

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23991
Docket Number MS-24116

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Richard Lomax
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Whether Mr. Lomax' dismissal in all capacities was warranted based on the facts presented in a hearing held before J. F. Spirk, Trial Officer, in November 6, 1979. Also, whether the evidence presented was sufficient to support the discipline given and whether adequate investigation into the incident was done by Mr. Spirk. Specifically, Mr. Spirk stated in the hearing that he would obtain a statement from a Mr. Pat Chandorf which was never obtained. Mr. Chandorf was a witness to an assault on Mr. Lomax.

On August 7, 1980, J. R. Walsh, Senior Director of Labor Relations, denied an appeal of the discipline assessed against Mr. Lomax. This denial was in error."

OPINION OF BOARD: Claimant Richard Lomax entered the Carrier's service on November 8, 1976 in the capacity of trackman. On October 25, 1979, Claimant was assigned as a trackman on Inter-Regional Rail Gang No. 501 working on the Mainline Alliance to Cleveland Branch. At approximately 2:00 PM, Claimant was engaged in a fight with a fellow employe, James E. Dalton. As a result of this incident, both Claimant and Mr. Dalton were removed from service pending further investigation.

Claimant attended a hearing on November 6, 1979 in connection with the following, "Fighting on company property at approximately 2:00 PM on October 25, 1979 at MP 120.19 Mainline Alliance to Cleveland Branch." Following the hearing, Claimant was notified on December 31, 1979, that he was dismissed in all capacities.

Claimant's discipline was appealed up to and including the Senior Director-Labor Relations. By letter dated August 7, 1980, the Senior Director reaffirmed denial of the appeal.

The Carrier maintains that Claimant Lomax and Mr. Dalton were engaged in what initially appeared as horseplay but which eventually resulted in a physical altercation between them.

Trackman Furst testified that he observed both Claimant and Mr. Dalton engaged in horseplay, with active participation on both sides. Thereafter, he observed Claimant Lomax chasing Mr. Dalton in the area of the loading dock.

Mr. Furst stated that he did not hear racial slurs directed at Claimant Lomax by Mr. Dalton, but only heard Mr. Dalton say to Claimant that he could run but not hide. The Carrier asserts that there is no evidence, except Claimant's statement, that Mr. Dalton made any reference to Claimant's color or that the latter statement was anything more than a continuation of the horseplay. According to the Carrier, neither statement was sufficient cause to justify the subsequent fight.

Claimant did admit to chasing Mr. Dalton and grabbing him with the intent of inflicting bodily harm. Claimant also testified that he did pick up a board at one point but then dropped same.

The Carrier maintains that both parties were at fault and accordingly dismissed Claimant and Mr. Dalton.

The Carrier notes that while Claimant stated at the hearing that Mr. Chandorf witnessed the fight, when he was approached by Carrier officials, he denied any knowledge of the circumstances surrounding the fight and stated that he had no statement to make.

The Carrier maintains that the discipline of dismissal was not arbitrary, capricious or in bad faith. Claimant had been employed with Carrier for only three (3) years and had been previously disciplined. This, coupled with the seriousness of the offense warranted dismissal (Award 13485).

The Claimant also maintains that while he was seeking shelter in an abandoned building with three other Conrail employees during a rainstorm, Mr. Dalton started kicking Mr. Lomax without warning. When Claimant Lomax protested, Dalton answered with racial slurs against Claimant Lomax. Shortly thereafter, Dalton picked up a board and threatened Claimant Lomax with it. In self-defense, the Claimant likewise picked up a board but laid it back down. Shortly thereafter, Claimant Lomax was looking in the other direction when he was suddenly attacked by Mr. Dalton. He was struck in the mouth with a board. In reaction, Claimant Lomax grabbed at Mr. Dalton to prevent further attack but was stopped by other employees.

Claimant maintains that he did not make any move or any comment toward Mr. Dalton to in any way provoke the attack. Mr. Furst testified at the original hearing but was not in a position to observe the entire incident, particularly the blow received by Claimant.

The Claimant further maintains that since the Carrier did not enter Mr. Chandorf's statement into the record, a full investigation was not made into this incident.

Upon careful consideration of the record herein the Board finds that Claimant received a fair and impartial hearing. The charge was supported by substantial evidence on the record, and in the circumstances, the discipline assessed was not premised on caprice or unreasonableness. The Board also notes in this matter that both the Claimant and Mr. Dalton were dismissed. Both employees were accorded equal treatment.

The Board as in previous awards reiterates that in such situations of alleged provoked fighting, employees should not retaliate. The proper and responsible behavior is for the involved employee to notify his foreman, supervisor or someone in authority; however retaliation is not condoned. In these circumstances the Board must deny the claim.

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 not violated.

A W A R D

Claim denied.

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 1962.