

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22283
Docket Number CL-22131

Rolf Valtin, Referee

PARTIES TO DISPUTE:

{ Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees
{ Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
GL-8390, that:

"(1) Carrier violated and continues to violate Rule 39 and other rules of the Agreement, the provisions of the investigation and hearing procedures and acted in an arbitrary and capricious and prejudicial manner when it dismissed Mr. Andrew Demenko as a result of an investigation held on June 11, 1976.

(2) Carrier shall now be required to compensate Mr. Andrew Demenko for all wage loss incurred including overtime and all benefits he is entitled to under the existing Agreements beginning June 5, 1976 and continuing until Mr. Demenko is returned to service with all seniority rights and privileges unimpaired.

(3) Carrier shall also be required to compensate Mr. Demenko ten (10%) percent interest per annum to become effective thirty (30) days from the date Mr. Demenko was withheld from service."

OPINION OF BOARD: At the time of his dismissal, the claimant had accumulated about 25 years of service with the Carrier. There had been no prior disciplinary action against him. The substance of the letter dismissing him (dated June 18, 1976) reads as follows:

"...you are hereby dismissed from the services of the Burlington Northern, Inc. for violation of the Rules 661, 664 and 667 of the BN Safety Rules by your physical altercation with Mr. H. J. Hajek, Manager, House 10 and for your insubordinate and quarrelsome conduct unbecoming that of a Burlington Northern employee and for your failure to comply with instructions from proper authority at about 12:05 A.M., June 4, 1976 while assigned as Working Foreman, House #10, Chicago, Illinois."

The record in the case is of substantial length and contains numerous contentions and countercontentions, both procedural and substantive. We have come to a series of conclusions and will move directly to them.

The evidence as to what happened on the night in question is sharply in conflict. We deduce the following to have been the essence of the incident. The claimant was engaged in loading Cleveland trailers for the Universal Carloading Superintendent. At a stage at which fifteen trailers had been loaded and two more trailers were yet to be loaded, BN Manager Hajek asked the claimant to load a carton into an N&W trailer. The claimant resisted the instructions, resentfully indicating that he had more pressing work to do. Hajek went off to report the matter to the Warehouse Foreman. By the time he (Hajek) came back to re-order the claimant to load the carton into the N&W trailer, both he and the claimant were in a huff. The claimant, however, decided to comply with the instructions. Hajek, on the other hand, decided to walk alongside the claimant to make certain that the claimant would comply. The claimant was on his way toward the N&W trailer with a four-wheeled cart when one of the wheels went over Hajek's foot. Hajek pushed the cart aside, and the claimant thereupon became profane and physically assaulted Hajek. We find that there was a hard shove with raised hands, but we are not prepared additionally to find that the claimant struck Hajek on the jaw with a closed fist.

On these findings, we must hold that the claimant was guilty of a serious offense. In our opinion, however, it is equally true that there were a number of mitigating circumstances. One lies in the fact that the claimant in a very real sense had two bosses on the night in question and that he was in effect asked to interrupt an assignment which he had previously been given and which he was anxious to complete. Another lies in the fact that the claimant is of imperfect command of the English language and that Hajek, had he kept awareness of this and inquired as to why the claimant was resisting his request, might well have been content to defer the loading of the carton into the N&W trailer. And yet another lies in the fact that Hajek chose to walk alongside the claimant to make certain that the claimant would carry out the order. In the light of the claimant's long and excellent service with the Carrier, this was an insulting posture. Further, the obvious fact is that the cart would not have gone over Hajek's foot had Hajek stayed away from the claimant.

When these things are put together, it seems to us that Hajek cannot realistically or fairly be held blameless. We find that the incident was marked by shared culpability. And when this, in turn, is joined with 25 years of unblemished service, we do not believe that the discharge penalty can be accepted as appropriate.

Overturning the discharge on the merits, we view it as unnecessary to deal with the procedural objections which the Organization has raised with respect to the predischarge investigation. We do, however, want to go on record as sharing the Organization's concern for the narrowness of the scope of inquiry which the hearing officer insisted on -- thus precluding the Organization from introducing testimony respecting Hajek's attitude on prior occasions and the possibility that attitudinal problems on Hajek's part may have been at the root of the incident on the night in question. We do not believe that an investigation involving an employee's dismissal is intended to be confined to the immediate facts of the incident precipitating the dismissal.

We are converting the claimant's discharge to a suspension of 4-month duration, directing that the claimant be reinstated without impairment of seniority rights and with reimbursement for lost wages starting with October 4, 1976 (without payment of interest and without makeup of health-and-welfare insurance coverage, but with offset application of outside earnings). In coming to this result, we have been influenced by the facts that the Organization, in early August, 1976, turned down a Carrier offer to reinstate the claimant without back pay on leniency grounds and that the Carrier, by early September, 1976, had in its possession an Organization offer by which the claimant would have been reinstated forthwith and the back-pay question would have been separately processed.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

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That this Division of the Adjustment Board has jurisdiction
over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January 1979.