

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38353
Docket No. SG-38936
07-3-05-3-376

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

PARTIES TO DISPUTE: (Union Pacific Railroad Company
(Brotherhood of Railroad Signalmen

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of D. S. Carlton, for reinstatement to his former position with compensation for all lost time, including overtime, with seniority and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 68, when [it] failed to provide the Claimant with a fair and impartial investigation and then issued the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving the charges in connection with an investigation held on August 6, 2004. Carrier's File No. 1405473. General Chairman's File No. N 68 496. BRS File Case No. 13168-UP.”

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.

The Claimant was notified on July 23, 2004, to appear "for investigation and hearing on charges to develop the facts and place responsibility, if any, that while working as Signaller, you allegedly entered into an altercation with another employee on July 23, 2004 at approximately 5:30 P.M." The notice further stated, "Your alleged inactions indicate a possible violation of the current Union Pacific Rule 1.7."

Rule 1.7 – Altercations states:

"Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property."

A Glossary to the Rules defines "Altercation" as follows:

"ALTERCATION: When an employee's actions cause or result in a vehement quarrel characterized by physical activity such as pushing, shoving or fighting."

The Carrier contends that it presented substantial evidence to support the conclusion that the Claimant violated Rule 1.7. The altercation occurred on Carrier property, the Carrier contends, because it took place in a hotel room rented and paid for by the Carrier to house its employees. No procedural violation was committed by the Carrier in the investigation or administration of discipline in this matter, the Carrier argues, and the Organization's arguments to the contrary are without merit. The Level 5 discipline of dismissal imposed in this case was not arbitrary or capricious, the Carrier contends, but was reasonable and within the discretion of the Carrier in view of the seriousness of the violation. The Board, the Carrier asserts, should not overturn the assessed discipline because it cannot allow an employee to stay in its service when that employee has caused fear and apprehension in a co-worker.

The Organization contends that the Carrier violated the Agreement between the parties by failing to provide the Claimant a fair and impartial investigation and then issuing the harsh and excessive discipline of dismissal. That the Carrier prejudged the case, the Organization asserts, is evident from the fact that it put the Claimant's job up for bid the same day as the investigation. The Rule relied on by

the Carrier as having been violated, the Organization argues, does not even apply to this case because the alleged incident did not take place on Carrier property or while the Claimant was on duty. The Carrier violated its own disciplinary policy, the Organization asserts, by charging the Claimant with two violations, although both charges arose out of a single incident. The co-worker, the Organization contends, did not give credible testimony, the most glaring untruth being his testimony that he felt threatened and intimidated by the assault on him. Finally the Organization contends that the degree of discipline issued was harsh and unfair.

In a letter dated September 28, 2004, by the General Chairman to the Carrier appealing the Claimant's dismissal from service, it was noted that the Carrier's disciplinary policy "includes a Glossary that is to be consulted and is intended as a guide to determine if the act by an employee meets the criteria for dismissal." The Organization argued that "because Carrier dismissed Claimant" it was required to prove "that the degree of severity of the alleged altercation met the criteria outlined in the Glossary of Carrier's UPGRADE policy." The Organization contended that the Carrier had not proved that the criteria were met.

The Board agrees with the Organization's contention that there is not substantial evidence to establish that a Level 5 altercation occurred as defined in the Carrier's Glossary. According to the Glossary, for a Level 5 altercation to occur there must be a "vehement quarrel." The term "vehement" is commonly understood to denote intensity or severity characterized by exceptional force or violence.

In the Board's opinion the incident that occurred on July 23, 2004, cannot fairly be described as a "vehement" quarrel. It consisted of a single push that caused no injury and did not cause the co-worker to fall to the floor. No blow was struck. Although a fist was made by the Claimant, the co-worker acknowledged that it could have been done in self-defense because the Claimant thought that the co-worker was trying to attack him. The Claimant immediately apologized voluntarily and they walked together to the room of the Assistant Foreman. The fact that the two men walked together immediately after the incident to the room of the Assistant Foreman persuades the Board that there is no substantial evidence that the co-worker felt threatened or intimidated by the Claimant or that he was in fear and apprehension. This finding is buttressed by the Assistant Foreman's testimony that when the two men were in his room together after the incident, neither of them was angry and neither threatened the other. Further, there is no

evidence that the Claimant ever threatened anyone or acted with violence in the past.

The Board, however, views with the utmost seriousness any hostile physical contact by one employee against the other such as occurred in this case. It is not necessary to determine for purposes of this decision whether because the Carrier paid for its employees' hotel rooms, those rooms were on the property of the Carrier. The fact is that the incident in question involved a work-related dispute. The Carrier has a legitimate interest in protecting its employees from any violence as a result of activities that happen on the job. Although the discipline administered in this case was excessive because a vehement quarrel did not occur, the violation was sufficiently serious so that the Board will not award any backpay to the Claimant.

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 5th day of September 2007.