

In the Matter of Arbitration
between
Brotherhood of Maintenance
of Way Employees
and
The Colorado and Wyoming Railway
Company

Public Law Board
No. 2271

B. S. Mendoza

STATEMENT OF CLAIM

1. That the dismissal of Track Foreman B. S. Mendoza was arbitrary, capricious, and based on unproven charges.
2. That the Carrier compensate B. S. Mendoza (reinstated to service September 11, 1978) for all loss of earnings between the dates of February 24 and September 11, 1978 account of the Carrier's wrongful action.

The claim, initiated by the General Chairman on March 14, 1978, was progressed through the various appeal procedures provided in the Labor Agreement between the parties without satisfactory agreement being reached. This led to the agreement of October 5, 1978, creating a Special Board of Adjustment, in accordance with Public Law 89-456, which Board is designated as Public Law Board No. 2271.

The parties deadlocked on the selection of a neutral referee and appealed to the National Mediation Board which made the appointment on November 28, 1978. The Public Law Board, as constituted by the parties and the NMB appointment, is composed as follows:

Tedford E. Schoonover, Neutral Member

Ben Ochoa, Employee Member

G. P. Simony, Carrier Member

Hearing on the dispute was held on February 2, 1979 at the Holiday Inn, Room 116, Pueblo, Colorado. Evidence was presented in the form of verbal testimony and documentation. The hearing concluded with a verbal summation by each side. The claimant attended the hearing but did not participate.

FINDINGS

The claimant, B. S. Mendoza, entered Carrier service on October 15, 1956 as a track laborer. He was subsequently promoted to the position of Torch Operator-Truck Driver on October 26, 1971 and to Track Foreman on August 22, 1972.

On Friday, February 24, 1978, the claimant and Foreman Diego Espinosa were notified that they were being held out of service pending investigation of an alleged altercation at approximately 6:30 a.m. on that date. Such investigation was set for 10:00 a.m. on the following Monday, February 27, 1978. The notice stated the purpose of the investigation was to determine the facts as to the alleged altercation between the two employees. The notice included a statement that both were to arrange for their own representation and witnesses.

The investigation was held in the Company offices as scheduled. During the investigation statements were introduced by the claimant and Track Foreman Espinosa as well as other employees. Statement by Track Foreman Espinosa follows:

"My name is Diego Espinoza. I am a track foreman for the C&W Railroad Track Department. I have been employed by the C&W going on six years in August. On the morning of February 24, 1978 at 6:25 AM, I was just coming to work in the morning. I was the first one to arrive so I went for the keys and opened the door for the rest of the guys. We keep the Comfort Station locked all the time and the key is kept in the garage. Three or four other men were on their way in with me. I went to the lunchroom to put my lunch in the refrigerator. I turned around from the refrigerator and glanced at the bulletin board that we have there which was straight ahead of me. At that time Ben Mendoza walked in the door and hit me. I was standing maybe two feet from the bulletin board and had nothing in my hands. Mendoza walked in the same door I had come in from the locker room to the lunchroom. I started to glance to my left but didn't get a chance to finish because that's when I got hit. I didn't see Mendoza coming through the door but I knew he was coming in because when I went to put the keys away in the garage he was coming in behind me. I saw him get out of his truck. He was the next one behind me then. I was hit with one punch and my glasses went under the table so I went after them to pick them up. I was hit on the left side of the cheek and mouth. I then went outside to try to get myself together. I went out through the locker room door at the south end of the building. I recognized Mendoza as the man who hit me immediately after I was struck. He didn't say a word to me and he didn't come after me to hit me again. After I went outside, I met up with Virgil Garcia and I told him what happened and I told him that I was going to call the ambulance and go to the dispensary. I then went back in to get my other glasses and put these glasses in my locker. I didn't see or talk to Mendoza at any time. I was then taken to the Emergency Hospital. The doctor said that I had cuts on the inside of my lip where Mendoza hit me in my teeth and they took x-rays but he said the x-rays didn't show anything. I was brought back to the comfort station around 10:45 AM. When I was struck by Mr. Mendoza, I did not fall to the ground. My head went to the side a little and I didn't sit down afterwards. The only thing I can think of that might have led to the action taken by Mr. Mendoza is that on February 22nd we worked overtime on a Blast Furnace job. Jack Leyba, who is Ben Mendoza's son-in-law, and Joe Avalos were part of my gang on that job. These two

men have not been producing enough work to keep up with the other men. I took them in the following morning, February 23rd, to Mr. Jim Martinez to give them a pep talk to see if he could wake them up. Then is when Mr. Leyba said he quit and that's the only thing that I can think of that led to this incident. Signed by Mr. Espinoza, co-signed by Mr. Herrera, dated February 25, 1978."

The statement made by the claimant, B. S. Mendoza, in response to the above follows:

Mr. Simony: Would you state your name please?

Mr. Mendoza: Bienvenido Mendoza.

Mr. Simony: Where are you employed?

Mr. Mendoza: Colorado & Wyoming Railroad, division of the Track.

Mr. Simony: In what capacity are you employed? What is your present position?

Mr. Mendoza: My occupation? Track Foreman.

Mr. Simony: How long have you been working for the C&W Railway?

Mr. Mendoza: 22 years.

Mr. Simony: Where were you employed on February 24, 1978?

Mr. Mendoza: Colorado & Wyoming Railroad.

Mr. Simony: What time did you report for work this morning?

Mr. Mendoza: As usual, around 25 minutes to 7.

Mr. Simony: After you reported for work this morning, will you tell us in your own words what transpired, what happened?

Mr. Mendoza: Nothing.

Mr. Simony: You had no altercation with any other employee on the C&W?

Mr. Mendoza: Not at all. I walked in as usual to change my clothes and get ready to go to work.

Mr. Simony: You had no confrontation with any other employee on the C&W?

Mr. Mendoza: No sir.

Mr. Simony: You were not involved in any fistcuffs?

Mr. Mendoza: Not any at all.

Mr. Simony: You did not either threaten or strike another fellow employee?

Mr. Mendoza: No sir. As a matter of fact I would like to know what this is all about.

Signed by Mr. Mendoza, countersigned by Mr. Herrera, and dated February 27, 1978."

In the taking of the above statements the claimant and Mr. Espinoza were represented by Dave Herrera, Local Chairman for the BMW-E.

The investigation of February 27 was conducted by C. P. Hughes, Division Superintendent. Mr. Ben Ochoa, General Chairman, represented both of the principals. The statements previously quoted were introduced at the investigation and constituted the essential part of their testimony.

The building in which the alleged altercation occurred is known as the comfort station. It is a small building composed of two rooms; a locker room and a lunch room. The latter includes a refrigerator for storage of lunches and the like.

At the behest of Mr. Espinoza the investigation included statements and testimony of three Track Department employees. The first, Mr. Tony Baros, testified as follows:

"Well, I came into the comfort station. I went inside the locker room, the room where we dress. I heard a noise in the lunch room and I got up from where I was dressing up and I seen Diego picking up goggles from the floor."

In answer to questions as to whether the claimant and Espinoza were the only ones in the lunch room Mr. Baros answered as follows:

Mr. Hughes: On the morning in question, Mr. Baros, did you see either of the two gentlemen prior to them going into that room, to the lunch room that you mentioned?

Mr. Baros: I seen them walk inside the comfort station but I didn't see them go in the lunch room.

Mr. Hughes: You did see both of them come out of the lunch room or was there anybody else in the room with them at the time?

Mr. Baros: No. They was the only two guys in the lunch room. Rest of us were in the comfort station.

Mr. Hughes: What was Mr. Espinoza's physical condition at that time?

Mr. Baros: Well, after he picked up his goggles, he just walked out of the comfort station. Then I didn't see him anymore.

Mr. Hughes: Were his glasses broken at the time?

Mr. Baros: Yes.

Mr. Hughes: You walked into the room and saw the two gentlemen there?

Mr. Baros: Yes.

Mr. Hughes: Let the record show that Tony Baros is recalled. On Friday morning, approximately 6:30, give or take ten minutes, when the incident that we are investigating this morning occurred, did you see Mr. Espinoza and Mr. Mendoza in the lunch room together?

Mr. Baros: Yes.

Mr. Hughes: Was there anybody else with them at the time?

Mr. Baros: No sir.

Mr. Hughes: How close were they together? Were they within a foot of each other?

Mr. Baros: Yes, about something like that I guess.

Mr. Hughes: Were they right near the bulletin board or near the refrigerator?

Mr. Baros: Yes, that's where he was picking his goggles, Mr. Espinoza, he was picking his goggles up right by the bulletin board.

Mr. Hughes: There was no one else in the room at that time?

Mr. Baros: No.

Mr. Hughes: Was there anyone with you when you entered into the lunch room?

Mr. Baros: No.

Another employee, Jess Hernandez, testified that he did not see the incident but did witness Mr. Espinoza attempting to put a lens back into his glasses.

A third witness, Virgil Garcia, stated he did not see anything that happened between the claimant and Mr. Espinoza. He added the following on questioning:

"The only thing that I have is that when I went outside to my truck, when I was walking back, I met Diego outside in front of Jim's office and he told me what happened. I noticed that his glasses were bent and he had blood in his mouth. He told me what happened. That's it, I didn't see nothing."

On further questioning by Diego Espinoza, Mr. Garcia added:

"Mr. Espinoza: No. The only thing I could ask him is did I mention to you what I was going to do?

Mr. Garcia: Yes, you said you were going to stay there and cool off a little.

Mr. Espinoza: Did I tell you I was going to call the ambulance?

Mr. Garcia: Yes, you told me you were going to call the ambulance."

Reports from the Emergency Hospital and the CF&I Emergency Dispensary were introduced during the hearing and copies thereof were supplied to the BMWE representatives. The report of Dr. Young who diagnosed the case:

"Contusion to jaw, left side.
Contusion to facial bones, left
Laceration--left buccal mucosa
Home rest of shift today."

Captain W. S. Van Dyck, Chief of the CF&I Guards made the following statement which was introduced as part of the Carrier's presentation:

"Espinoza claimed he was hit by Mendoza. Took him th Emergency Hospital.

Check did show signs of teeth marks.

Mendoza said he did not strike Espinoza. Both were discharged later.

Turned it over to Turñ Foreman who called proper personnel."

The testimony of the claimant, Mr. Mendoza, contained some conflicts as to his presence in the lunch room where the alleged altercation occurred. At one time, in response to a question from Mr. Hughes as to whether he was in the lunch room with Mr. Espinoza, the claimant answered: "No sir; at no time was I in there." Later, however, when asked essentially the same question by Mr. Ochoa, the claimant answered as follows:

"No, I wasn't in there by myself. When I walked in there was at least five, six or seven guys, I can't say how many because why would I keep track of how many men were in there. I don't know. But, there was a whole bunch of guys in there when I walked in and going back to the lunch room after I dressed and everything, as usual I went to see if there was anything on the bulletin board. I don't remember being at that time after I dressed if I did walk in there. We all get together and walk around. After that time, probably if I walked in there, I don't see why not."

The Union Representatives did not claim that the investigation, as conducted by Superintendent Hughes, was unfair in any manner. Both Mr. Ochoa and Mr. Herrera were given opportunity to question witnesses during the investigation. At the conclusion thereof both stated they had no further questions. Copies of the transcript of the hearing were provided to both Union representatives.

Following the investigation of February 27, 1978 a dismissal letter was addressed to the claimant on March 3, 1978 by Superintendent Sibony.

"A careful analysis and review of the transcript of the investigation clearly establishes beyond any reasonable doubt that you, in fact, did strike Mr. Diego Espinoza on his left cheek on the date in question.

In addition to this act being in violation of General Safety Rules dated August 1, 1976, this might have resulted in much more serious injury (General Safety Rule No. 6).

Mr. Espinoza was taken to Emergency Hospital by shuttle bus arriving there at 6:25AM. His injuries were diagnosed as contusion to left cheek and laceration of inner surface of cheek.

Based on substantial evidential testimony in the record of investigation, you are hereby dismissed from the service of The Colorado & Wyoming Railway Company in all capacities effective with the date of this letter."

General Safety Rule 6 as promulgated by the Carrier August 1, 1976 provides:

"Employees must not enter into altercations, play practical jokes, or indulge in horseplay while on duty or on company property."

No disciplinary action was taken against Mr. Espinoza.

On September 8, 1978, as a result of a joint conference between the Carrier and Union, and without prejudice to the position of either party, Mr. Mendoza was restored to his former position with the right of the Organization to pursue the question of pay for time lost.

POSITION OF THE PARTIES

UNION POSITION:

1. The claimant was not properly charged as required by Rule 21 of the Labor Agreement and therefore was denied due process.
2. The discharge of the claimant was arbitrary and capricious and based on unproven charges.

COMPANY POSITION:

1. Rule 21 of the Labor Agreement requires that employees be given a fair and impartial hearing. The hearing fulfilled these requirements and all concerned participants including the union representatives and the claimant were afforded opportunity to ask questions, make statements, or comments during the course of the investigation.
2. Based on all the substantive evidence presented, the Carrier is firmly of the opinion that Mr. Mendoza was guilty of physically inflicting harm on fellow employee, Diego Espinoza. It is the Carrier's responsibility to impose discipline to protect employees if the morale of employees is to be maintained. Carrier must protect employees from those who deliberately engage in wrongful acts.

DISCUSSION

The Union position raises a number of questions in deciding the validity of the claim.

1. Was the claimant properly charged as required by Rule 21 of the Agreement?
2. Was the claimant denied due process?

3. Was action of the Carrier in discharging the claimant arbitrary and capricious?
4. Was action by the Carrier in discharging the claimant based on unproven charges?
5. Was the discipline assessed fair and reasonable and for just cause.

Dealing with the first question requires consideration of the essential provisions of Rule 21 which are quoted as follows:

"RULE 21 - DISCIPLINE

"Hearings (A). An employee in the service of the Carrier for sixty (60) calendar days or more shall not be disciplined or dismissed without first being given a fair and impartial hearing and a decision rendered in accordance with this rule.

"Within twenty (20) calendar days of the occurrence of the alleged violation action shall be taken by the Carrier to notify the employee in writing of the precise charges made against him by personal delivery, evidenced by receipt, or by registered or certified mail, return receipt requested. The employee shall be allowed not less than five (5) calendar days from receipt of notice of the hearing for the purpose of securing a representative.

"It shall be the responsibility of the Carrier to arrange for the presence of any employee or such other witnesses as might be available that have knowledge of the incident under investigation.

"The hearing shall be held within ten (10) calendar days from the date notice is received by the employee and a decision based on evidence adduced at the hearing shall be rendered within ten (10) calendar days thereafter.

"Representative (B). The right of an employee to be represented at the hearing by other employees covered by this agreement or by accredited representatives of the Brotherhood but not otherwise is recognized. The right of appeal is limited to the claimant employee or an accredited representative of the Brotherhood."

The evidence is clear as to the Carrier's action in dealing with the matter between the claimant and Diego Espinoza. It's first knowledge was a report that there had been an altercation and that one of them had been injured sufficiently to require medical attention. Not knowing the circumstances or who might be at fault it set up an investigative hearing for Monday, February 27, 1978. Furthermore, it took even handed action against the

participants by holding both out of service pending completion of its investigation. In notifying the two employees the Carrier included a statement that they were to arrange for their own representation and witnesses.

The investigative hearing held on February 27, 1978 was conducted in an orderly manner and questions of witnesses by the Union Representatives, as well as the principals, were permitted by the Carrier Officer who conducted the hearing. At the conclusion of the hearing all concerned stated they had no further questions. At the PLB hearing the Union Representative stated there was nothing improper in the manner in which the investigative hearing was conducted.

Following the investigative hearing, Mr. Simony of the Carrier addressed a letter to the claimant stating his dismissal was based upon evidence of violation of General Safety Rule No. 6 which prohibits altercations between employees. Mr. Simony added that:

"A careful analysis and review of the transcript of the investigation clearly establishes beyond any reasonable doubt that you, in fact, did strike Mr. Diego Espinoza on the left cheek on the date in question."

There is nothing in the above charge which is vague or general, as contended by the Union. The claimant was specifically charged with violation of Rule 6 which prohibits the very kind of altercation of which the Carrier found him guilty. Likewise there is no support for allegation that the notice issued on February 25 advising the claimant of the hearing to be held on February 27 did not meet the essential requirements of the rule for prompt action in matters of this kind. The Carrier acted promptly to get the facts in the case by setting the hearing for the Monday following the Friday (25th), the date of the altercation. Moreover, the claimant was advised to arrange for his own representatives and witnesses. He arranged for representation but did not choose to have any witnesses of his own. Such witnesses, as participated in the investigative hearing, were arranged for by the Carrier or Mr. Espinoza.

In issuing its dismissal notice on March 3 the Carrier acted well within the time limits of Rule 21 which sets a maximum of 10 days for the Carrier to make a decision in disciplinary cases.

Based on the above review of the Carrier's action in specifically charging the claimant with violation of General Safety Rule 6 and its conduct of the investigative hearing there is no basis to support the Union allegation that the claimant was improperly charged nor that he was denied due process. On the contrary, the evidence shows that the Carrier acted meticulously in meeting the essential requirements of Rule 21 of the Agreement.

Now, to review the evidence as it relates to the allegation that dismissal of the claimant was arbitrary and capricious and based on unproven charges.

What we have here is a charge by one employee which is utterly denied by the alleged offender. Thus, an analysis must look to circumstantial evidence presented and test where the truth lies.

The claimant's plea of innocence and non involvement is unsupported except for his own assertion. No witnesses, nor evidence, were presented to support his denial of complicity. On the other hand, there is a substantial body of evidence in support of the claim of Diego Espinoza that he was struck by the claimant, that his goggles or glasses were damaged, that the blow caused injury to the inside of his mouth, that the injury caused bleeding and required medical attention. Not only do we have Espinoza's statement in extensive detail as to circumstances of the alleged attack but we also have substantial corroborating evidence. Thus, his contention that only he and the claimant were in the lunch room where and when the attack occurred is supported by witness Baros who stated definitely that he saw only the two in the room; they were by themselves - no others were with them. In addition, Baros saw Espinoza picking up his damaged goggles from the floor. Jess Hernandez testified that he saw Espinoza attempting to repair his damaged goggles. Moreover, on going outside the building, Espinoza saw Virgil Garcia, related what had happened and stated he was going to call for an ambulance.

Following these developments Mr. Espinoza was transported by ambulance to the medical facility in the company of Captain of Guards, W. S. VanDyke, who was also told of the alleged attack by the victim. At the medical facility Mr. Espinoza was examined by Dr. R. S. Young who made the following diagnosis.

"Contusion to jaw, left side
Contusion to facial bones, left
Laceration--left buccal mucosa
Home rest of shift today."

The Emergency Hospital reported circumstances of the attack as related by Mr. Espinoza in the following language:

"I was putting my lunch away in lunch room, and he just come up and nailed me on left cheek with his fist."

Not only is the claimant's denial of the charges unsupported but we also find a basic conflict in his testimony in that at one point he contends he was not in the lunch room where the incident occurred. Later he changed his statement to the effect that when he went into the room there were six or seven guys there.

The above review of the evidence supports beyond reasonable doubt the conclusion that Mr. Espinoza was indeed struck by the claimant. A heavy preponderance of the evidence supports this conclusion; the only evidence to the contrary being the claimant's completely unsupported denial. Nor can we overlook the inconsistency in his testimony in first denying he was in the lunch room with Mr. Espinoza alone and later stating he was there with six or seven others. These inconsistencies and the weight of evidence on the other side render his testimony somewhat incredible.

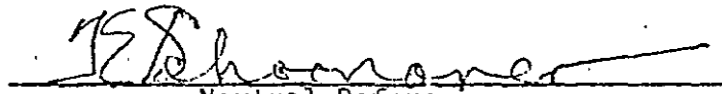
It is the Board's decision, therefore, that the disciplinary action against the claimant was not arbitrary or capricious and based on unproven charges. On the contrary, the evidence supports a conclusion that the claimant's guilt of violation of General Safety Rule 6, as charged, was proven beyond a reasonable doubt.

The Board agrees with the Carrier that it must protect employees from others who engage in wrongful acts; in this case the infliction of bodily harm by one employee on another. It is the Carrier's responsibility to take all reasonable steps to assure a safe working place and working conditions for its employees. It follows that where actions prevent the Carrier from fulfilling these responsibilities it must impose such discipline as needed to assure safe conditions and protect employee morale. Failing to do so would render the Carrier subject a charge of negligence in meeting its patent responsibilities.

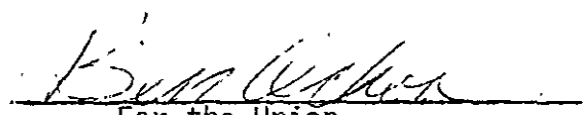
Action of the Carrier in originally dismissing the claimant from service was later rescinded effective September 8, 1978. This had the effect of reducing the disciplinary action to a period of suspension from February 25 to September 8, 1978. It is the Board's determination that such discipline was for just cause and was a reasonable exercise of Carrier's responsibility in implementing necessary rules to assure a safe working place.

AWARD

Claim denied.


Neutral Referee


For the Company


For the Union

Signed at Pueblo, Colorado this the day of February, 1979.