

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25042

Docket No. 44791

99 1 98-1-U-2061

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE • (

(Union Pacific Transportation Company (former CNW)

STATEMENT OF CLAIM:

“Claim in behalf of Switch Foreman R.E. McKinney, SS# 319-38-2326, Union Pacific Railroad former Chicago and North Western Transportation Company, for reinstatement to service, vacation and seniority rights unimpaired, compensation for all lost time including time spent at the investigation, that this incident be removed from claimant’s personal record and he be removed from the Union Pacific Discipline System when he was investigated on the following charge:

“allegedly engaging in an altercation with Hump Conductor Pat McGovern at approximately 12:10 A.M., on October 24, 1997, in the vicinity of the first floor of the hump tower while working as foreman on YPR36-23.”

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time of the incident that gave rise to this case (October 24, 1997), Claimant R. E. McKinney was working in yard service in the Hump Yard office at Proviso, Illinois. The record reveals that Claimant entered the bullpen area where he encountered Conductor McGovern. A verbal confrontation between McKinney and McGovern took place. Conductor McGovern stated that he was struck in the back of the head by McKinney. When this happened, McGovern got up out of his seat and said to McKinney, "I'm not going to fight you here, Mac, lets go upstairs and talk to the general." (The general referred to in this comment was the Yardmaster on duty. In this instance, it was Mr. P. Betts.)

McGovern proceeded up the stairs to the tower, where the Yardmaster in charge was located. The Claimant followed close behind. At some point while the two men were ascending the stairs, Mr. McGovern slipped and fell. He claims that Mr. McKinney bumped into him from behind, causing him to fall. When the two men reached the General's office, the verbal assault of McKinney on McGovern apparently continued. Mr. Betts, the Yardmaster in charge, recounts the incident as follows: "Pat and McKinney came up to the upstairs office and were talking about what was going on down stairs. McKinney stated to me he was going to take Pat out. I asked McKinney to please sit down and we will discuss the issue. He told me to get 'fucked' and left. he left the job without authorization from any Company official." As a result of this incident, Claimant was charged as follows:

Please report to office of DTO, Northlake, IL, on Tuesday, October 28, 1997 at 9:00 A.M. for Investigation and hearing in connection with your responsibility, if any for:

"allegedly engaging in an altercation with Hump Conductor Pat McGovern at approximately 12:10 A.M., on October 24, 1997, in the vicinity of the first floor of the hump tower while working as foreman on YPR36-23.

In addition, your alleged act of insubordination to Supervisor of Yard Operations, Paul Betts at approximately 12:30 A.M., on October 24, 1997 on the top floor of the hump tower, wherein you refused to comply with his instructions and absented yourself from your assignment without proper authority.

This investigation and hearing will be conducted in conformity with applicable rule and or agreement between the Company and your Union. You are entitled to representation per the applicable Schedule Agreement rule and may produce such witnesses as you desire at your own expense.

The proposed discipline is a Level 5 which is Dismissal.

Any discussions regarding this investigation including any requests for postponement from your Representative or the employee, must be made personally to M. A. Farrell, DTO, Northlake, IL (708 649 5112)"

A hearing into the matter was held on November 12, 1997. A transcript of that Investigation has been made a part of the record. As a result of that hearing, Claimant was found guilty as charged and assessed a Level 5 discipline under Carrier's UPGRADE discipline Policy. Level 5 calls for permanent dismissal from service.

This Board has reviewed the record of this case and has concluded that all procedural arguments presented by both sides are insignificant in relation to the merits of this case and will have no bearing on its outcome. The Board has also concluded that a penalty less than dismissal is appropriate in this instance.

This Board has reviewed the transcript and especially the testimony of each individual concerning the confrontation between Claimant and McGovern. The Board finds no probative evidence in the record to support the proposition that Claimant hit McGovern in the back of the head or that he purposely pushed McGovern down when the two men were going up the stairs to the tower. In order to support Carrier's charges on this point, some corroboration is required. It is not apparent in this record and Carrier has not carried its burden of proof. When Claimant and McGovern arrived in the tower and Mr. Betts got involved in the controversy, Claimant's behavior becomes an issue. This Board is persuaded by the testimony of Mr. Betts that Claimant was insubordinate and, by Claimant's own testimony, he left the property without permission.

Claimant was angry at McGovern and apparently at Betts because he thought Betts sided with McGovern, not with him. Because of this, he angrily left the office and the property. That action violated a number of Company rules for which discipline is appropriate. Given all of the facts of this case, however, dismissal is a more severe

penalty than is justified. Carrier can make its point with a reduction in the penalty of dismissal to a time served Suspension and an admonishment to Claimant that he is required to follow all rules and regulations and maintain a proper demeanor when on Company property. Any further outbursts or displays of anger on the job could result in his permanent dismissal from service. Claimant is to be returned to work with seniority, but without pay for lost time or benefits.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division**

Dated at Chicago, Illinois, this 27th day of July 1999.