Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9363
SECOND DIVISION Docket No. 9302
2-B&O-MA-'83

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That David E. Welch, Machinist Helper, Cumberland, Maryland, was held out of service by the Baltimore and Ohio Railroad Company on October 11, 1979, pending outcome of investigation held on October 23, 1979, and, as a result of the investigation, David E. Welch was unjustifiably dismissed from the service of the Baltimore and Ohio Railroad Company on November 5, 1979.

2. That, accordingly, the Baltimore and Ohio Railroad Company be ordered to reinstate Machinist Helper D. E. Welch to his former position, compensate him for all time lost from October 11, 1979, until restored to service with seniority unimpaired, made whole for all vacation rights, and payment for Health and Welfare and Death Benefits, under Travelers Insurance Policy GA-23000 and Railroad Employees' National Dental Plan GP-12000.

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 employe 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 as a Machinist Helper, and, at the time of the occurrence giving rise to this dispute, had been in the service of the Carrier about two years. Following an investigation conducted on October 23, 1979, Claimant was dismissed from the service of the Carrier on November 5, 1979. Claimant was charged with failure to wear proper eye protection on Wednesday, October 10, 1979 in violation of instructions and Company policy letter dated June 11, 1979, with insubordination toward an assistant superintendent of production of the Carrier, by use of vile and abusive language and with a refusal to obey direct instructions to wear the safety glasses. A copy of the transcript of the investigation has been made a part of the record.

The Carrier contends that substantial evidence was adduced at a fair and impartial investigation which conclusively proved that Claimant in fact failed to wear proper eye protection on Wednesday, October 10, 1979 and was insubordinate toward an assistant superintendent of production by both the use of vile and abusive language and by refusal to obey the supervisor's instructions to wear safety glasses, as charged. Additionally, the Carrier maintains that under all the facts and circumstances of this matter, including the prior disciplinary record of Claimant, dismissal was clearly justified.

It was contended by the Organization that sufficient evidence was not adduced to prove the charges; that the Carrier's sole witness to the occurrence charged was unsupported in his testimony by any other witness; that the complained-of conduct was within the generally accepted normal and routine behavior throughout the railroad industry and, therefore, the language allegedly used was not insubordinate; and that Claimant did in fact comply with the instructions of the supervisor to wear safety glasses, so that no insubordination whatsoever in fact occurred. It is further contended by the Organization that the discipline administered was wrong, arbitrary, capricious and excessive under these facts.

After careful consideration of the evidence on the record, the Board finds that the record contains substantial proof supporting the allegations that Claimant was insubordinate on the day in question. Two Carrier witnesses testified that each had encountered Claimant during the course of the occurrence when he was not wearing his safety glasses. Since the second supervisor met Claimant subsequent to the order by the initial supervisor for Claimant to put his safety glasses on, there was indeed probative evidence from which the hearing officer could legitimately conclude that the initial supervisor's version of the events was closer to the truth than the Claimant's self-serving denials. See Second Division Awards 7128, 7193, 7161, 7324 and Third Division Award 22638. Under the facts and circumstances, the refusal to continue wearing the safety glasses after the direct order to do so constituted insubordination. Second Division Award No. 7437.

With respect to whether Claimant in fact used vile and abusive language as an insubordinate act directed at the assistant superintendent of production and did not engage in meer shop talk, (Third Division Award No. 21299), it is apparent that there is an issue of credibility concerning the testimony of Claimant and the witnesses for the Carrier. The Organization contends that the credibility conflict results in no substantial evidence buttressing the finding of the hearing officer. 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 receive the evidence and testimony. On this record, we have no basis for substituting our judgment for that of the hearing officer. Third Division Award 22721 (Sickles). See also Second Division Awards 8280, 7912, 7955, 8201 and 7973. See especially Second Division Award 7325 (McBrearty).

As noted in Public Law Board No. 2566, Award No. 2 (Carter) it is stated:

> "It is the opinion of this Board that in railroad operations of any kind, safety is of primary importance. In order to properly carry out its operations, a Carrier must insist

that its employees faithfully and carefully execute the responsibilities which develop upon them.

Based on the record before it, there is no proper basis for this Board to interfere with the discipline imposed by the Carrier."

Likewise, under the circumstances of the instant matter, nothing in the record leads this Board to the conclusion that the discipline assessed was arbitrary, capricious, discriminatory or excessive. (Second Division Award 6489.) Therefore, the Board rules to uphold the findings and determinations made by the hearing officer from evidence adduced at the October 23, 1979 investigatory hearing.

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 26th day of January 1983.