

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employees:

1. That Carrier suspended Machinist Apprentice Joe D. Nevarez (hereinafter referred to as Claimant) from service on April 1, 1981, and subsequently dismissed Claimant on April 22, 1981, as a result of investigation held on April 10, 1981.
2. That Carrier be ordered to compensate Claimant for all lost wages incurred from April 1, 1981, to date of restoration to Carrier service and with all rights and fringe benefits restored in full.

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 employes 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.

Machinist Apprentice Joe D. Nevarez, the Claimant, was removed from the Carrier's service effective April 22, 1981, for the following:

"... insubordination, failure to follow instructions given to you by Supervisor P. M. Schakel at approximately 10:45 a.m., April 1, 1981, violation of Rules 7, 14, 15 and second paragraph of Rules 16 and 17, Form 2626 Standard, 'General Rules for the Guidance of Employes,' 1978 edition."

The incident in question involved the Claimant and Foreman P. M. Schakel. Both testified to what transpired. The Foreman asserted that on April 1, 1981, he observed the Claimant in the engine build-up area. It is uncontroverted that this is not the Claimant's assigned working area. It also appears that the Claimant was passing through on his return from the restroom. By his own admission, the Claimant stated he was in the area in question and had stopped to ask a fellow employe for a ride home. The Foreman testified he told the Claimant to leave the area, and he states the Claimant replied, "F--- you Paul." The Foreman said he questioned that statement, and the Claimant replied, "You heard me, I said F--- you Paul." The Foreman then asked the Claimant where he worked, and then he testified the Claimant responded, "F--- you, I'm not telling you."

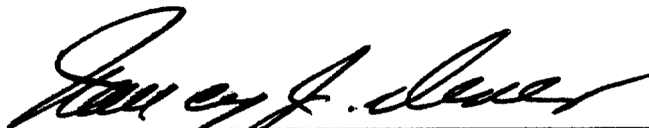
Despite acknowledging his presence in the engine build-up area, the Claimant denied speaking to the Foreman or saying anything. The Organization argues the Carrier did not meet its burden of proof and, in fact, went back to an old disciplinary action involving the Claimant to justify its actions. As has happened in many previous cases involving conflicting testimony, this Board is asked to rule in favor of the Claimant. To do so, requires us to make a credibility determination. This issue, however, is reserved for the Hearing Officer barring a showing that the record is devoid of any reasonable basis for such a conclusion. This is not our view of this matter, having benefit of a thorough review of the transcript. To accept the Claimant's version of the incident would require rejection of the Foreman's testimony. Herein, we find no basis or motive for the Foreman to testify untruthfully. The finder of facts, not this Board, has the opportunity to hear and observe the demeanor of both witnesses. Upholding the Carrier's credibility determination, there is substantial record to support a finding of guilt. When this finding is weighed against the penalty imposed along with the Claimant's prior record, we find no reason to disturb the discipline.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of March, 1984.