

NATIONAL MEDIATION
BOARD

Award No. 4

FEB 16 9 28 AM '79

Case No. 7
File No. 1688 UTU-CParties NATIONAL RAILROAD
UNION and Adjustment Board

to and

Dispute Illinois Central Gulf Railroad

Statement of Claim This is a request for removal of all discipline and pay for all time lost on behalf of Conductor D. D. Hamblin, which was an assessed 120 day suspension for his alleged conduct in connection with an altercation at about 9:15 a.m., Tuesday, October 5, 1976, near Gilman, Illinois.

Findings The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated September 12, 1978, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant was the Conductor of a work train crew, on October 5, 1976, working with Maintenance of Way Gang No. 227 near Gilman, Illinois. He became embroiled in an altercation that date. Said altercation involved at least four members of Maintenance of Way Gang No. 227 in Claimant's caboose. The drinking water for M. of W Gang No. 227 was stored in said caboose.

Claimant and the four Trackmen members of M of W Gang No. 227 received notice of a formal investigation which, after several postponements was held January 4, 1976:

"....to determine the facts and whether you entered into an altercation at about 9:15 a.m., on Tuesday, October 5, 1976, at or near Gilman, Illinois. You may arrange for representatives and/or witnesses as provided in your schedule agreements."

Carrier, as a result of said investigation, concluded that all five employees had been involved in an altercation and that they had thereby violated Operating Rules "A" and "I". Claimant Conductor and M of W Trackman Hall each received a 120 day suspension, while the other three Trackmen received lesser degrees of discipline for their roles in the altercation.

Operating Rules "A" and "I" provide:

"(A) a railroad employee is expected to work safely, obey all rules, and be faithful, alert and courteous in the discharge of duty."

"(I) Vicious, quarrelsome, profane or uncivil deportment is prohibited."

The record reflects that Claimant, in the early morning hours of October 5, 1976 had gone to Gang No. 227's Assistant Gang Foreman, H. R. Young, and told him "to tell the men, in Gang 227, that if they would behave and didn't go in and dirty the caboose that they were welcome to come on the caboose".

Four to seven Trackmen of said Gang No. 227 subsequently entered Claimant's caboose, apparently, for a drink of water. At least one, Trackman Garret, climbed into the cupola seats, another Trackman lay down on the seat in the bunker, in the lower portion of the caboose, while several Trackmen stood around the water container. Claimant told the Trackman sitting down to leave the seat cushions alone and the altercation began at that point. The M of W Trackmen used profane and vulgar language which was offensive and insulting to Claimant. Claimant, apparently frustrated by what he construed to be the lack of respect for he and his caboose, vented his anger on the four Trackmen by verbally abusing them generally and specifically. Some responded with equal abuse. Claimant told Trackmen Garret and Hall to stop moving the seat cushions around because they previously had been getting torn up thereby. He specifically called, at least one of them, ^{Trackman} ~~Trainman~~ Hall, a "nigger".

Claimant testified that he "told them to get out of the caboose that a bunch of "f--king" niggers were not going to take my caboose and tear it up". The Trackmen reacted by asserting they didn't have to get off the caboose and they used the repugnant term "you mother f--k-r". Claimant told Trackman Hall "if I wasn't on the job, I'd beat the piss out of you. I don't have to take this from f--k--g niggers". Thereafter, one of the Trackmen, Trackman Hall, who so testified, slugged Claimant in the face. Claimant was grabbed by two Trackmen and held from behind. He broke away therefrom, searched for and found a maul handle. Claimant gave chase to the Trackmen who ran from the caboose. Claimant thereafter called the police.

The Employees contend that the Notice of Investigation was defective, that Claimant was provoked into the use of vulgar language, that the Trackmen didn't go to the caboose for a drink of water, but rather that they had gone to accomplish what had occurred because Claimant had barred them off the caboose, and that the investigation was not fair and impartial because the Hearing Officer would not admit evidence of events occurring on dates prior to October 5, 1976 which had relevance to the October 5th incident.

The Board, as did Carrier, concludes that Claimant participated in the October 5, 1976 altercation. He was the catalyst in this incident. Black's Law Dictionary - Fourth Edition - defines "altercation" as:

"Warm contentions in words, dispute carried on with heat or anger, controversey, wrangle, wordly contest. Ivory v. State, 128 Tex. CR.R. 408, 81 SW 2d 696, 698."

"Battery" is also defined therein as:

"Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. Goodrum v State, 60 Ga 511"

"...an unlawful touching of the person of another by the aggressor himself,...Kirland v. State, 43 Ind: 153, 13 am. Rep. 386,The actual offer to use force to the injury of another person is assault; the use of it is battery, which always includes an assault; hence the two terms are commonly combined in the term "assault and battery". Harris v. State, 15 OKL. CR. 369, 177 p. 122, 123."

Claimant testified that he had invited the Trackmen members of M of W Gang 227 aboard his caboose. Thus, said Trackmen were aboard the caboose as invitees or guests of Claimant conductor. Yet, Claimant had not received assurance of any nature that the Trackmen's conduct, against which he had previously registered complaint with their M of W Supervisors, had or would, as desired, change. Consequently, when said Trackmen apparently reverted to the type of conduct of which Claimant disapproved, his ordering them off the caboose, at that juncture, was the maximum requirement reasonably expected of Claimant. However, the manner and language employed by Claimant to execute such order, to wit - "niggers get off my caboose", was neither proper nor what should be expected of a Conductor with 27 years of experience. The refusal of the Trackmen to comply with the order of the Conductor was sufficient cause for Claimant to have followed well established and proper channels for their removal from the caboose and/or further resolution of the problem. There were several reasonable alternatives open. As an illustration, Claimant could have gone to the M of W Supervisors and requested the Trackmen's removal and telling them the reasons why. If cooperation thereon was not forthcoming, then the matter could have been handled through the Train Dispatcher, as well as the concurrent filing of charges with the Transportation Department Supervisors, and a grievance with his Union.

Instead, Claimant chose to handle the removal of the Trackmen personally. Despite the goading by the Trackmen's invective, Claimant should not have entered into a vulgar and profane name calling situation. He clearly should not have used imprudent, improper and improvident profane racial slurs, such as "F--king niggers", "niggers get off my caboose", to black Trackmen.

Nor should Claimant Conductor have assaulted at least one of the Trackmen with a threat "to beat the piss out of you". Claimant, instead of using other available means to handle "his problem" had, in effect, issued a challenge to his "guests" which was accepted.

Conversely, there was no justifiable provocation as to create a necessity for the M of W Trackmen to gang up on Claimant. Nor should the Trackmen have committed a battery by holding Claimant, by punching him, and knocking his glasses off and breaking them as well as causing an injury to Claimant. The Trackmen too, had channels by which to handle any grievance that they thought they may have had.

The notice of investigation is held to be proper. Claimant was well aware of what he had to defend against. We turn to the procedural objection raised, to wit - keeping out any evidentiary reference of other than what occurred on October 5, 1976. Claimant received excellent representation because, despite efforts by the Hearing Officer to keep such references out of the hearing record, Claimant's Representative did in fact have evidence of events, prior to October 5, 1976 admitted into the record. The transcript reflects that Claimant had previously experienced problems with members of M of W Gang No. 227 dirtying and damaging cabooses on the Work Train assignment where said Gang's drinking water was stored. The record further reflected that Claimant had reported such problems to M of W Supervisors and a Trainmaster and that Claimant had barred said Trackmen from his caboose. Consequently, because the hearing record does in fact contain that evidence which allegedly was sought to be kept out thereof, and that the relevance thereof was highly questionable, the Board, in light of the factual occurrence on October 5th, finds, in such limited circumstances, the objection raised to be without merit.

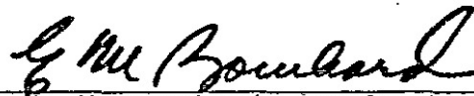
Carrier appears to have based the degree of discipline assessed on the degree of participation in the altercation. However, equating Claimant's participation with that of Trackman Hall, is inconsistent with the record. It is a well settled principle in law that the mere use of words, no matter how provoking, provides no basis or justification, as here, for the use of force. In such circumstances we find cause to mitigate Claimant's discipline to sixty (60) days.

Claim disposed of as per findings.

Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.



W. H. Canty, Employee Member



E. M. Bouchard, Carrier Member



Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Wilmington, Delaware, January 31, 1979.