

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

(Sheet Metal Workers' International Association
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

1. That the Carrier violated Rule 39 of the current Motive Power and Car Department Agreement.

2. That Claimant C. W. Simmons was arbitrarily and unjustly suspended from service by the Carrier on January 14, 1985.

3. That Claimant was arbitrarily and unjustly dismissed from service by the Carrier on March 19, 1985.

4. That claimant be restored to service with all seniority rights unimpaired.

5. That claimant be compensated by the Carrier for all time improperly held out of service as provided by Rule 39 of the current Motive Power and Car Department Agreement, in addition to interest at the annual rate of 10%.

6. That claimant be made whole for all vacation rights.

7. That claimant and/or his dependents be paid for all medical expenses incurred while claimant improperly held out of service.

8. That claimants estate be paid whatever benefits claimant has accrued with regards to life insurance for all time claimant improperly held from service.

9. That claimant be paid for all contractual holidays.

10. That claimant be paid for all contractual sick pay.

11. That claimant be paid for all jury duty and for all other contractual benefits.

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.

According to Carrier's Supervisor, on January 14, 1985, Claimant, a Sheet Metal Worker with approximately eight years of service, approached him and requested certain material. The Supervisor explained that the item sought was not stored in the location indicated by Claimant. He told Claimant to return with him to the Supervisor's office and they would find the correct part number for the material. A discussion ensued concerning whose responsibility that function was and culminated, according to the Supervisor (and specifically denied by Claimant), when Claimant "flexed his muscles, placed his nose against mine and said, 'Listen here you m.....f....., get out of my face or I'll knock you right on your a., right now.'" The Supervisor inquired if he was being threatened, to which Claimant responded, "Back off, you silly m.....f..... or I'll knock you on your a..." After the Supervisor informed the General Foreman of the event, the General Foreman removed Claimant from service pending hearing.

By letter dated January 14, 1984, the Carrier charged Claimant with insubordination and threatening the Supervisor with bodily harm. Hearing on the charge was set for January 21, 1985. The Organization asked for a postponement until February 14, 1985, which request was granted. After the Organization took the position at the February 14, 1985, hearing that the charge was not sufficiently precise, the Hearing Officer noted that the date of the charge contained a typographical error (1984 instead of 1985) and postponed the hearing until February 22, 1985. By letter dated February 14, 1985, the Carrier amended the charge to add the date of the alleged incident as January 14, 1985. Further hearings were held on February 22 and 26, 1985. By letter dated March 19, 1985, Claimant was dismissed from service.

Initially, the Organization raises a series of procedural objections, which, upon examination, we find to be without merit. First, the notice of hearing was sufficiently precise within the meaning of Rule 39. The notice, as ultimately amended, charged Claimant with insubordination and threatening a supervisor with bodily harm on January 14, 1985. Under the circumstances, we find such a notice to be sufficiently precise to adequately inform Claimant of the nature of the charges against him and to permit Claimant to prepare his defense. We find nothing in the record to demonstrate that Claimant was surprised by the allegations and evidence against him. See Third Division Award 26276. We note that aside from the fact that we have found the charge to be sufficiently precise, any element of asserted surprise on Claimant's behalf that allegedly precluded him from preparing a defense was negated by the fact that the Supervisor's testimony concerning the specific act was at the very

outset of the February 22, 1985, hearing. The hearing was recessed at the end of that date until February 26, 1985, thereby giving Claimant more than ample time to prepare a defense to the exact testimony used by the Carrier as the basis of the charge.

Second, the fact that the Hearing Officer was the General Foreman who theoretically may have been involved with discipline of Claimant in the past or could be so involved in the future, in and of itself, is an insufficient demonstration that he was not a "proper officer" to conduct the hearing within the meaning of Rule 39. No showing has been made of a past disciplinary action against Claimant by the Hearing Officer. Further, the record reveals that the Hearing Officer was on vacation at the time the incident between Claimant and the Supervisor occurred and the Hearing Officer had nothing to do with the instant charge prior to the hearing.

Third, the fact that the Hearing Officer interrogated the Supervisor and did not immediately permit the Organization to do so is an insufficient basis for finding that a fair hearing was not conducted within the meaning of Rule 39. Although the procedure utilized by the Hearing Officer was unusual, there is nothing in Rule 39 prohibiting that procedure. Since the Supervisor was recalled as a witness and the Organization and Claimant were permitted to extensively examine him, we cannot say that such a procedure was prejudicial.

Fourth, the fact that the Hearing Officer limited testimony to the specific events on January 14, 1985, was not in error under the circumstances of this case. The Organization and Claimant sought to introduce evidence and events unrelated to the charge at issue and in some instances that evidence concerned events that were several years old. Further, we note that the brief conversation which formed the basis of the charge resulted in three days of hearing consuming in excess of 95 pages of hearing transcript with numerous exhibits. We view the Hearing Officer's actions in this matter as a proper exercise of his authority to control the hearing. Nor do we view as error the fact that the Hearing Officer did not permit certain witnesses to testify or that he closed the hearing when there was no indication that other material evidence was going to be offered. The Organization and Claimant conceded that those witnesses could offer no material testimony concerning the charge at issue. Under the circumstances herein, we believe the Hearing Officer did not commit an abuse of his discretion in controlling the hearing in the manner protested by the Organization. We find this matter sufficiently different from those awards cited by the Organization upholding the right of a claimant to call witnesses to develop facts and theories since in this matter the subjects of testimony and evidence sought to be offered were known and were clearly not material to the issues raised by the charge.

Fifth, the fact that the Hearing Officer was talking to a Carrier witness about work related matters within the scope of their employment is also an insufficient basis in this case to require a sustaining award.

With respect to the merits of the Claim, we find substantial evidence in the record to justify the Carrier's actions. The Supervisor testified that he was threatened by Claimant and that testimony was credited over Claimant's denials. It is well established that this Board cannot make a contrary credibility finding solely because a credibility conflict existed and a version favorable to one party was not credited. See Second Division Awards 10840, 10394. We find nothing in this record or in the arguments made by the Organization to show that such an adverse credibility determination to Claimant was arbitrary or capricious. Finally, the fact that Claimant was suspended from service on the date of the incident pending hearing was not in error. Rule 39 permits such an action by the Carrier "in proper cases" and we view a threat of the nature involved herein and the potential hazard imposed as falling within the scope of that phrase. See Third Division Award 22034.

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 22nd day of February 1989.