

The Second Division consisted of the regular members and in addition Referee Robert O. Harris when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers
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(Richmond, Fredericksburg and Potomac Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current agreement, Firemen & Oilers Donald A. Coles was unjustly assessed a 10-day suspension beginning February 9, 1989, and February 16, 17, 18, 19, 20, 23, 24, 25, 26 and 27, 1989.

2. That accordingly the Carrier be ordered to make the aforementioned D.A. Coles whole by removing discipline from his record and compensating the Claimant for all time lost and any other benefit that he may have lost during his suspension that is a condition of employment during the time he was withheld from service.

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 employes 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.

On February 2, 1989, Claimant was employed as a Laborer in the Locomotive Section of the Mechanical Department at Carrier's Bryan Park Terminal in Richmond, Virginia, working the 3:00 P.M. to 11:00 P.M. shift. His duties were to clean and supply diesel locomotives and to perform other laborer duties as assigned by supervision.

His Foreman had been involved with the clearing up of a derailment until approximately 9:00 P.M. and he had left a Machinist, who was working as Gang Foreman, in charge while he was out of the shop building. When the Foreman came back into the building at approximately 9:10 P.M., he heard the Gang Foreman attempting to call the Claimant on his radio. After hearing the

Gang Foreman's unsuccessful attempts to reach the Claimant on his radio, the Foreman attempted to call the Claimant on his radio and when he also got no response, he began to look for him in the shop building.

The Foreman looked throughout the shop, went into the lunchroom, downstairs to the locker room and into the bathroom area. He testified that when he went through the locker room, he noticed a guitar case lying on a bench and when he turned and went back into the shower room area he found the Claimant sitting in that area playing his guitar.

The Claimant testified that he was in the lunchroom on his break, which he had delayed for 15 minutes so he could finish the job he was on at the time. He denied being in the shower room. He also denied personally having been told that he was not to bring a guitar to work although he admitted that at safety meetings there had been statements to the effect that no one was to bring radios or musical instruments to work.

It is the position of the Carrier that there is substantial evidence to support the charge that the Claimant had neglected his duties, when he was found in the employees' shower room away from his assigned work station playing a guitar during on-duty hours.

The Claimant admitted at the February 15, 1989 Investigation that he had been instructed not to go into the shower room or locker room area during working hours.

It is the position of the Carrier that the Claimant knew that he should not be in the shower room or locker room area, that he knew that he should not be playing his guitar during on-duty hours, and that when caught by his Foreman, rather than admitting his responsibility, he falsified testimony at the Investigation in an attempt to avoid discipline.

Further, the Carrier submits that it did not commit error when it did not accept as factual the statement from another Laborer which was submitted by the Organization. The Carrier notes that it is significant that this statement was signed by the Laborer on February 14, 1989, the date prior to the disciplinary Investigation. In the notice of charges, the Claimant was advised to arrange to have present any witnesses that he desired to give testimony on his behalf. The other Laborer did not appear at the Hearing on behalf of the Claimant.

It is the Organization's position that the Claimant was denied a fair Hearing because the Carrier chose to credit the testimony of its official against that of the Claimant and the other Laborer and because there was insufficient evidence to support the charges as alleged.

To uphold the penalty assessed, the Carrier must prove that the Claimant (1) was found in the employees shower room; (2) was away from his assigned work area; (3) was playing a guitar; and (4) that these events occurred during on-duty hours.

While there is a conflict in testimony as to whether the Claimant was in the shower room and playing his guitar, the Claimant did admit that he had the guitar in the locker room on the day in question. He also admitted that there had been announcements at the safety meetings that musical instruments should not be brought to work. While he said that he was not certain that the general rule applied to him, there is nothing in the record to show why it did not. However, the Foreman's testimony that he had previously told the Claimant personally that he should not bring musical instruments to work cannot be credited on the basis of his own testimony. What he said was:

"Mr. Coles had his guitar there at that time and the electrician we had that night was sitting there picking at it. I asked him if it was his guitar, and he say no it was not. If that's your guitar, you know you're not suppose to have it on company property. Don't bring it into this building here anymore."

Nothing in that statement indicates that he was talking to the Claimant rather than the Electrician, or that the Claimant heard the words in question.

Furthermore, the Claimant contended that he was on break at the time the Foreman saw him in the lunchroom.

The undisputed testimony of the Gang Foreman was that individual employees were allowed to delay their break in order to finish a particular assignment. It is also undisputed that the Claimant was finishing an assignment at the regularly scheduled break time. Accordingly, when the Foreman saw the Claimant, he was on break and entitled to be in the lunchroom.

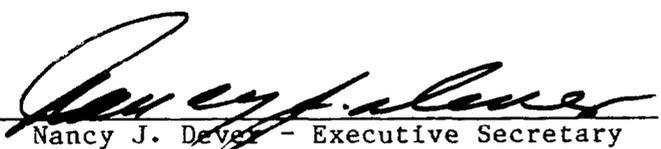
Under the circumstances set forth, the imposition of a ten-day suspension is not supported by the evidence. The Carrier has only proven that the Claimant had a guitar at work against a general prohibition. The suspension will be reduced to three days and the Claimant made whole for all additional time lost as a result of the imposition of a greater penalty by the Carrier.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1992.