

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 50

System Docket No. BMW-339D

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Edward L. Parish was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Edward L. Parish shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule 15 of the Scheduled Agreement.

FINDINGS

This dispute and those reviewed in contemporaneous Award Nos. 51 and 52 concern the same incident, involving three Claimants, identified hereinafter as Claimant A (the subject of this Award); Claimant B (the subject of Award No. 51); and Claimant C (the subject of Award No. 52). Claimants A and B are brothers and with, Claimant C, were members of a Maintenance of Way work gang assigned

to Michigan City, Indiana, to which the gang was driven by van each day and then returned by van to the gang's headquarters.

On October 21, 1998, the van left the Michigan City compound at the end of the work shift, approximately 3:30 p.m. Between 10 and 20 minutes later, the van driver was advised by radio that Claimant C had been left behind. The van then returned to the Michigan City compound to pick up Claimant C.

As a result of events which occurred thereafter, Claimant A was subject to an investigative hearing under the following Specification:

It is alleged that on Wednesday, October 21, 1998, at approximately 3:40 p.m., while on Amtrak property, you participated in a physical altercation as a result of an argument involving co-workers [Claimants B and C]. The altercation resulted in a personal injury to [Claimant C].

By agreement of all concerned, a joint investigative hearing was held for Claimants A and B. Following the hearing, Claimants A and B were dismissed from service.

The following summary of events is drawn from the hearing record:

Claimant A was seated in the front passenger seat next to the driver. Claimant B was in the back of the van. When Claimant C was picked up, he complained about being left behind. He was criticized by Claimants A and B and possibly others for the delay he had caused for not being at the departure point on time. Claimant C sat in the middle of the van. There followed an exchange of rough language.

This escalated rapidly, with Claimant B slapping Claimant C on the back of the head. These two Claimants then engaged in a physical encounter, with Claimant C being gouged in the eye (with resulting injury, requiring treatment). At this point, while still in or near the compound, the driver stopped the van.

The three Claimants got out of the vehicle, and the physical encounter continued between Claimants B and C. This led to Claimant B throwing a rock or other hard object at Claimant C, which hit its target; Claimant C responded by picking up the rock and throwing it and hitting Claimant B.

During this encounter, Claimant A had picked up a lag spike. Whether this was for defensive purposes or otherwise cannot be determined with certainty.

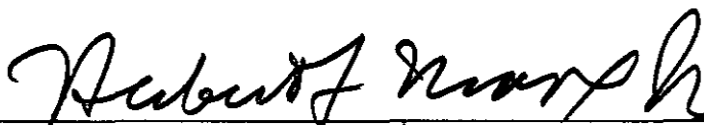
Awards 51 and 52 concern the discipline assessed to Claimants B and C. As to Claimant A, whose dismissal is here under review, it is clear that he engaged in abusive verbal exchange with Claimant C. There is testimony from the Claimants, as well as from other employees who were in the van, that threats of "killing" were made, probably by all three Claimants.

The charge against Claimant A was that he engaged in a "physical altercation"; this is not fully supported by the record. Claimant A, however, cannot be found innocent of any improper conduct. He clearly was involved in the harsh, provocative and threatening verbal exchange. He did not, as did the other employees, fully remove himself from the physical altercation between Claimants B and C.

Claimant A's conduct cannot be condoned, particularly because there is sufficient evidence that he had some share of responsibility in the initiation of the entire incident. While substantial disciplinary action is appropriate, dismissal is unduly harsh. Claimant A has more than 26 years' service with the Carrier, and his record is free of disciplinary action other than one incident occurring 19 years before the current incident. The Board concludes that the discipline imposed on Claimant A must be modified. Claimant A shall be offered reinstatement with seniority unimpaired, but without back pay or retroactive benefits. The period from his being placed out of service until the date of offer of reinstatement shall be placed on his record as a disciplinary suspension.

A W A R D

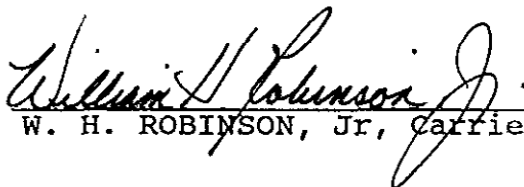
Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 8/10/99