

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26767
THIRD DIVISION Docket No. MW-26924
88-3-86-3-702

The Third Division consisted of the regular members and in addition Referee Elmer F. Thias when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood** of Maintenance of way **Employees**
(National Railroad Passenger Corporation - (Amtrak)
(Northeast Corridor

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

(1) The discipline (thirty days suspension: time out of service to apply) imposed upon Engineer Work Equipment R. M. Steffy for alleged violation of Rules 'I' and 'J' for allegedly being 'involved in a fight,' was arbitrary, **capricious**, on the basis of unproven charges and in violation of the Agreement (System File **NEC-BMWE-SD-1072D**).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS :

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

The carrier or carriers and the **employee** or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant has been employed by the Carrier for a period of eight years and has a reprimand on his record. On the date of occurrence for which the Claimant was subsequently disciplined, he was working as a" Engineer-Work Equipment.

Because of his involvement in a fight with another **employee**, the Claimant was charged with violation of Rules "I" and "J" of the Carrier's General Rules of Conduct under a Specification which reads as follows:

"In that on August 23, 1984 at approximately **5:10** a.m. in the vicinity of Davis Interlocking, **#5** track, you were involved in a fight between yourself and Lawrence Baylor ."

A trial was held on September 6, 1984. Six witnesses were celled and gave testimony at the trial. Thereafter, the Carrier imposed a disciplinary suspension of thirty days. The **Organizaton** contested the discipline on the property end has taken appeal to this Board. The dispute is properly before **us**.

The altercation on August 23, 1984, began as a verbal dispute between other members of Gang Z-032, to which the Claimant belonged, namely **Trackman** Baylor and the Repairman. The **Trackman** was driving a van used to transport the crew and the repairman was driving a truck necessary to his duties. Testimony is that the **Trackman** had had an **abrassive** conversation with the General Foreman approximately twenty-five minutes prior to the altercation and the General Foreman testified the **Trackman** was very hostile when he went beck to pick up the gang. It would appear that the Trackman's van was loaded with the members of the gang he was to transport when the Repairman drove up to pick up the Claimant. The Repairman had blocked the Trackman's exit from the site. The Claimant boarded the truck and the two drivers continued their **exchange** of words.

It should be observed that the gang had been on duty for a period of seven hours and ten minutes at the time and had been engaged in strenuous work. They were preparing to be transported an undisclosed distance to their headquarters where they would be relieved from duty. The record indicates that the Claimant twice left the truck in which he was to be transported and walked over to the van "...to cool off a hot situation..." according to the Organization. On the other hand, the Carrier perceives the Claimant as "...the aggressor and clearly not a 'mediator'..." When the Claimant arrived at the van, the **Trackman** driver descended from it, the Foremen intervened between the two and the Claimant was hit on the side of his face end knocked to the ground by the Trackman.

As indicated, there were six witnesses who testified during the Investigation. The Trackman, who struck the Claimant, was not present and did not testify. There are certain conflicts in the testimony of the witnesses but much of the testimony is cohesive. This Board serves in an appellant capacity **and** it is not our function to determine credibility of witnesses nor to resolve conflicts in testimony. Those **determinations** are to be made by the Officer who conducted the trial. Our responsibility is to determine whether the developed evidence is sufficient to support the discipline imposed.

Pertinent incidents of the altercation are briefly stated above. There is testimony which adds analytical detail to the incidents. Some of the testimony on the details differs and some may be said to conflict. Taken as a whole, the testimony of the six witnesses regarding the altercation end the particulars thereof is relatively free from doubt or uncertainty. The circumstantial evidence developed is clear.

From 4:45 a.m. to 4:50 a.m. the Trackman, driver of the van, engaged in an argumentative conversation with the General Foreman over duties assigned him by the General Foreman and was hostile to the point the General Foreman ordered him to take his van to Davis or be subject **to** disciplinary action. The **Trackman** complied, taking the van to the point he was to pick up the members of Gang Z-032 to be taken to their headquarters. When the Repairman arrived at the same location, intending to pick up and transport the Claimant, the **Trackman** initiated an exchange of words with the Repairman as well as overt activities whereby he blocked the Repairman's exit with the van, blinked and flashed the lights of the van and otherwise impeded the Repairman's efforts to drive from the location. The Claimant arrived after the interplay between the **Trackman** and the Repairman had begun and he attempted to intercede and reduce existing tensions. Nevertheless, the **Trackman** persisted. When the Claimant made a second attempt to intercede, walking a short distance to the van driven by the Trackman, the **Trackman** came out of the van and struck the Claimant in the face. In that regard, the blow was not struck immediately, it came after the Foreman of the gang had physically placed himself between the **Trackman** and the Claimant.

The issue is whether the Claimant was involved in a fight with another **employee** to a degree where culpable responsibility is established. We have reviewed and considered the entire record and **we** find the evidence is not sufficient to substantiate the charge.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of January 1988.