

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 3689

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

AWARD NO. 3

Case No. 3

STATEMENT OF CLAIM

1. That the dismissal of Sectionman D.R. Beaudette for alleged "violation of General Rule B and General Regulations 700 and 701 of Form 7908" was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File 5-19-12-14-55/013-210-B).

2. That the claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

Claimant was injured on duty and was taken to an industrial medical clinic for examination and treatment.

As a result of his alleged actions while at the clinic, he was subject to an investigative hearing on the following charge:

Your responsibility in connection with incident when you were allegedly boisterous, using profane and vulgar language at approximately 10:30 to 11:30 AM, Thursday, September 23, 1982 at the Industrial Medical Group of Las Vegas while they were attempting to secure x-rays, indicating a possible violation of General Rule B and General Regulation 700 and 701 of Form 7908, "Rules Governing Duties and Department of Employees, Safety Instructions and Use of Radio," effective October 1, 1974 which reads as follows:

GENERAL RULE B: "Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation."

GENERAL REGULATION 700: "Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

GENERAL REGULATION 701: "Courteous, orderly conduct is required of all employees. Boisterous, profane, or vulgar language is forbidden."

The sole evidence against the Claimant came in the form of three written statements from a doctor and two nurses at the clinic. These statements were as follows:

Dennis Beaudette used foul language in front of me, nurses and other patients while being helped at this clinic. In the treatment room he refused to get on the table and said, "I'm not getting on that God damn table, I've had this f - - - - - pain for 3½ hours. Son-of-a-bitch, I can't bend my back." I advised patient to calm down and that he was in a clinic and was disturbing the other patients. I assured him that we were here to help him and would refer him to a specialist since his symptoms were so intense.

R. D. Reynolds, M.D.

I took patient, Dennis Beaudette, back to x-ray, asked if he injured himself at work this morning, patient said, "Where the f - - - do you think I did it." Then I asked him to get up on the x-ray table to take the x-rays and he said he didn't want to lie on the f - - - - - hard table, wouldn't I shoot the pictures on the wall.

Sandie Crawford

I asked Dennis to lay on his stomach on the therapy table and he said he wasn't going to lay on that f - - - - - table and to get that God damn doctor back in here.

Mary Ann Flanders

Although apparently requested by the Carrier to attend the hearing, the doctor and two nurses declined to appear. Thus, the "evidence" is encompassed entirely in the written statements, without further explanation.

The Carrier asserts that the incident may have caused a loss of good will for the railroad and possible loss of future services of the clinic.

In his testimony, the Claimant denied that he had used the words quoted in the three statements "other than me saying 'hell' or 'damn', grunting and groaning, because I was in pain, it had been three hours since I hurt my back". The Claimant also testified that he later telephoned the clinic office manager and said, "I apologize if I was out of line, but as far as I know, I did not use any vulgarity or any dirty language . . .".

Following the hearing, the hearing officer advised the Claimant that he was dismissed on a finding of being "boisterous, using profane and vulgar language while you were being X-rayed; indicating a violation of General Rule B and General Regulations 799 and 791".

The Organization raises two fundamental objections to the proceedings, both deserving serious consideration by the Board. The first is the use of written statements without the opportunity to cross-examine the individuals who made the statements. The second is the conduct of the hearing officer.

Many previous awards have discussed the propriety or impropriety of the reliance on written statements without

the presence of the individuals in investigative hearings. Neither the Carrier nor the Organization was in a position to compel the presence of the clinic personnel. The Claimant, in his testimony, denied using the offensive language. Given all these circumstances, the Board is not prepared to ignore the statements completely. There is no suggestion that the clinic personnel would be motivated to attempt to implicate the Claimant on a false basis. Nevertheless, some caution must be exercised in accepting the statements word for word. This is especially true on the basis of the Claimant's denial.

This gives special importance to the unacceptable conduct of the hearing officer. He was required to conduct a "fair and impartial hearing" and not to act as a prosecutor. It is clear that he took upon himself the latter role. As an example, this is shown in the following exchange between the hearing officer and the Claimant:

Q. Why would the Medical Clinic go to the effort to give us a call regarding this incident and follow it up with written statements signed by three individuals, basically, with the same language. Why do you think that they would go to that trouble to advise us of this if it did not happen?

A. Well, if they were here I could ask them that. I'd like to know why. I did call them on the phone. I talked to the Office Manager. And I said I apologize if I was out of line, but as far as I know, I did not use any vulgarity or any dirty language and she told me. . . I said are you going to prosecute me or what and she said she just wanted to notify the railroad and that was as far as it was going to go. I did tell her to apologize to the people if they were offended. But I don't feel that I said what that says that I said.

Q. They wouldn't have, surely, put it down if you hadn't said it?

A. Well, if they were here, I would like to ask them. But they're not here.

Q. You've had an opportunity to talk to them on the phone, haven't you?

A. They wouldn't talk to me on the phone. All I talked to was the Office Manager.

Q. I wonder why. (Emphasis added)

The emphasized portions of the hearing officer's statements clearly show that he had a closed mind as to any doubt of the veracity of the statements, despite the Claimant's denial.

This becomes doubly significant when it is considered that the hearing officer himself issued the notice of dismissal. It is reasonable to conclude that the hearing officer had predetermined guilt and the severity of punishment.

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Even taking the "evidence" as literal truth, there is no showing that the penalty of dismissal was warranted. The quoted statements do not show that the Claimant was "boisterous", especially given his painful condition. Further, the words were in the context of his answers to the clinic personnel. Even if the language was offensive, it was not the same as characterizing the personnel he was addressing, such as would be the case if he had been accused of saying, "You f- - - - - etc. etc.".

The Carrier was properly concerned about the conduct of one of its employees in a surrounding which might affect the Carrier's future relationship with the clinic. Nevertheless, the combination of the reliance solely on hearsay, the conduct of the hearing officer, and the painful condition of the Claimant must necessarily lead to a sustaining award. However, back pay may be mitigated by the Carrier to the degree it can demonstrate that the employee's temporary disability from the injury may have precluded him from working for an appropriate period following his dismissal.

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A W A R D

Claim sustained, as provided in the Findings.  
The Carrier is directed to put this award into effect  
within 30 days of the date of this award.



HERBERT L. MARX, JR., Neutral Member



C.F. FOOSE, Employee Member

E.R. MYERS, Carrier Member

*Dissenting*

New York, N. Y.

DATED: 4-12-85