

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32050
Docket No. MS-32549
97-3-95-3-457**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

(Luellan J. Russell, Jr.

PARTIES TO DISPUTE: (

(Florida East Coast Railway Company

STATEMENT OF CLAIM:

"Wrongful dismissal from the Florida East Coast Railway for being wrongfully charged with 'conduct unbecoming an employee of the Florida East Coast Railway by reason of entering an altercation with Trainman Felipe Heng on March 7, 1995, when infact (sic) Mr. Heng caused the altercation by committing a "hit and run" and later calling me a ... and also stating that he "had something for me, which I truly believe was a "gun".'

I was also charged with 'exposing a firearm, which FEC Railway "assumed" I obtained from my personal vehicle, located on Company property, in an "apparent attempt" to inflict bodily harm to a fellow employee.' However, I never exposed a firearm, I never obtained a firearm from my vehicle and I never made an 'apparent attempt' to inflict a fellow employee, this being Mr. Heng, with bodily harm. These charges were only based on assumption and are untrue.

I feel that the entire investigation was conducted to find fault to discharge me from the FEC Railway. Meanwhile Mr. Heng, who is 'Hispanic' still remains employed with the Florida East Coast Railway, due to the fact that he held a higher position than I. The truth is all of the employees mentioned in the enclosed transcript held higher positions than myself and held no personal regard to my workmanship or job status with the railroad.

I feel that I was mislead (sic) by Ms. Gloria Taylor, Personnel Administator (sic) with the Florida East Coast Railroad, who stated in the attached letter, of August 1, 1995, that she would 'canvass supervisory personnel under whom I performed service prior to making a final determination. Although, all letters were in good faith on my behalf, Ms. Taylor stated that 'after reviewing my prior service record with the Company, she could not give favorable consideration to my request for reinstatement. However, Ms. Taylor probably made her decision prior to "'canvassing supervisory personnel' and wanted to delay her decision. What was her purpose for obtaining comments from my former supervisors. Was it because she wanted the others to conspire against me, as well, which they did not."

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 were given due notice of hearing thereon.

Claimant was a Laborer with approximately seven and one-half years of service. By letter dated March 14, 1995 from the Carrier, the Claimant was "charged with conduct unbecoming an employee by reason of having entered into an altercation with Trainman Felipe Heng" on March 7, 1995; he was also "charged with exposing a firearm which he obtained from his personal vehicle which was located on Carrier property in an apparent attempt to inflict bodily harm to a fellow employee."

A formal Investigation was held on April 14, 1995. By letter dated May 10, 1995 the Claimant was dismissed from service for "exposing a firearm", which was in his personal vehicle, "located on Company property in violation of Company rules."

On March 7, 1995, the Claimant and Trainman Heng were involved in a minor vehicle accident on the Company's property. Without stopping his vehicle, Trainman Heng proceeded to the Yard office. The Claimant followed Trainman Heng, in his vehicle.

Both Trainman Heng and the Claimant parked their vehicles close to the Yard office. After they exited from their vehicles, they engaged in a heated discussion. At some point during the altercation, the Claimant returned to his vehicle.

What occurred when the Claimant returned to his vehicle raises the key factual issue in this dispute between the parties. The Carrier contends that upon returning to his vehicle, the Claimant reached inside, picked up a gun and then placed it back down. The Claimant denies that he reached into his vehicle and picked up a gun.

The Board finds that the evidence is compelling in support of the conclusion that during his altercation the Claimant went to his personal vehicle to secure a gun. Moreover, the Board finds that he did so "in an attempt to inflict bodily harm to a fellow employee."

Three persons observed the Claimant pick up the gun. Clerk Lura Borgert-Buss observed the Claimant pick up the gun about "12, 16 inches and then he laid it right back down." She added that "it wasn't pretend. It wasn't made up. I saw him pick up that gun." The Claimant's act of picking up the gun was observed by the person described in the transcript of the Investigation as Julio Almeida, the "copy guy", and the statement of Federal Railroad Administration (FRA) Inspector McCarty which was provided during the Investigation of the incident.

The Claimant admitted that he had a gun in his vehicle. The Claimant said that he took the gun "out" at the scene of the accident when Trainman Heng damaged the mirror on his vehicle. He did so because he did not know "what this guy was thinking, what was his problem?" The Claimant denied that he picked up the gun when he returned to his vehicle during his altercation with Trainman Heng in the parking area outside of the Yard office.

Trainman Heng testified that during their heated discussion which "wasn't getting anywhere, the Claimant told him that he had "something for [him]." The Claimant went to his vehicle, and as he turned around he "looked up and people were

looking at us." As a result, he entered his vehicle and left. Conductor Robert Murphy who was riding with Trainman Heng when the accident occurred, and witnessed the altercation, in effect, corroborated the testimony of Trainman Heng by stating that the Claimant said to Trainman Heng, in effect, "go ahead and get yours, I've got mine**."

Accordingly, the Company's charge that the Claimant exposed "a firearm which [he] obtained from [his] personal vehicle located on Company property, in an apparent attempt to inflict bodily harm to a fellow employee" is based upon the convincing testimony by Clerk Borgert-Buss, Trainman Heng, and Conductor Murphy, which is consistent with the evidence of two other witnesses to the incident, namely Mr. Almedia and FRA Inspector Murphy.

The Carrier has an unqualified obligation to provide a safe work place for its employees. While engaged in the altercation with Trainman Heng, Claimant's conduct of walking to his vehicle, leaning in and picking up the gun in his vehicle cannot be dismissed as an empty or hollow gesture. Claimant Russell's actions carry with it the risk of serious violence and danger to fellow employees. The actions of Claimant Russell permanently alters the relationships between Claimant Russell and other employees and the Carrier. The damage to these relationships is irreparable.

It would be useful at this point to refer to Chief Engineer Riehl's letter dated July 21, 1995 to Personnel Administrator Taylor, which, in relevant part, he stated the following:

"...While I am not satisfied the investigation revealed all of the facts of the incident that provoked Mr. Russell to handle the firearm, the fact that he did so is unacceptable. I fully accept that Mr. Russell did not show the weapon in a threatening manner. However, the fact remains that the weapon was handled from its place of storage preceding what was anticipated to be an altercation of some form. If the altercation which ensued had escalated, it is unknown whether the weapon would have been used. This is immaterial as I do not believe we can afford to learn the answer."

Rule 19 of Rules and Instructions for the Engineering and Maintenance of Way Department Employees provides:

“Carrying firearms, knives or other objects of any description used in a manner to inflict bodily harm to others or damage to railway property, either on their person or railway property is prohibited.”

Clearly, Claimant Russell was in violation of Rule 19. The Board concludes that there is substantial evidence in the record to support the dismissal of Claimant Russell.

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 10th day of June 1997.