

PUBLIC LAW BOARD NO. 2529

Joseph Lazar, Referee

AWARD NO. 2

CASE NO. 2

<u>PARTIES</u>	)	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
<u>TO</u>	)	and
<u>DISPUTE</u>	)	FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT
OF CLAIM:

1. That the Carrier violated the Agreement between the Parties when as a result of an investigation conducted at Amarillo, Texas, January 15, 1980, they dismissed R. L. Cook from his position of Extra Gang Laborer, said dismissal being capricious, unjust and prejudged.
2. That the Carrier shall restore Claimant to his former position with seniority, vacation and all other rights unimpaired and, further, shall compensate him for all wage loss 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 employee and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Claimant Extra Gang Laborer R. L. Cook, on January 22, 1980, following formal investigation on January 15, 1980, was "dismissed for violation of Rules 661 and 667 of Burlington Northern Safety Rules and Rule 701(B) of Burlington Northern Rules of the Maintenance of Way Department in connection with failure to comply with instructions from the proper authority at approximately 9:00 A.M. on Thursday, December 20, 1979, while assigned to Extra Gang No. 1 working in the vicinity of Clarendon, Texas."

These rules read as follows:

- Rule 661: "Employees 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."
- Rule 701: "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 superior."
- Rule 667: "Employees must comply with instructions from the proper authority."

There is no question in the instant case that a verbal dispute occurred between Claimant and another employee in the bus Claimant was driving over the ownership of a thermos bottle. There was no physical contact between Claimant and the other employee, but the detailed circumstances revolving around whether Claimant stepped outside of the bus in a challenge to "settle" the matter physically, or stepped outside of the bus in order to retrieve a glove while posting red and yellow boards in connection with the day's worker order, remain in question. Question also remains concerning the Relief Foreman's statements to Claimant and the other employee in the incident.

Quite likely, sufficient testimony might have been elicited to clarify relevant questions of fact if material witnesses were present to testify at the investigation held on January 15. The transcript shows the protest of Claimant and of Claimant's Representative, on page 3, that the Foreman of Extra Gang No. 1 "badgered his employees who would have given testimony in Mr. Cook's behalf by refusing to let witnesses work one-half day and take off in time to attend Mr. Cook's investigation as witnesses. He told these employees if they did take off to act as witnesses in Mr. Cook's behalf, they would lose a full day's salary and the railroad would not let them take off and lose a half day's salary in regard to gys testifying in Mr. Cook's behalf." The Claimant's Representative, in this connection, quoted Rule 26, that at such investigation, Claimant "shall have the right to call witnesses to testify in his behalf." The Carrier does not deny the facts concerning witnesses alleged in the protests of Claimant and his Representative.

The Board is satisfied that the Claimant's right under the provisions of Rule 26 "to call witnesses to testify in his behalf" was not accorded in the circumstances of this case. Accordingly, without reaching the substantive merits in this case, it is clear that the views of the Brotherhood should prevail.

The evidence of record establishes that Claimant was reinstated by the Carrier on August 5, 1980 and that this necessitated a revision of the formal claim to a claim for all wage loss suffered by Claimant between the dates of January 22, 1980 and August 5, 1980, pursuant to the provisions of Rule 26 (c), reading, in part: "...If the employee has been suspended or dismissed from service and the charges are not sustained, such employee will be reinstated with his seniority rights unimpaired and be compensated for wage loss, if any, suffered by him resulting from said suspension or dismissal."

A W A R D

1. The Carrier is in violation of the Agreement.
2. In accordance with the above Findings, and as limited and defined in the above Findings, the claim is sustained
3. The Carrier shall compensate Claimant for wage loss, if any, suffered by him between the dates of January 22, 1980 and August 5, 1980. The Carrier is entitled to deduct any earnings or compensation received by Claimant representing back wages lost during the period from discharge to reinstatement.
4. The Board retains jurisdiction to determine any dispute that may arise out of the interpretation or application of this Award.

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JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

S. E. Fleming
S. E. FLEMING, EMPLOYE MEMBER

B. J. Mason
B. J. MASON, CARRIER MEMBER

DATED: 10-19-81