

PUBLIC LAW BOARD NO. 2139

Parties: Brotherhood of Maintenance of Way Employees
and
Washington Terminal Company

Statement of Claim: "(1) Carrier shall reinstate Assistant Foreman Frank Branch who was dismissed from service at the close of work on June 16, 1977; with seniority rights unimpaired and paid for all time held out of service.

(2) The charges made against Mr. Branch were not related to the incident; he was unfairly treated. Mr. Rose, Engineer R.S&C, perjured the case and procedurally violated the case when Mr. Rose preferred the charges, was a witness and assessed the discipline."

Discussion: The Grievant was an Assistant Foreman (Track) with four years seniority. On the day in question, he was returning from lunch at around 12:30 P.M. with Track Employees Thompson, Kirby and Williams. Police Officer Davis testified that Mr. Williams was drinking a bottle of beer as he attempted to walk through Gate No. 2. Officer Davis testified he stopped Mr. Williams who then left the bottle on a retaining wall outside the Gate. The Officer stated he informed Mr. Williams that it was against Company rules to drink on the property. Mr. Williams used profanity and threatened to kick Officer Davis' "black ass" (both Mr. Williams and Officer Davis are black men). At this juncture the Claimant allegedly interfered and told the Officer that Williams worked for him and he would take care of him. Officer Davis testified he told the Claimant that Williams was under arrest for threatening an officer. At this point, Mr. Williams broke away and ran toward the Mail House.

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Shortly thereafter, another employee told Officer Davis that Mr. Williams was returning to do him bodily harm. Williams approached the officer with his hand under his tee shirt. As Officer Davis approached to place him under arrest, Mr. Williams broke away and again ran toward the Mail House. Officer Davis stated that as Williams ran away, he threw a bottle to the ground which he had under his tee shirt. Officer Davis added he radioed for assistance and Officers Headen, Starnes and Watson responded. Officer Davis stated he pursued Williams through the Mail House. However, he was caught by the Claimant and Trackmen Jackson and Thompson. Williams again broke away and was caught by these three employees. Officer Davis testified as the two other police officers and he attempted to handcuff Williams, the Claimant and the other Trackmen physically prevented them from so doing, because they had physical possession of Williams and would not let him go. Davis testified that Mr. Thompson stated that the officers were not going to handcuff Williams. Finally Williams broke away and ran outside the Station. Officer Davis further testified at this time, he observed that the Claimant had a strong odor of alcohol on his breath and was loud and boisterous in his speech. He also allegedly repeated the officers were not going to handcuff Mr. Williams.

The testimony of the other two police officers basically corroborated Officer Davis' version of the events.

The Claimant testified that Mr. Williams was boisterous and he and his fellow workers sought to subdue him in order to quiet him down and prevent him from doing bodily harm to Officer Davis, and that he called Sergeant Donovan of the Terminal Police to alert him that there was a possible confrontation between a police officer and a track

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employee at the 2nd Street Gate. Sergeant Donovan testified that he received such a call.

The Claimant protested that during the Investigation he could not get two witnesses to testify in his behalf, because he could not afford to pay them the wages that they would have lost while being absent from work to testify at the Investigation.

The Claimant's personnel record introduced at the Investigation revealed that he had been reprimanded in May 1974 for excessive loss of time from duty.

Carrier's Position

The Carrier contended the discipline of dismissal should be sustained and the claim denied, because the evidence revealed that the Claimant interfered with Terminal police officers in the performance of their duty, and in so doing, he acted in a discourteous and boisterous manner, and was also observed as having an odor of alcohol on his breath.

The Carrier stated the testimony of all the police officers who testified made it abundantly clear that the Claimant interfered with them as they sought to arrest Trackman Williams. The Claimant and his fellow employees by wresting Mr. Williams to the ground prevented the officer from arresting him. The Claimant and his associates prevented the police officers from reaching Williams, and they also stated that the officers were not going to handcuff the trackman.

The Carrier stressed that the Claimant by his conduct was guilty of a major offense. In addition to his misconduct in interfering with the police officers, there was also evidence that he appeared

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under the influence of intoxicants by his breath and general deameanor.

The Carrier further stressed that it had the right to rely on the testimony of the police officers because their testimony was more credible than the Claimant's.

The Carrier denied that it committed any of the procedural errors charged to it by the Organization. It averred that the Claimant was not denied a fair hearing because Engineer Rose did not pre-judge the Claimant's case. While Engineer Rose preferred the charges against the Claimant, he was neither a witness nor did he assess the discipline. The record was reviewed by another staff officer who found the Claimant guilty as charged.

The Carrier also denied that the Notice of Charges filed against the Claimant was defective. The charges were specific and informed the Claimant in detail of what he would have to defend himself at the Investigation.

Organization's Position

The Organization stated the Investigation was procedurally defective because the charges filed against the Claimant were unrelated to the incident and the Investigation was prejudged because Engineer Rose who preferred the charges, was also a witness and assessed the discipline.

Concerning the substantive aspects of the case, the Organization stated the Claimant was a victim of carrying out what he believed was his duty and responsibility as a Foreman, when he restrained Mr. Williams. The Organization stressed that, although Officer Davis testified that the Claimant interfered with him in the execution of his duties, this was not the case. Officer Davis testified that when Mr. Williams started toward him with an object in his hand, the Claimant and

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Trackman Thompson jumped on Williams and wrestled him to the ground. This prevented possible injury to the officer.

The Organization added additional evidence that the Claimant sought to assist the officers can be gleaned from the fact that the Claimant called Sergeant Donovan to inform him of a possible confrontation between a trackman and an officer.

The Organization stressed that the credible evidence shows that the Claimant was not guilty as charged and therefore should be restored to his position, seniority unimpaired, with full back pay for time held out of service.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the meaning of the Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that there is no merit to the Organization's procedural objections. The record reveals that the Claimant received a fair and impartial Investigation and his case was not prejudged because Engineer Rose testified at one stage in the Appeal Hearing after the Investigation had been completed and the Claimant had been found guilty as charged. The Notice of Investigation fully apprized the Claimant of the charges he was being called upon to defend himself.

The Board finds that the Claimant's real objective appeared to be to prevent the police officers from harming the Claimant. That appeared to be his main objective, rather than basically interfering

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with the arrest of Mr. Williams. This was a mistaken objective because there was no reason to believe that the officers would have injured the Claimant in the course of arresting him. This was of course unwarranted and impermissible conduct on the part of the Claimant. Regardless of his objective, he did interfere with the Terminal police officers who were seeking to carry out their appropriate and legitimate functions. The Claimant was concerned about protecting the Claimant and not the police officers.

The Board finds as mitigating factors, the Claimant's relatively good service record and that he did alert Sergeant Donovan as to a possible confrontation. This was not the conduct of an employee seeking to frustrate completely police officers in the exercise of their duties.

The Board determines upon the complete record of the case that dismissal is too severe a sanction for the Claimant's misdeeds, and finds that a suspension of approximately 18 months a more appropriate disciplinary sanction. However, the Claimant is put on notice by this Award that this is to be the last time he can expect to be able to engage in the sort of conduct he participated in on May 13, 1977, and still remain an employee of the Terminal. This Award is not intended to exculpate the Claimant for his impermissible behavior, and it is intended to put him on clear and explicit notice

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that any sort of repeat performance will result in his final termination, and it is expected by this Board that the Organization would not appeal such a termination.

Award: Claimant restored to duty, seniority unimpaired,
but with no pack pay granted.

Order: The Carrier is directed to comply with the Award,
on or before December 19, 1978.

Jacob Seidenberg
Jacob Seidenberg, Chairman and Neutral Member

Merrill L. Stewart - dissent
Merrill L. Stewart, Carrier Member
see attached dissent

Fred Wurpel, Jr.
Fred Wurpel, Jr., Employee Member

November 18, 1978

PUBLIC LAW BOARD NO. 2139

Dissent to Award No. 1

The portion of the award reading "The Board determines upon the complete record of the case that dismissal is too severe a sanction for the Claimant's misdeeds and finds that a suspension of approximately 18 months a more appropriate disciplinary sanction", gives no consideration to the fact that uncontroverted testimony was presented that the claimant had the odor of alcohol on him, which is a clear violation of company Rule "G" and is accepted practice for approval of a discipline of dismissal. The only other participant (Gregory Williams) who was found guilty of violations including Rule "G" had his dismissal upheld by this Board. Neither of the other two participants in the incident that gave rise to the discipline (George Thompson and Gary Wayne Jackson) were accused of violating Rule "G", yet the Board has recommended that their discipline be reduced from dismissal to suspension and restored to duty without back pay which equals the discipline selected by the Board for Frank Branch.

In my opinion this decision results in a relatively more favorable award to claimant Frank Branch than any of the other three parties to the incident. Under such circumstances I must in all good conscience dissent to Award No. 1.

Merrill L. Stewart
Merrill L. Stewart

Carrier Member P.L.Board 2139

December 6, 1978