

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23389
Docket Number CL-23342

Josef P. Sirefman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8993) that:

1. Carrier violated the Agreement Rules, particularly Rule 21, when under date of December 11, 1978 it issued a notice wherein it dismissed from service Mr. R. J. Agins, Accounts Payable Accountant at Ravenswood, account investigation held on December 4, 1978, and

2. Carrier shall now be required to reinstate Mr. R. J. Agins with all rights unimpaired, and make him whole for all losses in monies concerning wages and fringe benefits.

OPINION OF BOARD: Claimant Richard J. Agins, Jr., an Accounts Payable Clerk, was served with a Notice of hearing dated November 28, 1978 concerning his responsibility for:

"1) directing foul and abusive language at Mr. M. H. Eischen, Manager of Expenditures, at approximately 3:30 P.M., November 28, 1978; 2) issuing threats on Mr. Eischen's family and threatening to kill Mr. Eischen at approximately 3:30 P.M. on November 28, 1978; and 3) assaulting Mr. Eischen when you struck him several times at approximately 3:30 P.M., November 28, 1978."

A hearing was held on December 4, 1978 and Claimant was dismissed on December 11, 1978.

A review of the record before this Board establishes that Claimant was afforded all the procedures provided by the contract. There is a conflict in the record with Claimant stating that he was the one verbally abused and physically assaulted by Mr. Eischen. As was stated in Award 22721:

"Once again, this Board is asked to review conflicting evidence and determine that the Claimant's version of a disputed factual circumstance be accepted and that the Carrier's version be rejected. We have noted in numerous Awards that this Board is not constituted to make such determinations.

"Issues of credibility must be determined by those who received the evidence and testimony, and we would have no basis for substituting our judgment in that regard. Obviously, if a record is devoid of any reasonable basis for a factual conclusion, then it is incumbent upon us to correct that impropriety. But, such is not the case here."

In this instance it cannot be said that the record is "incapable of supporting the Carrier's conclusions" (same Award). Claimant came to Eischen's office unbidden to complain about a letter of reprimand for using public telephones on the job; he turned back into the office towards Eischen after apparently being on the way out; Eischen was seen on the floor thereafter and Claimant was seen punching towards the floor rather than attempting to disengage himself as would be consistent with a claim of having been attacked; the threat was made after Eischen and Claimant had been disengaged by others; as he was departing from the office after the altercation Claimant said, "it was worth it" an utterance inconsistent with being the victim of an attack or even disengagement but consistent with continued physical and verbal aggression.

Even if it remains unclear from the record as to what Mr. Eischen said causing the Claimant to respond "What did you say" and to turn back towards Eischen and the resulting altercation, Claimant had other means available for redress, assuming arguendo that the remarks were offensive, than resorting to physical violence. In view of the seriousness and sustained nature of the incident the penalty of termination is not unreasonable.

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

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

That the Agreement was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulsen*
Executive Secretary

Dated at Chicago, Illinois, this 15th day of September 1981.