

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36004
Docket No. MW-36286
02-3-00-3-511**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Foreman J. Martinez, Jr. in connection with an altercation on April 8, 1999 was without just and sufficient cause, excessive and in violation of the Agreement (Carrier's File 1204716-D SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Martinez, Jr. shall now ' . . . be immediately reinstated to his respective assigned position, that his seniority and all other contractual rights be restored unimpaired, that he be compensated net wage loss he has suffered since his wrongful dismissal, and that all charges be expunged from the personal record."**

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.

At the time of the incident involved in this case, the Claimant was a Foreman assigned to the Alamogordo section gang with headquarters in Alamogordo, New Mexico. He had been employed with the Carrier for approximately 15 years, and, with one exception, had a clean discipline record.

On April 8, 1999, the Claimant was involved in an altercation with two other employees. There is no dispute that the Claimant and Welder A. Davis had a discussion in front of the Alamogordo Depot concerning overtime pay which was claimed for the previous day. Davis, who was in charge of the welding gang, claimed overtime for the previous day on the basis that his gang did not observe a lunch period. The Claimant, the Foreman of the section gang, did not put in for any overtime for his gang.

Truck Driver C. Price was present during this encounter. He testified:

"... I was doing my pre-trip inspection on the truck. And [Claimant] walked up to Andy Davis, the welder, and started telling him that there would be no overtime from the day before. And that if he turned in overtime it would be considered padding the payroll. And Andy told him that he didn't appreciate Joe accusing him of padding the payroll. And Joe said something else to him, and I didn't quite understand quite what it was because I was standing about four maybe five feet from him.

[Claimant] turned to walk off, then he turned around and put his hands around his back with his fist clenched, stuck his chest out, and walked right up against Andy, and started bumping him in the face with the rim of his hard-hat, and then reared back, and hit him real hard in the face knocking Andy back, knocking his hard-hat off. ..."

G. Rodriguez and R. Sturtz also witnessed the exchange between the Claimant and Davis. They stated that initially there was a discussion, but then the Claimant directed profanity toward Davis, who responded that there was no need to use such language. Both witnesses agreed that the Claimant walked away from Davis only to return and physically assault him. Davis testified that the Claimant rushed at him and the Claimant's "hard-hat struck me underneath the nose and my upper lip, knocking my hard-hat off."

At that point, Price interceded between the two men. He testified:

"I was wanting to stop something from getting any serious than what it was, because of the fact - I mean you would have had to been there to see it. I have never seen anything like this. I mean it was like he was using his hard-hat as a weapon or something. I've never seen anyone do anything quite like this."

The Claimant testified that Price pointed a finger at him, but his account is directly contradicted by the testimony of the other employees present. According to Price, Rodriguez, Stultz and Davis, Price attempted to intervene to separate the Claimant from Davis. Price stated that the Claimant "hit my arm and threw it back around me, and put me in a quarter of a turn . . . and hit me real hard underneath my chest with both hands, picking me up off the ground almost knocking me down." These actions resulted in personal injury to Price, the record shows.

Rodriguez ran to get Manager Track Maintenance R. Onate. After speaking to the employees and taking their statements, the Claimant was pulled out of service pending Investigation.

Additional testimony was developed at the Investigation held on May 4, 1999.

The Claimant testified that he had been under stress because of manpower reductions. He stated that he had become depressed and "wasn't feeling too well" on the morning of the incident. The Claimant testified that he had "walking pneumonia" and was taking medication which had been prescribed by his physician. He stated that his doctor had told him that the medication "could have caused a chemical imbalance and cause anxiety."

Onate confirmed that the Claimant had earlier brought in a prescription, but Onate stated that he was unaware that the Claimant was taking prescription medication on the date of the incident. In any event, Onate testified, it was the Claimant's responsibility to inform him that he was taking medication that could affect his work performance.

Based on the Carrier's determination that the Claimant was guilty of violating Rules 1.6 and 1.7, which prohibit quarrelsome conduct and altercations with co-workers, the Claimant was discharged. The Organization filed the instant claim protesting the dismissal. It contends that the Claimant was not afforded a fair and impartial Investigation in accordance with principles of due process. With respect to the incident itself, the Organization argues that there were several circumstances which should have been taken into consideration when assessing the propriety of the penalty. First, the Organization maintains that the Claimant was provoked and that the Claimant was unfairly singled out for discipline. Second, the evidence suggests that stress, medication and illness may have caused the Claimant to momentarily lose his composure. In the Organization's view, the Claimant's long and distinguished work record clearly outweighs this brief lapse of judgment. All told, the Organization maintains that dismissal was overly harsh and unwarranted when consideration is given to the factual circumstances of this case.

The Carrier takes the opposing view, contending that the Claimant was provided a fair Hearing. The Carrier further argues that the evidence as to the Claimant's culpability is

overwhelming and that any asserted defenses were unsubstantiated and unpersuasive. The Claimant's dismissal under these circumstances was fully warranted.

In the Board's judgment, the evidence fully supports the conclusion that the Claimant engaged in an altercation in violation of Carrier Rules and acceptable workplace behavior. The testimony of every employee at the scene established that the Claimant confronted Davis, escalated the tenor of the discussion by using profanity, and then physically assaulted him. To make matters worse, when Price attempted to stop the altercation, he, too, was assaulted by the Claimant.

This is not a case where the Claimant was goaded into retaliating by a provocateur nor is this a case where blame for the altercation must be shared. Aside from the Claimant's completely unsupported assertion that Price waved a finger in his direction, there is no evidence in the record that the Claimant was provoked by either employee. The Claimant clearly was the aggressor in both instances.

The Carrier has an obligation to provide for the safety of its employees, and this includes protecting them from violence by other employees. That is why, as a general rule, physically attacking an employee is not tolerated. As a Foreman, the Claimant had an even greater responsibility to treat employees in an appropriate manner and to control his behavior. Even an exemplary record does not outweigh the seriousness of such misconduct.

In determining the propriety of the discipline imposed, the Board has given careful consideration to the Organization's Agreement due process arguments. Indeed, review of the transcript of the Investigation shows that there were numerous points at which the Hearing Officer hampered or otherwise limited the Organization's representative from questioning witnesses and presenting evidence. The Hearing Officer repeatedly cut off lines of questioning which were potentially relevant to the Claimant's defense in this case. Although we are cognizant that the Hearing conducted on the property is not cloaked with the formality and formal rules of evidence applicable in a court of law, the Hearing Officer nevertheless has a fundamental obligation to ensure that the process has been fair and that the Claimant has had reasonable opportunity to develop evidence pertinent to his defensive position. That did not occur in this matter, a fair reading of the record shows.

The Carrier contends that the outcome in this case might not be any different even if the Claimant had been given the opportunity to fully develop his theory of the case. However, by denying the Claimant that opportunity, we simply are not in a position to know what the outcome would have been. The Claimant's various contentions as to extenuating circumstances leading to the incident were not fully developed, thereby precluding a fair and complete assessment.

As a result, the instant case is in a difficult posture. On the one hand stands the conclusion that the Claimant engaged in a course of conduct that justifies discharge. On the other hand, the Carrier's administration of discipline is unacceptable because precepts of fairness and due process were not followed. In fashioning a remedy, the Board does not feel constrained to exonerate the Claimant on the basis of the Carrier's dereliction, yet to uphold the instant discharge would ignore the procedural shortcomings and the potentially relevant evidence on the question of penalty.

Accordingly, where there has been an Agreement due process violation, but there is convincing proof on the merits, the Claimant will be reinstated but without backpay. In addition, the Claimant is directed to enter the Employee Assistance Program as a condition to his reinstatement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of April, 2002.