

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6644

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK SOUTHERN RAILWAY COMPANY

)
) Case No. 1
)
) Award No. 1
)

Martin H. Malin, Chairman & Neutral Member
R. C. Robinson, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: July 25, 2003

STATEMENT OF CLAIM:

1. The discipline (withheld from service and subsequent dismissal) imposed upon Mr. E. K. Crummel in connection with charges of alleged conduct unbecoming an employee while on Company property on January 28, 2000 was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (Carrier's File MW-HARR-00-04 NWR).
2. As a consequence of the violation referred to in Part (1) above, the charges against Mr. E. K. Crummel shall now be stricken from his record and he shall be restored to service and compensated on a make whole basis for any and all time lost.

FINDINGS:

Public Law Board No. 6644, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The critical issue facing the Board is whether Carrier proved the charge by substantial evidence. A number of matters are not in dispute. On January 28, 2000, Claimant was working as a trackman in Enola Yard in Harrisburg, Pennsylvania. Claimant's former paramour, Juanita Smith, was a jitney driver for a contractor that provided transportation service for Carrier's train and engine crews. At 11:50 a.m. Claimant encountered Ms. Smith near the yard office. She was upset because Claimant had served papers in a lawsuit on her. Ms. Smith screamed at Claimant, verbally abused him and blocked his access to his truck. Claimant said nothing toward her and

took no aggressive action.

A second incident occurred at 12:30 p.m. Carrier maintains that in the second incident, Claimant physically struck his former paramour. Upon a careful review of the record, we conclude that Carrier failed to prove this by substantial evidence.

The second incident occurred just outside the yard office. It appears that again Ms. Smith verbally abused Claimant and this time she also kicked him. Claimant's coworker Eugene Harrell testified that as he, Foreman Ozzie Lewis and Claimant were walking to the yard office, Ms. Smith approached, verbally abused him and kicked him. Mr. Harrell described what he observed as follows:

She came near him, he put his hand up, it wasn't no, it just was stay away, like that, it wasn't no hittin or somethin like that, there was no kinda hittin whatsoever.

Mr. Lewis testified that he entered the yard office ahead of Claimant and, although he heard Ms. Smith yelling at Claimant, he did not observe their physical interactions. Claimant testified that Ms. Smith came at him with a balled fist and kicked him in the shin. Claimant related that he put his hand up to block the anticipated punch and, as he walked away, Ms. Smith kicked him again. Ms. Smith then threatened Claimant and Claimant entered the yard office and telephoned the Harrisburg Police Department.

Carrier's Special Agent Reardon investigated the incidents. He interviewed Ms. Smith who advised him that Claimant pushed her face with his hand. Ms. Smith did not testify and, during subsequent handling on the property, she provided a written statement recanting her prior statement. Agent Reardon also interviewed Kathy Steck, another jitney driver, who related that she saw a man's hand go up and a woman's head go back and assumed that the man had slapped the woman. Ms. Steck did not testify.

Agent Reardon interviewed David Tyson, a passenger in Ms. Steck's jitney. As related by Agent Reardon, Mr. Tyson stated that he saw a black male with his hands near a woman's face. He did not see the male strike the woman and was not sure if the woman was hit but felt that the man had struck the woman.

None of the hearsay statements related by Agent Reardon provide substantial evidence of Claimant's guilt. Ms. Smith clearly had motive to fabricate her statement, later recanted it and, consequently, her statement cannot be given much probative value in the absence of her live testimony subject to cross examination. Neither Ms. Steck nor Mr. Tyson claimed to have actually seen Claimant strike Ms. Smith. They related their assumptions and feelings, but such assumptions and feelings cannot be given any probative weight in the absence of their being available for examination and cross examination concerning the basis for those assumptions and feelings.

The only other evidence that Claimant was in any way an aggressor was Agent Reardon's

testimony concerning his interview of Claimant. Agent Reardon testified, and his investigation report related, that Claimant admitted pushing Ms. Smith in the chest. However, on cross examination, Agent Reardon's testimony in this regard was much more equivocal. When asked by Claimant, "[Y]ou asjkd me did I strike her in the face? I said no, my hand wasn't that high. You said, well show me. Did I at that time, did I push you in the chest?", Agent Reardon replied, "You put your hand up to my chest." When asked, "I told you I was walking away, did I not?", Agent Reardon replied, "Yes sir." When asked, "Did I not put my hand up as to protect myself and I was walking away from her?", Agent Reardon replied, "Yes sir." Agent Reardon also testified, "I do remember you saying you pushed her as a result, as a defensive action after she kicked you, and tried to kick you."

Claimant denied ever telling Agent Reardon that he made physical contact with Ms. Smith. However, deferring to the determination made on the property to credit Agent Reardon's testimony over Claimant's in this regard, the most that can be said is that contact occurred as Claimant was walking away and as he put his hand up in a defensive manner in light of Ms. Smith's assault. We simply are unable to find substantial evidence of probative value that Claimant was an aggressor or that he did anything other than take reasonable action to avoid further attack from Ms. Smith. Indeed, any finding that Claimant took aggressive action against Ms. Smith is completely inconsistent with the undisputed events of the first incident, i.e. that Ms. Smith verbally assaulted Claimant and blocked his access to his truck and Claimant did nothing in response other than wait for Ms. Smith to stop and move out of the way. A finding that Claimant acted aggressively toward Ms. Smith is also inconsistent with Claimant's having entered the yard office and reported the incident to the Harrisburg Police immediately after it happened.

Carrier argues, however, that Claimant was responsible for the second incident because he walked to the yard office right past where Ms. Smith was parked instead of using one of two other doors. Claimant, however, testified that all he did was follow Foreman Lewis to the yard office and that the Foreman chose to use the front door because there were snow piles by the side doors. Indeed, Agent Reardon testified, concerning Claimant's coming to the yard office the second time,

I didn't consider that to be out of line for Mr. Crummel. He was acting within the Scope of his employment there. He certainly had a right to be anywhere he needed to be on NS property.

It is undisputed that Claimant and his coworkers returned to the yard office because of the need to make photocopies in connection with an application for a commercial diver's license. We see nothing improper about Claimant's going to the yard office or using the door that he used. Accordingly, we hold that Carrier failed to prove the charge of conduct unbecoming an employee by substantial evidence.

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AWARD

Claim sustained.

ORDER

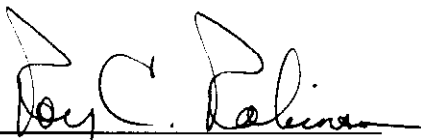
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. L. Kerby
Carrier Member



R. C. Robinson
Employee Member

Dated at Chicago, Illinois, December 17, 2003.