

The Second Division consisted of the regular members and in addition Referee Edward M. Hogan when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
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(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation be ordered to restore Machinist A. M. Murphy to service and compensate him for all pay lost up to time of restoration to service at the prevailing machinist rate of pay.
2. That Machinist A. M. Murphy be compensated for all insurance benefits, vacation benefits, Holiday benefits and any other benefits that may have accrued and were lost during this period in accordance with Rule 7-A-1 (e) of the prevailing agreement effective May 1, 1979.

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 employees 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 withheld from service on September 9, 1980, pending a formal investigation scheduled for September 16, 1980. By letter dated October 6, 1980, Claimant was advised that he had been dismissed from the service of the Carrier.

The charges faced by the Claimant were insubordination, using abusive language to a supervisor, and threatening a supervisor, all occurring on September 9, 1980. The Organization contends that the action of the Carrier was arbitrary and capricious in that appropriate notices were not sent. The Organization further argues that the evidence as presented at the formal investigation did not support a finding of guilt with respect to the three charges faced the Claimant.

The Carrier avers that there is substantial credible evidence on the record to support the finding, that the formal investigation was fair and impartial, and that given the Claimant's past employment record, that the discipline imposed was fully warranted.

It is a longstanding practice and policy of this Division, and other Divisions of this Board, that we are not a trier of fact, and that absent arbitrary, capricious and discriminatory behavior or abuse of managerial discretion, we will not overturn the findings as adduced by the hearing officer. We agree with the contention of the Carrier that there exists on the record before us sufficient credible evidence in which to find as the hearing officer has determined. This Division in Award No. 1687 states:

"The efficient operation of the railroad industry requires that responsibility be fixed and the instructions of superiors be followed. While it is hoped that supervisors and subordinates maintain a mutual respect for each other, we know that this is not always the case. But the remedy by either is not to undertake to settle differences by force or threats of force. To countenance such conduct would bring about an intolerable situation. The Railway Labor Act and the collective agreement ... provide an orderly method to settle such disputes. The agreement should be adhered to in this type of dispute the same as any other."

We have consistently held that, if there is a disagreement as to the following of a particular order, the order should first be obeyed and subsequently grieved by the employee. This of course would not apply to an order which would require an employee to commit an illegal act or an order which is otherwise protected by various statutes. Our careful and thorough review of the record leads us to the conclusion that the Claimant should have obeyed the order, and if he continued to believe it to be improper, file a proper grievance later. (See Second Division Awards 4136, 1253, 1547, 2715, 3894, 2996, 3266 and 3894.)

In Second Division Award 4132, this Board found:

"The term 'insubordination' usually refers to an employee's refusal to submit to the authority of a duly authorized supervisor and to obey his instructions. However, 'insubordination' may also be demonstrated by profane or vile remarks addressed to a supervisor by an employee. The right of an employer to take appropriate disciplinary action against an employee who is found guilty of either type of insubordination is beyond doubt."

This Board has consistently held that where there is a conflict in the testimony of witnesses at the formal investigation, the hearing officer, as the trier of fact, makes the determination as to the credibility of evidence and testimony. This Board shall not overturn such findings, absent arbitrary,

capricious or discriminatory behavior or an abuse of managerial discretion. This Board is a reviewing body, not a trier of fact. We are not in the position of being present at the submission of testimony, whereby we could evaluate the written and oral submissions and demeanor of witnesses.


We also concur with the position of the Carrier that this Board has long held that it is the Carrier's discretion and judgment to withhold an Employee from service upon its determination that a major offense has been committed. Our examination of the record does not yield us to overturn the Carrier's determination on this point. Lastly, we find that the charges as presented to the Claimant sufficiently advised him of the matter which would be considered at the formal investigation. This Board has long held that a charge which reasonably apprises an Employee of the facts under investigation and provides him the opportunity to bear a defense is quite sufficient.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwer - Executive Secretary

Dated at Chicago, Illinois, this 9th day of May, 1984