

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31625
Docket No. MW-31858
96-3-94-3-154**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Sectionman B. K. Sparks for alleged violation of General Rules A, B, D, and H and Rules 607 and 608 of Form 7908, Safety, Radio and General Rules for All Employees, in connection with allegedly behaving in a quarrelsome manner and attempting to provoke an altercation on November 6, 1992, was arbitrary, capricious, disparate treatment and in violation of the Agreement (System File D-184/930202)

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning November 6, 1992."

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 employee 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 November 11, 1992, Carrier advised Claimant to report for an Investigation on November 17, 1992. The notice charged Claimant with behaving in a quarrelsome manner to provoke an altercation on November 6, 1992. The Investigation was postponed to and held on November 20, 1992. On December 4, 1992, Carrier advised Claimant that the charges had been sustained and that he was dismissed from service.

The Organization contends that Claimant was not given a fair hearing. The Organization maintains that the transcript reveals that Carrier had prejudged Claimant's guilt. The Organization further maintains that Claimant was treated disparately from his supervisor, in that both were involved in the incident, both initially were withheld from service, but the supervisor was returned to service whereas Claimant was not. The Organization further contends that Carrier committed other procedural violations, including having an official other than the hearing officer issue the findings and impose the discipline, and failing to provide the General Chairman with a copy of the Investigation transcript.

On the merits, the Organization contends that Claimant was provoked and that Claimant engaged in conduct which was tolerated by Carrier on other occasions. The Organization maintains that Carrier failed to prove the charges against Claimant by substantial evidence.

Carrier contends that Claimant was provided a fair hearing. Carrier maintains that the Organization's procedural objections have been considered and rejected by this Board in prior Awards. Carrier contends that four witnesses testified to Claimant's misconduct on the day in question and that the record amply supports the finding of guilt.

The Board has examined the transcript carefully. Based on our review, we find that Claimant was provided a fair hearing. The Organization quotes the hearing officer at one point alluding to "beating the old horse." Our review of that portion of the transcript leads us to conclude that it does not evidence a prejudgment of the facts. The hearing officer referred to "beating the old horse" in response to the Organization's request to continue the hearing to enable another employee to whom the supervisor was allegedly abusive in the past to testify. The hearing officer had already received evidence suggesting that the supervisor had been abusive to the Claimant and at least

one other employee in the past. The hearing officer's words may not have been well-chosen, but, when read in context, they merely reflect his desire to keep the testimony focused on the events of November 6, 1992, the date of the incident under investigation.

The Organization's objection that the decision on discipline was rendered by a Carrier officer other than the officer who conducted the hearing has previously been rejected by this Board in prior Awards involving these parties. See Third Division Awards 29775, 29584. We see no reason to depart from our prior precedents.

Rule 48(f) requires Carrier to furnish the General Chairman with a copy of the transcript promptly. Carrier contends that the transcript was sent to the General Chairman, while the Organization disputes this. We see no need to resolve this conflict because it is undisputed that when the Organization advised Carrier that the General Chairman had not received the transcript, Carrier furnished a copy and offered to extend the time limits for filing an appeal. Under these circumstances, the Claimant's rights were not prejudiced and there is no basis for overturning the discipline. See Third Division Award 29584.

We further are not persuaded by the Organization's claim of disparate treatment. The Manager of Track Maintenance testified that he initially decided to withhold the Section Foreman from service due to an unrelated incident and then had second thoughts about it. We find no disparate treatment in Carrier's treatment of the Section Foreman. As discussed below, the evidence fully supports Carrier's finding that the Section Foreman did not provoke the Claimant on November 6. Consequently, there was no reason related to the incident in question for Carrier to withhold the Section Foreman from service.

Accordingly, we turn to the merits of the claim. On November 6, 1992, Claimant reported late to work and the Section Foreman refused to let him work. The Section Foreman testified that Claimant cursed him and threatened him with bodily harm. The Roadway Equipment Operator, a disinterested witness, testified that Claimant cursed the Section Foreman, became violent and sought to fight him. Both witnesses testified that the Claimant thereafter followed the Section Foreman down the right-of-way.

The District Truck Driver and the Welder Helper each testified that they did not witness the altercation between Claimant and his supervisor. However, they saw Claimant later by the road and Claimant told them he had followed the Section Foreman down the right-of-way and would have beaten the Section Foreman if he had

caught up to him. Although Claimant denied threatening his supervisor directly, he admitted following the Section Foreman and admitted to the conversations with the District Truck Driver and the Welder Helper.

Thus, the testimony of the Section Foreman and three disinterested witnesses, as well as Claimant's partial admissions, support the findings made on the property. Furthermore, although there was some evidence that the Section Foreman may have used abusive language toward Claimant and one or two other employees in the past, the Roadway Equipment Operator, who was the only disinterested witness to the actual confrontation on November 6, fully corroborated the Section Foreman that the supervisor was not abusive and did not otherwise provoke the Claimant on that date. Furthermore, the Claimant not only cursed the Section Foreman, he threatened him with bodily harm. There is no evidence that such threats were tolerated as a common practice on the property.

Accordingly, we conclude that the findings made on the property are fully supported by substantial evidence. The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 29th day of August 1996.