PUBLIC LAW BOARD NO. 2529

Joseph Lazar, Referee

AWARD NO. 19
CASE NO. 26

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM:

1. That the Carrier violated the Parties' Agreement when, as a result of an investigation conducted February 24, 1982, they discharged Trackman L. Sharp for alleged violations on February 17, 1982, said dismissal, being neither fitting nor objective, was capricious and unjust and in abuse of the Carrier's discretion.

2. That Claimant L. Sharp be reinstated to his former position with seniority, vacation and all other rights unimpaired and, further, that he be compensated for loss of earnings suffered account the Carrier's improper action.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

In notice dated March 15, 1982, decision was made that Trackman L. Sharp was "Dismissed from the service of Fort Worth and Denver Railway Company for violation of Rule(s) 563, 564 and 567 of the Burlington Northern Safety Rules in connection with an altercation with employee J. L. Mosley, and being quarrelsome or otherwise vicious on company property at about Milepost 16.2 at about 2:00 p.m. February 17, 1982 while employed as a trackman on Section 11A near Saginaw, Texas as evidenced by a formal investigation afforded him on Wednesday, February 24, 1982, at Fort Worth, Texas."

The basic facts in this case are clear. Claimant made certain verbal remarks of a provocatory nature resulting in physical reprisal by his fellow employee who was the victim of the remarks. The Foreman, who possibly might have stopped the reprisal on appeal from the Claimant, stopped the fighting and directed the employees to go back to work. The fellow employees went back to work, but Claimant testifies that he asked the Foreman for medical attention. The Foreman testified that Claimant "showed no signs to me" of being hurt and did not realize that Claimant made the request for medical attention. About fifteen minutes after the fighting had stopped and the fellow employee had gone back to work, while the fellow employee was bent down, the Claimant hit the fellow employee so as to injure his jaw, and the fellow employee tried to keep Claimant away by pushing until the fighting was stopped by the Foreman. The fellow employee was taken to a hospital for his bleeding jaw injury. Claimant's defense was that when he asked the Foreman, on the initial separation, for medical attention, "I was in a daze and at that time when I was talking to" the Foreman, he was "close" to the fellow employee, and believed that the fellow employee had bent down, not for work, but "to get something I interpreted that was for me" and that his punching the fellow employee was defensive. The defense, however, is debatable.

General Rules 563, 564, and 567 read:

"563. Burlington Northern service demands the faithful, intelligent, courteous and safe discharge of duty. Courteous, orderly conduct is required of all employees. Boisterous profane, sexist, or vulgar language is forbidden. Employees must not enter into altercation with any person regardless of provocation, but will make note of the facts and report such incident in writing to their immediate supervisor.

564. Employes will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will.

567. Employees must:

a. Not incur risk which can be avoided by exercise of care and judgment.
b. Take time to work safely.
c. Exercise care to prevent injury to themselves and others."

The evidence of record shows clear violation of General Rules 563, 564, and 567 as determined by the Carrier. Such violations warrant termination and the Carrier was justified in its dismissal of Claimant. However, the record shows that the Carrier, by letter of August 31, 1982, (Carrier's Exhibit No. 2(d), had been agreeable to the reinstatement of Claimant on the basis that it be without pay for all time lost and seniority unimpaired, and be subject to the following additional conditions: that Claimant will not be paid for time lost or anything else for the period he has been out of service; that Claimant must present himself to Chief Engineer for an interview before resuming service; that Claimant must satisfactorily pass any required physical and/or rules examination; that after complying with these conditions, Claimant will be permitted to exercise his seniority and resume service.

On consideration of the whole record and all of the evidence, the Board is of the opinion that the proposed disposition of the instant case as evidenced by the Carrier's Exhibit No. 2(d) is fair and equitable. This disposition shall be without prejudice or precedental force, however, as to any other case.

A W A R D

1. The Carrier is not in violation of the Agreement.

2. Reinstatement of Claimant on the basis, as stated by the Carrier in its letter of August 31, 1982 (Carrier's Exhibit No. 2(d), is fair and equitable. Claimant shall have thirty (30) days from date of this Award to satisfy the conditions stated above, or to present medical evidence of his inability to do so.

3. The Board retains jurisdiction to determine any dispute that may arise out of the interpretation or application of this Award.

Joseph Lazar

JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

S. E. Fleming

S. E. FLEMING, EMPLOYE MEMBER

B. J. Mason

B. J. MASON, CARRIER MEMBER

DATED: May 23, 1983