

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23980
Docket Number MW-24037

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Texas and Louisiana Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Laborer F. L. Biggs for alleged violation of Rules 801 and 804 was unwarranted and on the basis of unproven charges (System File MW-80-81).

(2) Laborer F. L. Biggs be reinstated with seniority, vacation and all other rights unimpaired, the charge against him be stricken from his record and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: This is a discipline case wherein Claimant F. L. Biggs, laborer, was dismissed from service for alleged aggravated robbery and possession of a weapon on Carrier's property. This was in violation of Rules 801 and 804.

Rule 801 states:

"Employees will not be retained in service who are
...immoral...or otherwise vicious..."

Rule 804 states:

"...employees are forbidden to have firearms...
while on the property."

Upon reporting to work on March 4, 1980, 7:00 AM, Claimant was met by a police officer who interrogated him concerning a robbery of Mr. Emilio Silva, Assistant Foreman, Englewood Yard. This robbery took place on February 22, 1980 at 5820 Wallinsville Road, while Mr. Silva was servicing and refueling a company vehicle. Assistant Foreman Silva had filed charges against Claimant for aggravated robbery with a deadly weapon. The amount of funds which was alleged stolen from Assistant Foreman Silva was approximately \$800.00.

Claimant was subsequently taken to the detective division where he was further interrogated and given a polygraph test. Claimant was also selected from a police line-up by Mr. Silva. Claimant was then released. Claimant also subsequently passed the polygraph test.

On March 10, 1980, Claimant received a letter from Carrier stating that he had violated Rules 801 and 804 of the Carrier's rules. Carrier further stated that "February 22, 1980 when you accosted S. P. employee E. D. Silva with a firearm and took Mr. Silva's money at 5:15 AM at 5820 Wallisville Road."

Claimant timely requested a hearing in connection with these charges. A hearing was granted. The hearing was held on April 8, 1980. At the hearing, Carrier presented one witness, E. D. Silva. Silva testified that Claimant was the individual who robbed him on February 22, 1980. Mr. Silva identified Claimant based upon the same clothes which Claimant was allegedly wearing on the date of the robbery. Mr. Silva testified that he had seen and spoken to Claimant approximately one month previously. On this basis Mr. Silva asserts he was able to identify Claimant. Mr. Silva testified as follows:

"Q. Did you see the man's face that held you up?

A. Yes, I had to.

Q. Did you give a statement to anyone concerning the characteristics of the man that held you up?

A. The special agent.

Q. In that statement, did you say that the man that held you up was clean shaven?

A. Yes, I did.

Q. Is Mr. Biggs clean shaven?

A. No, but at that time I didn't pay any attention to the beard.

Q. At the time that you were held up and you stated that it was Mr. Biggs, why would you give a statement stating that the man was clean shaven?

A. I didn't notice any beard.

Q. What type of gun did the man have that held you up?

A. 22 automatic."

Mr. Silva under questioning by Organization representative further testified:

"Q. When the man robbed you, how could you say that the man was clean shaven when there was so much light and you couldn't see the beard?

A. Because I didn't kiss him, and I didn't feel his face. I didn't ask the man if I could look at his face."

"Q. If you robbed me, wouldn't you think, if you had a beard, that that would be the first thing I would notice?

A. I am not accustomed to looking at a man straight in the face. I just know who they are. I wasn't expecting him to do that. I would have noticed his arms, legs and everything, just like that earring you have on your ear. I didn't notice that at that time, but if I knew what was going to happen, I would have.

Q. If you can notice the jacket, cap, the height, what color pants he was wearing, if he had a beard, wouldn't you have seen it?

A. If that was all I was looking for, yes. But that's not what I was looking for.

Q. When you describe a man, wouldn't you describe everything that you saw?

A. Yes, and I described everything that I saw.

Q. And you described the man as being clean shaven, didn't you?

A. Yes."

The Board notes that the record indicates that the uncontroverted testimony of Claimant is that he has worn a moustache and beard for some 4 or 5 years. Claimant also testified that he owns a .38 caliber revolver and not .22 caliber automatic.

Subsequent to this hearing the decision to dismiss Claimant for violations of Rules 801 and 804 was sustained. This decision was appealed to the highest officer where it was also sustained.

Carrier maintains that the evidence adduced on the record supports its decision to dismiss Claimant for violations of Rules 801 and 804. The Carrier further maintains that Claimant Biggs was positively identified by Mr. Silva as being the assailant in the February 22, 1980 incident while Mr. Silva was servicing the company truck and refueling it.

Carrier points out that there are numerous awards which uphold the discipline of employees for possession of firearms while on Carrier's premises. Second Division Award Nos. 6479 and 6938. Carrier also maintains that since the hearing it has learned that Claimant passed the polygraph test and his case was dismissed by a Harris County Jury on March 13, 1980. The Carrier further points out that the outcome of Civil proceedings are not necessarily incumbent upon collective bargaining agreement. Second Division Award Nos. 7300, 7543, 7673, 8147 and Third Division Award No. 22879.

Organization maintains that Claimant did not commit the alleged robbery nor is it in violation of Rules 801 and 804. Organization further maintains that the Carrier presented one sole witness, Mr. Silva. Carrier's witness testified that his assailant was clean shaven. Organization points out that Claimant has had a beard and moustache for the past four (4) years and at the time of the incident of February 22, 1980. Organization also maintains the fact that the Claimant passed the police polygraph test. Organization further points out that there are no criminal charges pertaining to this incident pending against Claimant.

Upon careful consideration of the record the Board finds that the charge was not supported by substantial evidence on the record. The record indicates that Claimant was mistakenly identified as the assailant by Mr. Silva. The Board notes that Mr. Silva identified his assailant as clean shaven. Claimant's unrefuted testimony was that he has had a beard and moustache for the last four years. In these circumstances the Board must sustain the claim. Accordingly we hold that Claimant shall be reinstated with backpay and with seniority and all other rights unimpaired.

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;

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of August 1982.