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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6463
Docket No. 6321
2-CRRofNJ-FO-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: { System Federation No. 72, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Firemen and Oilers)
 { The Central Railroad Company of New Jersey

Dispute: Claim of Employees:

1. That under the current agreement, Laborer David Anderson was unjustly treated and dismissed from service without good cause effective May 13, 1971.
2. That accordingly, the Carrier be ordered to reinstate Laborer David Anderson with his seniority and service rights unimpaired and compensate for all time lost, and made whole for all benefits provided for in the 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 waived right of appearance at hearing thereon.

Claimant was employed by this carrier for eleven years. The record does not show nor does the carrier claim any prior improper conduct or censure for any reason, in other words, a clean record.

On the day in question, claimant asked about a day's pay shortage. It is alleged that claimant became abusive and insubordinate while pressing his pay claim. He was taken out of service at that time and was dismissed after the hearing.

At the hearing, the carrier's hearing officer read into the record three written statements which had been prepared before the hearing. One statement was by the engine house foreman who was the individual alleged to have been abused orally by claimant. It was his order to leave the office which claimant did not immediately obey. A second statement was by an employee, not identified except that he was with the foreman at the time. A third statement was that of a male clerk in the office.

The three persons who made the statements were at the hearing. Each one was asked if his statement was correct after it was read into the record. Each one answered that his statement was correct. The claimant gave his version of the incident in oral testimony. It differed materially from the three statements and indicated that the foreman had first used abusive language to the claimant. The claimant was not questioned about his testimony. The three, whose statements were read into the record were not questioned as to their statements.

We are mindful of the many prior Awards which have established that this Board will not disturb a hearing officer's conclusion when it is based upon substantial evidence brought out at the hearing. Likewise this Board will not disturb a decision or penalty unless it is arbitrary or capricious. In addition, we will not attempt to resolve conflicting testimony brought out at the hearing.

We have reviewed each of the prior Awards brought to our attention by the carrier's representative to provide reason to deny this claim. They are Second Division Awards Nos. 1251, 1788, 4639, 5244, 6373, 5747, 5813, 6050, 6195, 4136, 6064, 5945, 4302, 1809, 3266 and 5541 and 3623. The last two were singled out by the carrier representative as having great weight in favor of the carrier.

None of these Awards are based upon a record which consists entirely of written statements prepared in advance, of witnesses present at the hearing, and read into the record by the hearing officer, in behalf of the carrier. All of them refer to testimony given by witnesses upon which the hearing officer could determine credibility of witnesses.

The only testimony given at the hearing was by the claimant. The foreman was asked by the hearing officer if he wished to say anything, after listening to claimant's testimony. The foreman did not deny the claimant's version which was much different from the three prepared statements which had been read into the record. He did not deny the claimant's testimony that the foreman had been abusive to him and the phrase used by the foreman to him to wit: "---and I told him I was still a day's short in pay, and he told me like a pig's ass I was." This statement was made to claimant when he telephoned the foreman at the engineer's shanty just before they met in the engine terminal, as testified by the claimant. Claimant also testified that five minutes later at the engine terminal and in the presence of the witnesses whose prepared statements were read into the record, claimant asked the foreman what he had told him on the phone. Claimant testified that the foreman answered: "---and he said he couldn't remember that far back." This was not denied by the foreman. It was not denied by the other two whose prepared statements were read into the record.

The carrier has argued that the claimant and his representative could have cross examined the men whose prepared statements were read into the record. It could also be argued that the claimant could have been cross examined but was not. More important, the failure of the three who had prepared their identical written statements in advance of the hearing, who were present at the hearing, did not testify orally to contradict or deny the claimant's version given in oral testimony at the hearing.

We are not going to decide the conflicting version of what took place. We fail to see, however, how the hearing officer could determine credibility of the witnesses under these circumstances. In addition, it is possible that the hearing officer could have prejudged the case if he relied on the written statements and disregarded claimant's testimony, and ignored the fact that the carrier's witnesses did not deny the claimant's testimony after they heard it.

We shall not comment upon the weight which might ordinarily be given to identical written statements prepared in advance by witnesses who are available to testify, and read into the record. The determination to be made in this case follows from the failure of the carrier's witnesses to testify, contradict or deny the claimant's testimony.

In this situation, there is no room to consider mitigating circumstances, to resolve the conflicting testimony or to comment upon the penalty. It is the conduct of the hearing which is at fault insofar as the presentation of evidence and testimony did not provide a basis for the decision reached by the hearing officer. It follows, therefore, that the decision must be considered to be arbitrary and we so find.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Kellen
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February, 1973.