Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7028
Docket No. 6933
2-PC-SMW-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association A.F.L. - C.I.O.
(Penn Central Transportation Company, Debtor

Dispute: Claim of Employes:

Claimant, Sheet Metal Worker (Pipefitter) Gregory Loizos should not have been disciplined.

The claimant's record should be cleared and claimant should be compensated for any days lost as a result of discipline imposed.

The exact charge is -

"Violation of Safety Rule 4012 - Personal conduct must be free from scuffling, practical jokes or horseplay while on duty or on Company property."

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The general nature of the instant claim and the relief demanded are set forth in the Statement of Claim. The basic facts here involved are that on June 14, 1974, Claimant and Foreman Di Edigio engaged in an altercation, as a result of which blows were struck and Claimant assertedly received bruises requiring medical treatment on the same day. This incident occurred in the employe's locker room shortly after the close of Claimant's tour of duty. Each of the participants contended the other was the aggressor.

As a result, formal hearing was held on June 25, 1974, at which Claimant was charged as follows:

> "Violation of Safety Rule 4012 - Personal conduct must be free from scuffling, practical jokes or horseplay while on duty or on company property."

Claimant was found guilty as charged and was assessed discipline of 30 days suspension. Concurrently, similar proceedings were initiated against Di Edigio based on the same charge, and he too was found guilty and assessed precisely the same discipline. In point of fact, no actual discipline (time off) has as yet been imposed, the findings having been entered only "as a record of discipline".

Both participants testified at the hearing and, although it was admitted that oral disagreement had occurred, each one accused the other of unprovoked assault. Additionally, Claimant testified that a coemploye, Dougherty, was present and "broke it up". However, when called to testify, Dougherty denied this was so and stated that there was no "basis to this statement". Further, in reply to whether he heard "anything at all" in reference to this incident, he testified "No, only ordinary noises such as people getting washed."

We are faced, therefore, with a situation in which the testimony of Claimant and Di Edigio are contradictory, each accusing the other of unprovoked assault and of having struck the first blow. The only witnesses to the incident are the participants themselves, the witness cited by Claimant having refused to corroborate his version of what occurred. Additionally, as is evidenced by the record testimony, various of the contentions of both Claimant and Di Edigio are not credible.

In these circumstances, and in similar factual situations, we have held repeatedly that Carrier is justified in finding both participants guilty of violation as charged, meriting the assessment of proper discipline. The applicable principles are stated succinctly in 2nd Division Award 6604 (Yagoda), as follows:

> "Carrier introduces generally consistent evidence concerning the incident on July 10, 1972, during which Claimant admits to having struck Foreman Rose. <u>The only witnesses to the incident are the participants themselves, and their testimonies conflict as to the important questions of provocation and self-defense</u>. ***
>
> The standard of proof in a hearing to determine the validity of a discharge requires Carrier to show substantial evidence in support of its action. 'Substantial evidence means relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consol. Ed. Comp. v. Labor Board, 305 U.S. 197, 229. The testimony at the

"hearing was sufficient to meet this test, and Awards from every Division of this Board do not permit us to substantiate our judgement for that of the Carrier where there is substantial evidence of the offense committed (Award No. 6281, Second Division McGovern, 1972). It is for the trier of facts to determine the credibility of witnesses, and the conflicts in the testimonies of Claimant and Foreman Rose have been resolved by the hearing officer in favor of Carrier. Mere resolution of these conflicts in favor of Carrier is not sufficient grounds to sustain Employes' claim and thereby reverse the hearing officer's decision." Emphasis added)

See also 1st Division Awards 14690 (Coffey), 14863 (Robertson); 2nd Division Awards 5211 (Johnson), 6084 (McGovern), 6195 (Quinn), 6489 (Bergman); 3rd Division Awards 16281 (Perelson), 17492 (Rambo), 19696 (Rubinstein); and 4th Division Awards 978 (Ferguson) and 2903 (Weston).

In Award 10791 (Ray-3rd Div.), the facts were almost identical with those in the case before us. Claimant and a coemploye (Douglas) had "an exchange of words", following which Claimant allegedly struck Douglas with a piece of pipe and seriously injured him. The following language is particularly apropos here:

"There were no other witnesses to the altercation and the statements of the Claimant and Douglas as to what transpired immediately prior to the time Claimant struck Douglas are in conflict. The Organization takes the position that Carrier chose to accept the wrong version of the incident, believing Douglas instead of Claimant.

This raises the question of weighing evidence and passing upon the credibility of the witnesses, a function reserved to the Hearing Officer who heard the testimony and observed the demeanor of the witnesses. In a long line of cases this Board has held that it will not substitute its judgment for that of the Hearing Officer upon the weight of the evidence. This principle was well expressed by Referee Carter in Award 3149 as follows: 'We are committed to the rule that it is not a proper function of this Board to weigh the evidence and if the evidence is such, that if believed, it supports the findings of the Carrier, it will not be disturbed.' Other excellent statements are found in Awards 2633 (Shake); 3127 (Youngdahl) and 5861 (Jasper).

"Applying this principle to the present case a careful reading of the record satisfies the Board that there is sufficient evidence, if believed, to support the findings of the Carrier that the Claimant was at fault. . . ."

Moreover, we have held in innumerable prior Awards that if Claimant was afforded a fair and impartial hearing, and the record indicates substantial evidence to sustain a finding of infraction of the Rules, and the penalty imposed is neither arbitrary, capricious nor an abuse of discretion, we will not reverse the determination by Carrier. This is precisely the case here.

See Award 6240 (Shapiro), citing Awards 1323, 3092, 2087, 2769, 3874, 4000, 4001, 4098, 4132, 4195, 4199 and 4693.

Accordingly, based on the record evidence and controlling authority, we will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March, 1976.