

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

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers
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(Seaboard System Railroad

Dispute: Claim of Employees:

1. That under the current agreement Machinist R. J. Haddox was improperly suspended from service thirty (30) calendar days, as a result of an investigation conducted December 18, 1981, relative to the charge of insubordination.
2. That accordingly the Carrier be ordered to reimburse Machinist R. J. Haddox for all time lost, and that all references to the alleged insubordination be stricken from his 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 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.

Claimant R. J. Haddox was charged on October 13, 1981 with insubordination "...in that you refused to relinquish to Terminal Trainmaster C. E. Becker smoking materials suspected to be marijuana about 3:30 A.M., October 19, 1981, Radnor, Tennessee." After a formal investigation on December 18, 1981, Claimant was assessed a thirty (30) day actual suspension from the service of the Carrier on January 28, 1982.

The Organization initially maintains that the Carrier's delay between the investigation and the date on which the discipline was announced was excessive, unacceptable and without explanation. There is no rule support or other basis for the Organization's position in this respect. There is no showing that the time between the investigation and Carrier's discipline was in any way prejudicial to the Claimant.

The fact that the actual transcript of the proceedings is replete with misspellings, deletions and borders on the unintelligible is not a sufficient ground for this Board to find that the investigation is unfair. Careful examination of the record provides this Board with sufficient opportunity to review the evidence, although with some difficulty. The transcript is not so inadequate as to prohibit the Organization from effectuating a proper appeal of Claimant's case.

The Organization argues that based on the testimony of independent witnesses for Claimant, the fact that no medical drug check was performed, and the fact that Claimant continued to work the balance of his shift compels us to find that the Carrier failed to meet its burden of proof. The charge against Claimant was for insubordination and not for possession of drugs, or for being under the influence of drugs while on duty or subject to duty.

The evidence of record demonstrates that the trainmaster had walked over to the car inspector's office due to engine difficulties on a train which necessitated replacement of one of the locomotives. The trainmaster saw the Claimant smoking what appeared to be a cigarette. As the trainmaster proceeded to enter the passenger's shed, he smelled an unusual odor similar to burning leaves, which he suspected to be marijuana. The trainmaster approached the Claimant and asked to see what it was that Claimant was smoking. Claimant denied that he was smoking anything at all, although the trainmaster observed a lighted cigarette in the cupped palm of Claimant's hand. The trainmaster testified that despite five (5) requests by him to examine the item, the Claimant refused, rolled the alleged cigarette in his palm and scattered its contents over the adjacent track. Despite efforts to recover the suspected substance including a consensual search of Claimant by one of Carrier's special agents, no evidence of marijuana was uncovered.

The Organization presented two witnesses who testified that Claimant was not smoking a cigarette or insubordinate when he was approached by the trainmaster. One carman testified that he was smoking and standing approximately fifteen (15) feet away from the Claimant when the latter was approached by the trainmaster. The carman denied hearing the start of the conversation, and acknowledged that the trainmaster could have asked the Claimant more than once what was in the latter's hand before he was close enough to hear any of the conversation. The carman testified that from his standpoint the Claimant was not insubordinate. The Organization's second witness was a hostler who testified that he saw the trainmaster search the track area by flashlight around where the Claimant was standing. However, this witness did not hear any of the conversation between the charging officer and Claimant.

This Board is unable to find, based on the facts before us, that the determination by the hearing officer of the credibility and weight of the witnesses' conflicting testimony was insufficient to sustain the charge of insubordination. One witness for the Claimant appeared after the alleged insubordination had already occurred. The other witness was only close enough to the conversing parties to hear a portion of what was said between them.

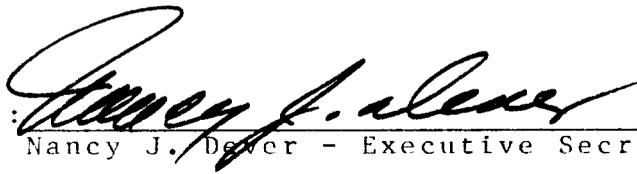
The record before this Board does not make the decision to sustain the assessed discipline in this appeal a facile one. As stated in Second Division Awards 10367, 10379, deference to the hearing officer's determination on the question of the credibility and weight of the witnesses' testimony should not be mechanically applied. A careful review of the record before this Board sustains a finding by the hearing officer of sufficient credible evidence in proof of the charge. In addition, the penalty assessed was neither arbitrary, unreasonable or capricious.

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 15th day of May, 1985.