor explained to us that she had a 50% chance of dying during the operation, and or surviving and being blind, paraylzed, or any number of things happenings. I left the next morning for Tucson for her surgery. After which I don't know what became of the incident. I felt it was settled (sic)

> because that same day Carlos and myself went to Mr. John Kasmans, General Superintendent (sic) office and apologized to one another."

After Investigation, and by letter dated December 21, 1984, the Carrier dismissed Claimant from service.

Our task is to review the record to determine If substantial evidence exists to support the charge against Claimant. If such substantial evidence exists, then we cannot disturb the Carrier's penalty unless it appears that the Carrier's action was discriminatory, unjust, unreasonable, capricious or arbitrary sc as to constitute an abuse of discretion. Third Division Award 21020, Fourth Division Awards 7347, 3490.

Clearly, substantial evidence exists in this record to uphold the Carrier's decision that discipline was warranted. Claimant admittedly grabbed and pushed another employee. Such conduct was In violation of Carrier's Rule N which prohibits such altercations.

However, under the circumstances presented, we are of the opinion that the penalty imposed was sufficiently unjust, unreasonable, capricious and arbitrary so as to constitute an abuse of the Carrier's discretion. We are mindful in accord with the Awards cited to us by the Carrier that, as a general proposition, this Board has upheld disciplinary actions resulting from physical altercations between employees. However, more exists for us to consider in this case than only the fact that an altercation occurred. First. Cisimant has provided 38 years of service to the Carrier. Such lengthy service does not excuse Claimant's actions, but nevertheless, we cannot ignore Claimant's length of employment. Second, this record does not show prior disciplinary problems involving Claimant. We can therefore presume that Claimant's record was satisfactory. First Division Award 14113. Third, Claimant was under extreme emotional pressure due to the gravity of the Illness suffered by his daughter - a fact known to Favoroso by virtue of his quoted testimony. Again, although such cannot excuse Claimant's conduct, Claimant's state of mind is a factor that we cannot ignore. Fourth, the incident was brief by all witnesses' accounts. Fifth, we cannot say that the incident was without provocation. Although denied by Esteban, according to Foreman Favoroso, it is not clear that Esteban did not purposely place the motor on Claimant's personal property. Sixth, it is uncontroverted in the record that Claimant realized his error and apologized for his misconduct. Indeed, aside from Claimant's statement to that effect, which may be considered self-serving, Foreman Favoroso also testified that Claimant made apologetic remarks.

We have carefully reviewed those Awards cited to us by the Carrier, and we do not find them to be totally disposltlve of the rather unique set of circumstances presented in this case. In Third Division Award 22872, a Supervisor gave an employee an order and, in response, the employee slapped the Supervisor's hand. We upheld the dismissal noting that "[i]t is a well-accepted principle in employer-employee relations that men working together, regardless of their relationship, do not strike each other." However, we further

noted that dismissal for physical altercations is not a hard and fast rule and that "[o]" numerous occasions in the past, this Board has issued awards wherein it reduced the penalty imposed by Carrier when it was clearly established in the record that the disciplined employe was provoked into retaliating in kind or when a" employe acted in no more a" unacceptable manner than did the Supervisor who provoked him." We believe the facts in this case demonstrate the kind of circumstances calling for the imposition of a lesser degree of discipline as contemplated by our expression in Third Division Award 22872.

In Third Division Award 19538, we upheld the dismissal of the employee and we noted that "[t]his Board has held on a number of prior occasions that dismissal is a" appropriate remedy in cases of employees fighting on duty (See Awards 11327, 13485, 11170)." However, we further noted in that Award that, "Claimant was responsible for provoking and engaging in a fight...." As earlier noted, the element of provocation on Claimant's behalf is not present in this case. Indeed, from the witnesses' factual accounts of the incident, Esteban's actions constituted the provocative conduct.

In Third Division Award 13684, we upheld the dismissal of the employee which involved the fact "that Claimant attacked his Supervisor and inflicted upon him serious bodily injury. The alleged provocation for such attack, testified to have been the words and attitude of the Claimant's Supervisor, cannot be held to justify Claimant's resort to force and violence resulting in serious injury to a fellow employe." In this case, the type of alleged injury suffered by Esteba" comes nowhere "ear the degree found in Third Division Award 13684. Moreover, the mitigating factors found in this case are not found in Award 13684.

In Fourth Division Award 2770, a dismissed Foreman was reinstated without backpay when the Foreman, after observing a Carrier Police Officer arrest his stepson, confronted the Police Officer and angrily poked his finger in the Officer's chest several times and challenged his authority. However, that award articulated a factor that we deem relevant in this case, i.e., the over-reaction of a" employee due to factors unique to the situation. "[T]he situation is a highly unusual one where Claimant was understandably under severe emotional pressure when he saw his own stepson being arrested by a Carrier Police Officer." It was found that "...Claimant reacted overemotionally but we do not agree that he should be dismissed, in this unusual occurrence, for one bad moment." While the employee did not receive backpay in that case, we do note that the element of provocation present in this case was not present in Award 2770. Additionally, the degree of emotional pressure experienced by Claimant herein (a factor explicitly recognized as worthy of consideration in Award 2770) from his daughter's grave illness appears to be more significant in this case.

I" Fourth Division Award 3123, the record established that "Claimant instigated the altercation in question" - a fact not present herein. Moreover, the employee was reinstated "in light of his 17 years of service" - a factor we deem relevent in this matter.

In Second Division Award 7347, the dismissal of an employee for knocking down, hitting and kicking a Foreman who was a key Carrier witness against the employee in a prior case was upheld. The injury to the Foreman in that case required that "the Foreman had to be taken to the hospital with a hematoma of the left eye, and bruises of the check and back." It was noted that "[s]uch behavior is not excusable because the offender is in an agitated emotional state"; the Employee should not have retaliated or fought back to the point of becoming the aggressor and the employee "should use only the amount of force necessary to fend off the attacker, and at no time should they assume the offensive." However, we find that case to be sufficiently different from this case due to the different facts, the kind and degree of alleged injury suffered and the lack of extenuating circumstances presented herein.

In Second Division Award 5674, an employee with 23 years of service was reinstated without backpay in a case where the employee struck her Foreman on the head with a baggage car roller splitting his hard hat. The altercation came after the employee sought to prevent the Foreman from walking down steps that she was cleaning and the employee was allegedly pushed to the ground by the Foreman and the Foreman was walking sway. It was held in that Award that "the altercation on the steps of the railroad car did not constitute self-defense, and was Inexcusable despite provocation . ..[since] the Claimant was in no physical danger when assault on said Foreman occurred." Again, the factors present in this case are not found in Award 5674. We do note, however, that the employee's long and satisfactory service was specifically taken into account in reducing the disciplinary action.

In First Division Award 23324, discharge of an employee for being insubordinate, using abusive language and threatening a Supervisor with bodily harm was upheld. It was noted that "[s]uch offenses subject an employee to immediate dismissal irrespective of length of service on prior discipline record." But once again, that case Is factually distinguishable in light of the absences of the unique circumstances present herein.

In First Divison Award 21924, an employee with 20 years of service was reinstated without backpay after being discharged for engaging in horseplay with an engineer which resulted in injury to the engineer after he was hit by a bottle. The employee's length of service and prior record were taken into account in reducing the discipline. Again, while standing for the proposition that lengthy suspensions have been imposed for such misconduct, the facts in Award 21924 do not reveal the unique kind of circumstances found in this case.

Further, notwithstanding the Awards cited by the Carrier, altercations of this nature do not, as a matter of strict precedent, require in all instances that dismissal be imposed as a penalty or that lengthy suspensions resulting from a return to service without backpay are mandated. Although we recognize that in the following Awards cited to us by the Organization, such lesser penalties ware not imposed by the Board, nevertheless, in situations where altercations have occurred, discipline of something other than a dismissal or lengthy suspension has been rendered. See e.g., Second Division Awards

8777 (15 day suspension for fighting even where the employee's record demonstrated a prior incident for similar misconduct), 8451 (30 day suspension even where the employee charged was the instigator), Public Law Board No. 2778, Award No. 32 (5 day suspension where there was no evidence that the employee started the fight).

Thus, we are faced with the extremely difficult task of determining the appropriate amount of discipline for what we consider to be a very unique set of circumstances. Considering Claimant's position as a Foreman, his lengthy service, satisfactory record and the totality of the circumstances surrounding the confrontation the mitigating and extenuating factors presented, as well as the fact that Claimant immediately recognized his misconduct and thereafter apologized for it, and balancing those factors against the principles of the Awards cited to us by the Carrier and the basic concept of labor relations that discipline is to serve a rehabilitative rather than a punitive function (see e.g., Third Division Awards 20409, 19037, 18016, Second Division Award 6485, First Division Award 14113), we are compelled to conclude that a two week suspension rather than dismissal or an otherwise lengthy suspension would have been appropriate to correct Claimant's admitted misconduct. When factors such as these are present, this Board has modified disciplinary penalties. See e.g., Third Division Award 23572.

In light of the above, we shall therefore Award that Claimant be returned to service with seniority and other rights and benefits unimpaired and that he be made whole less the wages for the two week suspension. In light of our findings, it is unnecessary to address the Organization's argument that Claimant was denied due process under Rule 13 of the Agreement.

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 Employes involved in this dispute are respectively Carrier and Employes 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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 27th day of October 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26584, DOCKET MW-26901
(Referee Benn)

In the instant dispute, the Claimant, a B&B Foreman, became so enraged at a subordinate that he placed both hands around the subordinate's neck, lifted him off the qround, and shoved him against the wall. The assault was brought to a halt only when two other employees pulled the Claimant from the subordinate. The Majority found that the Carrier erred in assessing any discipline beyond a two-week suspension.

While the Majority proceeds through a lengthy analysis of the reasoning that went into its decision, it is clear that only one factor played the dominant role in the Majority's deliberation. The Majority was so taken with the mental stress the Claimant allegedly had on the day of the incident, that it decided to treat the Claimant's beating of the employee as a minor matter which the Carrier should have ignored. The Majority's compassion must have been the overriding consideration as there is nothing else in the decision that provides any understanding of a determination that tramples upon every precedent of this Board, on this subject, spanning the more than 50 years of the Board's existence. The Majority does not even attempt to cite precedent for the proposition that under facts similar to those in this case, the Board has ever awarded backpay to a claimant found to have assaulted a fellow employee with no evidence, or even contention, that the beating was an act of self defense.

While the Majority does allude to other factors of a "unique" nature, it is inconceivable that it could have rested its decision on them. Thus, we cannot conceive that the Majority seriously believes that the concept of progressive discipline is an appropriate consideration in a physical assault case. The Majority cites five Awards to support the "rehabilitative function" of discipline but not one deals with a case of physical assault. We know of no Board precedent for the proposition that the first time one employee beats another he is subject to two weeks suspension: the next beating 30 days; the third beating 60 days, and so on. While the Majority is concerned with the rehabilitation of the Claimant, the Carrier has the responsibility to be concerned with the health and welfare of the employees who must work alongside the Claimant while he is undergoing "rehabilitation."

The Majority also refers to the fact that the Claimant was a Foreman. While there is no indication whether such fact weighed in the Majority's considerations as a favorable or unfavorable factor supporting the Carrier's action, we can only presume that such fact supported the Carrier's action. One would suppose that a Foreman ought to be aware that his supervisory position places a larger responsibility on him to treat subordinate employees in a humane manner, which clearly does not include choking them.

The Majority refers to the fact that the assault lasted a short period of time, and that claimant "immediately recognized his misconduct and apologized for it." In view of the undisputed fact that the physical assault came to an end only when the

Claimant was physically restrained hy other employees, it is not clear what the Majority means in stating the Claimant: "immediately recognized his misconduct." He certainly did not end the assault voluntarily. With respect to his "apology," we submit that his sincerity is suspect. It is equally plausible, if not far more likely, that Claimant understood that choking a subordinate employee could lead to serious consequences with respect to his continued employment, and that his "apology" was a belated attempt to salvage the situation. We cannot help but speculate whether such apology would have been forthcoming if Claimant had any inkling that the most serious consequences of his action would be a two-week suspension. It is noteworthy that in his testimony at the Investigation, the Claimant's defense to the charge continued to center on the issue of whether the beaten employee had intentionally or unintentionally intended to put the motor on Claimant's duck decoys!

The final "unique" circumstance was the Claimant's past record which was not shown to be unsatisfactory. The Majority was furnished with 14 Awards, representing each Division of the Board, which held that, in physical assault cases, the most an unblemished record would justify is reinstatement without backpay, and even then, only in a minority of cases.

Indeed, the Majority's attempt to distinguish some of the Awards cited by the Carrier presents additional compelling evidence that the Majority's mind was closed from considering anything that might lead it to reach a decision denying the Claim. A complete analysis of the **Majority's** discussion of the

Awards cited by the Carrier would needlessly lengthen this Dissent with no productive result. Instead, we will focus only on the first such Award discussed by the Majority, Third Division Award 22872, wherein the employee was dismissed for striking a supervisor. The assault was described as one in which the claimant "slapped the Roadmaster's hand away from his face." The claimant's defense was that he was provoked by the Roadmaster's attitude in issuing an order to the claimant in which the Roadmaster "waived his finger in his face while he was talking to (Claimant)." The Board denied the Claim in its entirety, stating:

> "On numerous occasions in the past, this Board has issued awards wherein it reduced the penalty imposed by Carrier when it was clearly established in the record that the disciplined employe was provoked into retaliating in kind or when an employe acted in no more an unacceptable manner than did the supervisor who provoked him. That is not the situation in this case. The Roadmaster spoke aggressively to claimant. Claimant responded in kind verbally, but he also struck the Roadmaster. There was no justification for such an action.
>
> "It is a well-accepted principle in employer-employe relations that men working together, regardless of their relationship, do not strike each other. When one man assaults another on company property, he can expect to be severely disciplined by his employer. Discharge is not an uncommon penalty in such situations. For an employe to strike a supervisor is intolerable. This Board need not recite the reasons why this is unacceptable behavior. It should be obvious to even the most uninformed.
>
> "Based on the entire record, the Board is of the opinion that Carrier was justified in dismissing claimant. It has not acted in an arbitrary, capricious, or discriminatory manner and the penalty imposed clearly fits the 'crime' committed and admitted to by Claimant."

The Majority cavalierly disposes of Award 22872 with the comment that the facts of the instant dispute "demonstrate the kind of circumstances calling for the imposition of a lesser degree of discipline." To be sure, the facts in Award 22872 are different from the facts in our case. For example, in Award 22872, the physical contact of the claimant consisted of slapping the Road Foreman's finger away from the claimant's face. In our case, the physical assault was described by one witness in the following terms:

> "(The Claimant) had grabbed Mr. Estaban in the doorway with his hands around his neck. I then grabbed (Claimant) to pull him off Mr. Estaban and calm him down."

The witness further testified that in grabbing the employee around the neck the Claimant "pushed him back to the doorway entrance," and that 'Claimant held the employee "pinned in the doorway" until he was restrained. Another disinterested witness confirmed that the Claimant grabbed the employee "around the throat" "with both hands" until removed by the witnesses. Both witnesses were emphatic that the employee made no threatening gestures or remarks to the Claimant.

Another difference between Third Division Award 22872 and our dispute is that in Award 22872, it was a subordinate that struck a supervisor, while in our dispute a supervisor struck a subordinate. Such difference hardly makes the Claimant's conduct more justified.

In essence, the Majority finds no problem with the Board upholding the carrier's decision to dismiss the employee in Third Division Award 22872 for slapping his supervisor's hand while it

finds that in the present case, the most discipline that could be assessed against a supervisor for grabbing a subordinate around the throat until physically restrained was a two-week suspension. It is also noteworthy that the Board in Award 22872 does not engage in any discussion of such factors as the length of service of the claimant, his past record, the length of time of the assault, whether the claimant apologized, all of which the Majority here feels are unique factors in determining the appropriate level of discipline, i.e., permanent dismissal or two weeks. As the Board stated in Award 22872, for one employee to strike another is "intolerable" and "unacceptable"; the reasons "should be obvious to even the most uninformed."

The Organization did not present a single Award to the Board that would justify the Majority's decision. The most the Organization was able to demonstrate was that a carrier, as a matter of management prerogative, does not always dismiss employees who assault other employees. The issue here, of course, was not whether the Carrier had the prerogative to impose lesser discipline than dismissal. Not a single Award furnished by the Organization, some of which are cited in the Majority decision, challenged the Carrier's right to determine the appropriate level of discipline. Insofar as the issue of leniency is concerned, we will not waste additional space to cite the legion of Awards that have uniformly held that issues of leniency are properly addressed to the discretion of the Carrier, and will not be considered by the Board.

All of which takes us back to the beginning of our discussion, the Majority's sympathy for the stress resulting from the Claimant's personal problem. We will not dispute here whether the Claimant was under stress at the time of the assault. We do believe, however, that the final comment at the Investigation of the employee who was attacked is a complete response. The employee stated:

> "I would like to state earlier, when this incident happened, I did not understand that (Claimant) was under so much stress outside work. If he was in so much stress he should have took a few days off."

It is hardly necessary to expand on the employee's statement. It is obvious that if an employee is to be allowed to escape the consequences of physically assaulting a coemployee on the basis of personal problems, no matter how severe, we will be justifying an era of mayhem and havoc in this industry. The Majority decision justifies such conduct and must immediately be committed to oblivion.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST