

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13774

Docket No. 13605

03-2-01-2-7

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood Railway Carmen Division
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

- (1) The Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13.1 when they arbitrarily administered a five (5) day suspension to Kevin M. Dyer, as a result of an investigation held on April 14, 2000.**
- (2) That, accordingly, the Springfield Terminal Railway Company be ordered to remove the discipline from the file and record of Kevin M. Dyer. Additionally, to compensate him in the amount of eight (8) hours pay for each workday he was withheld from service commencing May 1, 2000, through and including May 5, 2000. The Carrier must also compensate the Claimant for any other lost time as provided in our collective agreement.”**

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 were given due notice of hearing thereon.

The instant claim, filed on May 3, 2000, alleges that the Carrier improperly assessed the Claimant the excessive penalty of a five-day suspension for "uncivil conduct" toward his supervisor as a result of an April 14, 2000 Investigation which the Organization asserts did not prove the charge that the Claimant used profanity or was engaged in non-railroad related work.

The Claimant, a Welder with one year of service, was notified to attend a Hearing on charges of being uncivil in his deportment and conduct on February 18, 2000 by telling his supervisor to "get the f* off my back" in response to a question about his doing non-railroad work on Company time. The transcript of the Investigation reveals that the Claimant was assigned to work outside repairing a boxcar on the morning in question, and came inside to the Freight Room around 10:00 A.M. to ask experienced welder Raymond Harding what kind of preparation work to do on a 502 latch on the boxcar door, because he was having problems with the cast iron catches cracking after they cooled. Harding testified that he pulled out two cast iron rods from the cabinet in his work area and told the Claimant to try them to see if they also cracked. Both Harding and the Claimant testified that while they were discussing and reading the instructions on the rods, they noticed Assistant Manager Michael Lozano standing behind the screen staring at them for between two and three minutes. Harding stated that he made a comment about why Lozano did not just come over to talk to them if he wanted to, and the Claimant stated that he felt he was being harassed, since Lozano constantly watched people and told them how to do their jobs when the workers were more experienced.**

Lozano approached the Claimant and Harding walked back to his welder to work, not overhearing the content of their conversation, but testifying that he heard no raised voices or profanity. Lozano testified that he asked the Claimant what was going on since he saw him holding a cast iron rod, which is not used in the railroad industry to his knowledge. Lozano stated that the Claimant said he was going to weld something on the car and Lozano asked him to show him where he was going to weld the cast iron rod. According to Lozano, the Claimant said in an ugly, raised and insulted voice "why don't you get the f* off my back." The Claimant did not recall Lozano's initial question to him, and testified that he told him to get off his**

back, but did not use profanity, as he is not stupid enough to curse at a supervisor. Lozano and the Claimant returned to their jobs. Lozano testified that he returned to the area about 10 or 15 minutes later to see the part the Claimant was going to weld, as he did not know what it was but believed it was not a boxcar part, asked Harding what he knew about it and was told that he did not know what was going on and did not hear any part of the conversation. Harding testified that he did not recall Lozano ever questioning him either at the time of the conversation or afterwards about what occurred.

Harding stated that cast iron is used on the railroad, and that he and the Claimant were discussing how to weld a cast iron door catch at the time Lozano approached. The record reflects that the Claimant approached Lozano later in the day about whether he was going to give him a Hearing, and was told he did not know and it could happen. The Claimant said that he approached Lozano because he felt he was being harassed. He testified that it was obvious what he was doing with a welding box in his hand talking to an experienced welder, and he did not understand why he was under scrutiny for it. The record is clear that there were no prior issues between Lozano and the Claimant, that this was their first confrontation, and that the Claimant's work record was free of any discipline. The record also establishes that the Claimant received a furlough notice earlier that week.

By letter dated April 28, 2000, the Carrier found the Claimant guilty of the charges and assessed him a five-day suspension. During the correspondence on the property, the Carrier made clear that it felt that Lozano's testimony was more credible than the Claimant's; the Organization provided a letter witnessed by 16 Carmen at the Waterville car shop on June 30, 2000, that Lozano used profanity toward a crew member in response to a question at a safety meeting that morning, in support of its argument that he was not credible.

The Carrier argues that such letter is not admissible as it was not provided during the disciplinary Hearing, and is outside the scope of review. It asserts that there is substantial evidence in the record to support the Hearing Officer's credibility resolution, which should not be disturbed by the Board, the charges against the Claimant, and the level of penalty assessed for such a serious violation which cannot be condoned by the Carrier. The Carrier contends that Lozano had no reason to fabricate what occurred and the Claimant has everything to gain by not being truthful about the language he used to his supervisor.

At the disciplinary Hearing and on the property, the Organization objected to the Carrier's use of co-hearing officers, an argument that is not being pursued before the Board. The Organization contends that there is no proof whatsoever that the Claimant was engaged in non-railroad work on Company time, the reason why Lozano watched and approached him, and part of the allegation in the charges against him. It asserts that Lozano's testimony about what he saw and heard is not only incredible, in the face of contradictory testimony by both the Claimant and Harding and evidence that he used profanity himself toward his employees, but is confusing as to what he understood was going on between Harding and the Claimant and the nature of parts used routinely on the railroad. The Organization argues that the Carrier failed to sustain its burden of proving the charges by facts, rather than opinion, and that the penalty imposed is excessive based upon what occurred and the Claimant's record, citing Second Division Award 13576.

A careful review of the record convinces the Board that the claim must be, at least partially, sustained. The Claimant was found guilty of being "uncivil in his deportment and conduct" by his response to Lozano's approach "about doing non-railroad related work on Company time." The Carrier credited Lozano's testimony that the Claimant used the word "f***" in admittedly responding to Lozano to "get off my back." Despite the letter proffered by the Organization during the claim processing about what occurred at the safety meeting on June 30, 2000, it is within the province of the Hearing Officer to make credibility resolutions, and he did not have the benefit of such evidence upon which to weigh Lozano's credibility at the time. This is a case where there are no witnesses who overheard the conversation between Lozano and the Claimant, so there is no basis upon which the Board can find the Hearing Officer's credibility determination to be arbitrary or insupportable on the record.

That being said, it is clear from reading the Investigation transcript that the Claimant and Harding were engaged in work-related activities at the time, Lozano stood and watched them from behind a curtain for a few minutes before approaching, which both found unusual, Harding commented upon and the Claimant found harassing, and Lozano only questioned the Claimant about what he was doing. The reason Lozano questioned the Claimant's activities at all was because he was sure that the Claimant was engaging non-railroad related work on Company property, as asserted in the charges. This fact is not supported by the evidence. That the Claimant's annoyance at being watched and questioned about

his work when he was doing nothing wrong resulted in his snappy reply to Lozano's inquiry is a conclusion that is inescapable from the record. Considering the context of the comment, the Claimant's positive working relationship with Lozano, his admission that he told Lozano to get off his back, the fact that the use of profanity in his response was not overheard by anyone at work, the absence of any prior discipline on his record, and the Carrier's failure to substantiate part of its charges, the Board finds that the penalty of a five-day suspension is excessive under the circumstances. We direct that a written warning be substituted in its place, and that the Claimant be made whole for the loss of wages, if any, he suffered as a result of the suspension.

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 Second Division

Dated at Chicago, Illinois, this 24th day of October 2003.