

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28886
Docket No. MW-29264
91-3-90-3-154

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Kansas City Southern Railway Company

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

(1) The dismissal of Track Laborer E. Thomas for alleged violations of a portion of the General Notice of the Rules and Regulations of the Maintenance of Way and Signal Department as well as Rules E, L and N, in connection with the altercation that occurred on December 14, 1988, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.31-394).

(2) The Claimant shall be reinstated with seniority, all benefits and rights unimpaired and he shall be paid for all wage loss suffered, including holidays and any overtime which would have accrued to him had he not been dismissed and overtime pay for the day of the hearing as well as any mileage incurred in connection with attending said hearing."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 notified of an Investigation concerning his responsibility, if any, in an altercation with another employee. Subsequent to the Investigation, the Claimant was discharged from service.

At the Hearing, the Carrier presented a number of witnesses who testified as to a verbal confrontation which erupted between the Claimant and another employee which appeared to result from the fact that an article of the Claimant's clothing had gotten wet and he sought reimbursement. There ensued some harsh language, and eventually the Claimant was struck with a maul handle.

Our review of the entire record convinces us that the Claimant was, at least, guilty of a violation of Rule N which requires courteous deportment in dealing with fellow employees.

The more difficult question presented to us is a review of the severe punishment of termination from service since the Claimant did not appear to be the employee who struck the first blow. He obviously was however an agitator and provoker of the altercation.

The Organization has questioned the propriety of our review of the Claimant's prior record. It is well established that prior adverse personnel actions have no place in determining an employee's guilt or innocence. However, it is equally clear that a Board such as this is permitted to make such a review when reviewing the quantum of punishment involved.

Previously the employee was dismissed from service for certain absences without permission, but was reinstated without compensation for time lost because the penalty was deemed excessive. (See Third Division Award 26398). It is questionable that this absence case is, as such, of significant assistance to us in this case. However, Third Division Award 26928 considered a dismissal concerning an altercation between this employee and another employee. The Carrier restored him to service after almost four months. The Third Division reduced the suspension to one month since the "...striking of the blow by the other employee was clearly the more serious part of the encounter." The Award noted, however, that the Claimant admitted guilt to cursing and other provocative action.

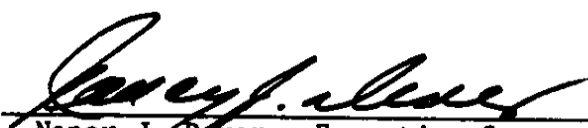
It is often noted that this Board should not substitute its judgment for that of the Carrier in discharge cases, unless the quantum of discipline is arbitrary and/or capricious. Given the Claimant's apparent propensity to provoke violent action by fellow employees we can not state that the Carrier's action was excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.