

A M E N D E D

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9323
Docket No. 9296
2-BN-EW-'82

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
{ Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Shop Electrician R. Minefee of the Clyde Diesel Shop was unjustly dismissed from service of the Carrier following an investigation held on dates of May 21 and concluding on June 4, 1980.
2. That further in violation, the Carrier is procedurally defective by failing to give the Claimant a copy of the Investigation transcript.
3. That accordingly, the Carrier be ordered to make the aforementioned Richard Minefee whole by restoring him to Carrier's service plus compensating him for all wages lost while withheld from service beginning on date of July 2, 1980, in the amount of eight (8) hours at the pro-rata rate for each day unjustly withheld and in addition, restoration of or compensation for all rights, benefits or privileges of which he may have been deprived and for removal of the entry of investigation and/or censure from his personal record.

Findings:

The Second 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 waived right of appearance at hearing thereon.

On April 29, 1980, Claimant, an electrician in Carrier's Clyde Diesel Shop at Cicero, Illinois, was working on the 8:00 a.m. to 4:00 p.m. shift. An incident occurred sometime after 2:00 p.m. on that date which resulted in the Carrier issuing, on May 2, 1980, a Notice to Appear for Investigation for insubordination, disorderly conduct, and failure to comply with instructions by his foreman. The investigation was twice postponed, recessed once and was concluded on June 4, 1980. As a result of the investigation, the Carrier dismissed Claimant on July 2, 1980.

The record in the instant case discloses that on April 29, 1980, the day of the disputed incident, sometime after 2:00 p.m., the Claimant was approached by his foreman in the basement of the roundhouse and was asked whether he had completed his assignment of checking out the traction motors on BN Locomotive 6255. It is undisputed that when Claimant responded that he had completed some of the traction motors but could not recall which ones, he was told by his foreman to get into the pit and complete his assignment. According to the Claimant, he reacted to this instruction by informing the foreman that the pit was filled with water and it was impossible to finish working the traction motors at that time. Claimant argues that the foreman went to look into the pit, returned and informed Claimant that the pit was dry enough to work in and that the foreman expected the motors to be done by 4:00 p.m. Claimant denies any insubordination, disorderly conduct or that he failed to comply with any instructions during this incident.

The record indicates that the Carrier foreman and general foreman testified that Claimant reacted to his foreman's instruction to get into the pit and complete his assignment by grabbing the foreman by the arm and attempting to pull him over to the pit and then, when the foreman pulled away and repeated the instruction to complete the work assignment, by following the foreman out of the pit area and poking the foreman in the chest with his finger while at the same time verbally abusing the foreman and threatening him with physical harm.

The Organization, on behalf of Claimant, contends 1) that Claimant was not afforded a fair and impartial investigation due to the failure of the Carrier to instruct an eyewitness to the alleged confrontation, requested by the Organization, to appear and testify; 2) that the present claim must prevail not only on the merits, but also since Carrier failed to comply with Rule 35(e)'s requirement that the employee be furnished a copy of the transcript of the investigation within 30 days; 3) that the foreman's instruction to Claimant was patently unreasonable because of unsafe working conditions and therefore Claimant had no obligation to obey; and 4) with respect to the merits, Carrier's action in dismissing Claimant was arbitrary, capricious, unjust and not supported by substantial evidence.

With respect to the procedural objections, this Board finds that they are without merit. As to the first point, the alleged failure to comply with Rule 35(a) by not instructing the witness to appear, Rule 35(c) states that the Claimant is to provide "for the presence of necessary witnesses he may desire". It is undisputed that the potential witness involved was a witness for the Claimant. The provision of necessary witnesses under Rule 35(c) is the responsibility of the employee and not the Carrier under the Rule. (See P.L.B. 1286, Award 15 (Zumas) and Third Division Awards 16261, 16121, 16032, 20557, 20867 and 20984.) This hearing was postponed at least twice and recessed at least once specifically to arrange for the alleged witness to be present; in addition, both the Organization and the Carrier called the witness numerous times over the 30-day period attempting to arrange for and persuade the witness to be present. Furthermore, the hearing officer offered to take a written statement. Accordingly, the lack of appearance of any requested witness was not based on any failure to release or notify by either the Organization or the Carrier and no party is required to instruct or compel a witness to attend.

As to the other procedural objections, the Board finds that there is nothing of substance in the record to warrant a finding of a prejudicial procedural defect. The affording of two copies of the transcript to the Organization did not prejudice Claimant's appeal and is not grounds for overturning the Carrier's disposition. (Note P.L.B. No. 1694, Award No. 3.)

With respect to the merits, Claimant's safety contentions are an affirmative defense and, as such, the burden of proof was on Claimant and the Organization. (See Second Division Awards 8390, 7973.) In the present case, the necessary proof is lacking unless the Board overturns the credibility determinations of the hearing officer, accepts the Claimant's version of the disputed factual circumstances and rejects the Carrier's version. Prior Awards often note the fact that the Board is neither authorized nor constituted to make such credibility determinations, since issues of credibility must be determined by those who received the evidence and testimony. On this record, we have no basis for substituting our judgment for that of the hearing officer and the safety defense claim must be denied. Third Division Award 22721 (Sickles). (See also Second Division Awards 8280, 7912, 7955, 8201 and 7973.)

In reviewing the entire record in this dispute, it is apparent there is also an issue of credibility concerning the insubordination and disorderly conduct. Numerous prior awards of this Board show that our function is as an appellate body, with a limited scope of review. The Board is restricted to searching the record for substantial evidence and we cannot resolve conflicts in testimony. (See Second Division Award 7325 (McBrearty).)

Here, a second witness (the general foreman) testified he observed Claimant violently gesturing and threateningly touching his foreman. Thus, the hearing officer could legitimately conclude that the foreman's version of the events, corroborated by a second witness, was closer to the truth than the Claimant's self-serving denials. On the merits, then, the Board is satisfied that there was substantial and substantive evidence of probative value that Claimant was insubordinate and engaged in disorderly behavior. Second Division Award No. 8566 (LaRocco).

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of December, 1982.