

PUBLIC LAW BOARD NO. 4104

Case No. 15/Award No. 15

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
vs.
Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. The dismissal of Grinder Operator A.A. Joudeh for alleged violation of 'Rule 701, 701B, 702B of the Maintenance of Way Department and Rules 5, 564 and General Rule M of the Burlington Northern Safety Rules' was arbitrary, without just and sufficient cause and on the basis of unproven charges (System File 1 Gr MWA 83-2-8A).

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

OPINION OF BOARD: Claimant was regularly employed by Carrier as a Grinder Operator. On July 28, 1982, Claimant was assigned to "grind thermite welds" at Mile Post 23.84 near Lisle, Illinois. That afternoon Welding Supervisor Briggs and Claimant were involved in a disagreement. According to Carrier, Claimant used vulgar language at Supervisor T.L. Briggs, and that Claimant had ultimately struck Mr. T.L. Briggs on the arm with his gloves.

Later that day, Claimant received notice of investigation to be held on August 5, 1982. The investigative hearing was then held, subsequent to which, Claimant was discharged.

On September 23, 1982, the Organization filed the instant claim alleging that Claimant was improperly discharged. Carrier timely denied this allegation. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

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Carrier submits that Claimant was properly dismissed. Carrier asserts that the Hearing Officer made a finding of guilt after review of the credible evidence. As such, this Board can not overturn this credibility finding, in Carrier's view. Additionally, Carrier suggests that the discharge was an appropriate response to such severe charges as insubordination, and striking a superior. Accordingly, Carrier asks that the claim be denied.

The Organization, on the other hand, argues that the discharge was improper. It contends that Carrier has failed to meet its burden of proof as to the charges against Claimant. The Organization urges that there is no evidence that Claimant struck Mr. T.L. Briggs except for the testimony of Briggs himself. It further asserts that the credibility of Briggs was questionable in that his testimony as to other matters was contradicted and implausible.

The Organization further maintains that even if Claimant was properly found guilty of the charges, the punishment was unduly harsh. It notes that this is the first offense against Claimant in almost ten years of service. Accordingly, the Organization asks that the claim be sustained.

After careful review of the record evidence, this Board concludes that the claim must be sustained in part and denied in part. This is true for several reasons.

It is clear that Claimant used profane language directed at Briggs. While the testimony of Mr. R.A. Swarrington and Mr. R.D. Brawner casts some doubt on the manner in which the profanity was intended, it does not contradict that the profane utterances were in fact made. Further, while the sole witness to the alleged hitting of Briggs was Briggs himself, this fact alone does not constitute a lack of proof.

Thus, the credibility determination of the Hearing Officer is controlling, absent extraordinary circumstances. (See, Third Division, Award Nos 13129, 13674, 14391). Those circumstances do not exist here. Therefore, the Hearing Officer's credibility determination should not be overturned.

The totality of the circumstances, however, reveal that the discharge of Claimant was unduly harsh. First, Claimant has almost ten years of unblemished service for Carrier. Second, the testimony indicated that Claimant's excited state may have been exaggerated by Briggs' reference to him as "boy". While this does not excuse Claimant's behavior, it does render it more understandable. Finally, Claimant was found to have slapped Briggs' arm with his glove. There was no evidence that Claimant was intending to punch Briggs, or cause physical injury. In light of these factors, Claimant's discipline should be limited to time out of service as a disciplinary suspension. Clearly, however, Claimant is not entitled to back pay.

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Accordingly, and for the foregoing reasons, the claim is sustained to the extent indicated in the Opinion.

FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

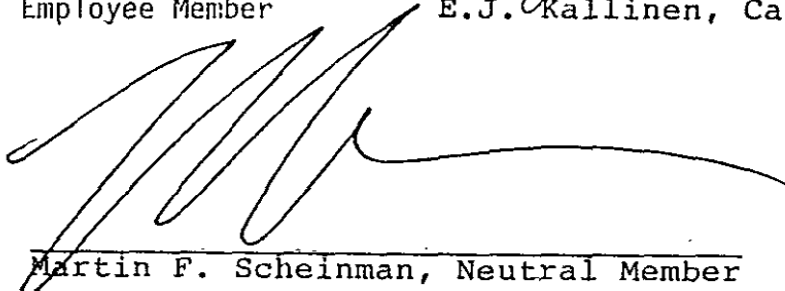
That the Agreement was violated in part.

AWARD:

Claim sustained to the extent indicated in the Opinion.


P. S. Swanson, Employee Member


E.J. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member