

The Third Division consisted of the regular members and in addition Referee Mary H. Kearney when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Maine Central Railroad Company
(Portland Terminal Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10171) that:

1. Carrier violated the Agreement between the parties when on June 13, 1986 it dismissed Yard Laborer Donald M. Matthews from service of the Carrier without just cause.

2. Carrier shall now be required to reinstate Yard Laborer Donald M. Matthews to service of the Carrier with all rights and privileges undisturbed and compensate him for all time lost commencing June 13, 1986 and continuing until he is reinstated to service of the Carrier.

3. Carrier shall further compensate Yard Laborer Donald M. Matthews interest at the rate of 18% compounded annually on the anniversary date of this claim for all monies due in Item 2, supra."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

On June 13, 1986, following an investigative hearing, Carrier informed Claimant:

"An entry of DISCHARGED has been made in the Discipline Record Book against your name for the following reason:

Your responsibility for violation of Guilford General Rules GR-C and GR-D, wherein you physically assaulted the wife of a Maine Central employee at approximately 1:30 p.m. on 5/16/86, on Gerry Avenue, South Portland, Maine."

Claimant had been originally hired by the Carrier in 1957, but had at least one break in service. He had worked as a Yard Laborer for the Maine Central for the eleven consecutive years preceding his dismissal.

As a backdrop for the incident in question, on March 3, 1986, the Brotherhood of Maintenance of Way Employees (BMWE) took a strike action against the Carrier. Picket lines were established by the BMWE employees and subsequently TCU employees also became involved in a strike action against the Carrier.

On May 16, 1986, pickets were gathered on Gerry Avenue near the entry to Carrier's Rigby West Yard in South Portland, Maine. The record fails to state what role Claimant was assuming that day. It indicates only that he was among a group of about ten to twelve people, some of whom were the pickets assembled as indicated above.

Slightly before 1:30 p.m., May 16, 1986, an employee of the Carrier drove his motorcycle on Gerry Avenue toward the entrance on Rigby Yard near where Claimant and the pickets were standing. This employee's wife rode as a passenger on the back of the cycle.

What occurred as they approached the entrance to the Yard is the subject of this dispute. The Carrier maintains that the evidence presented at the hearing sufficiently demonstrates that Claimant assaulted and injured the employee's wife with his fist as she rode by him. The Organization maintains, however, that the motorcycle increased in speed as it approached the group of pickets and others, and swerved toward Claimant. At that point Claimant raised his open right hand not to strike, but in an attempt to avert a collision between him and the motorcycle.

The substantive issue presented to the Board involves whether or not the Carrier has demonstrated by substantial evidence that Claimant was guilty of the rule violations as charged. The function of the Board when deciding such a question has been stated many times before. See Third Division Award 25907, which held:

"That in discipline cases the Board will not weigh the evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses. Conflicts in evidence do not warrant disturbing the Carrier's action."

Also in Award 25907, the Board reiterated an often cited definition of the "substantial evidence rule," the rule by which we are bound to abide:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Consol. Ed. Co. vs. Labor Board 305 U.S., 197, 229.)"

Based on a review of the overall record the Board finds it reasonable to conclude that Claimant did, in fact, assault the employee's wife.

First, the employee's testimony, supported by the police report, shows that his wife was struck "in the area of the right shoulder" as she passed by Claimant and was injured at that time.

Further, Claimant's own testimony allows that he did "hit or come in contact with" one of the motorcyclists, although he thought it was the employee. Notwithstanding the Organization's arguments to the contrary, the location of the wife's bruise on the back of her right shoulder, above the shoulder bone, does not preclude the possibility that it was caused by a blow from Claimant's right hand. Given the excitement and anxiety of the moments in question it is not unreasonable to conclude that the wife was hunched over and leaning forward against her husband's back instead of sitting up straight as she would have been under normal circumstances. That being the case, Claimant's hand could have easily struck the back of her shoulder as it came down.

Moreover, one piece of evidence in particular suggests that the wife was injured by an intentional punch and not by a gesture designed merely to push her and the motorcycle away. The doctor's report demonstrates that she was in pain and freshly bruised and that her shoulder movement was hindered six hours after the incident occurred.

Finally, although the evidence is mixed concerning whether Claimant's hand was clenched into a fist or open when he struck, either posturing of his hand could result in the injury she sustained. As certain martial arts demonstrate the side of an open hand, or an open hand held at an angle can strike with the force of a closed fist.

The Board finds insufficient basis in the record to sustain the Organization's procedural objections.

A W A R D

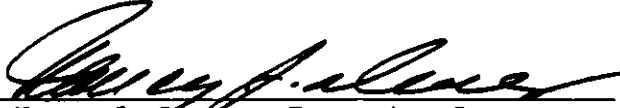
Claim denied.

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Award No. 27841
Docket No. CL-27867
89-3-87-3-388

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1989.