

The Third Division consisted of the regular members and in addition Referee Elmer F. Thias when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor

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

(1) The sixty (60) calendar days of suspension imposed upon EWE-B G. Young for alleged 'Violation of Rule I ... Violation of Rule J, Amtrak Rules of Conduct....' was without just and sufficient cause and on the basis of unproven charges (System File NEC-BMWE-SD-1061D).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimant was charged with violation of the Carrier's Rules of Conduct "I" and "J" in the following specification:

- "(1) In that on July 23, 1984, at approximately 8:15 P.M. you were quarrelsome and vicious with R. Barrett, Engineer PRS Construction, while working in the vicinity of Wayne Junction.
- (2) In that on July 23, 1984, while at the PRS Camp Facilities in Penn Coach Yard, you were again quarrelsome and vicious with R. Barrett, Engineer PRS Construction, using profane and vulgar language and assaulted Mr. Barrett in a violent manner."

A trial was held on August 13, 1984, at which the Claimant was present and accompanied by a Representative of the Organization. The Engineer Construction and three other employees of the Carrier appeared during the trial and gave testimony as did the Claimant. Following the trial, the Carrier concluded that the testimony established the charges and imposed a sixty calendar day suspension upon the Claimant. The Organization contests this discipline and maintains that the charges were not proven and that the discipline was without just and sufficient cause.

The thrust of the Carrier's position in regard to the incident at Wayne Junction seems to be that the Claimant was insubordinate to the Engineer. Four witnesses gave testimony in regard to that incident and the preponderance of the evidence on the question does not demonstrate the Claimant to have been quarrelsome and vicious. A similar result obtains with respect to that portion of the charges which alleges him to be quarrelsome and vicious and using profane and vulgar language at the Penn Coach Yard Facilities. The evidence is not sufficient to attribute those characteristics to the Claimant in this dispute. The allegation that the Claimant behaved in a violent manner is hardly manifest on the record.

The crux of this dispute is the alleged assault upon the Engineer, if it properly may be termed an assault. The only two witnesses to the incident were the Engineer and the Claimant. Additionally, there is certain circumstantial evidence to be considered. The Engineer testified that the Claimant struck him twice while they were in his office. Then he grabbed the Claimant and held him until the Claimant calmed down, whereupon he released the Claimant who went out the door. The Claimant's testimony was that he was physically threatened by the Engineer, was quite apprehensive of the Engineer and grabbed him in order to escape from the Engineer's office. The Claimant also testified that his back was up against the back door and he had turned to keep it open. Both testified that the Engineer said to the Claimant, "take your best shot." Finally, a Track Foreman testified to having observed a mark over the Engineer's eye when the Engineer came out of his office.

It is not the function of the Board to resolve conflicts in testimony and we do not do so here. The preponderance of the evidence, direct and circumstantial, is that the Engineer invited or challenged the Claimant to strike him and the Claimant did so. On the whole record, we find the charge of the Claimant having assaulted the Engineer to be substantiated but all the remainder of the charge is not substantiated.

Without going into further detail, we believe the record is clear that the Engineer was equally responsible in the matter for which the Claimant was disciplined. This factor, as well as others stated herein, leads us to conclude that the sixty calendar day suspension administered to the Claimant

is without proper justification and requires modification. We follow the course of Second Division Award 8893 and reduce the suspension to thirty calendar days directing the Claimant be compensated his wage loss incurred in excess thereof.

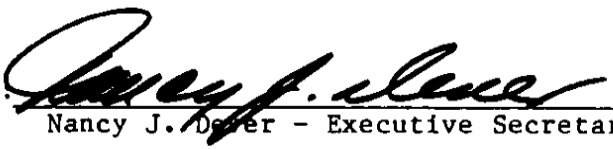
We wish to conclude by making it clear that fisticuffs, invited or otherwise, are intolerable in this industry. Railroads are charged with the responsibility of transporting both freight and passengers. Safety has always been paramount. Today's media focuses upon problems in safety and the traveling public expects the highest degree of performance. Consequently, episodes of the kind we find here are not taken lightly. Both the Carrier and the Organization have developed fair and workable procedures for consideration and adjustment of grievances, and these procedures must be followed. This Board will not condone a resort to physical force.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest.


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1988.