

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12857
Docket No. 12735
95-2-93-2-93

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers, AFL-CIO, System Council No. 2
(
(Union Pacific Railroad Company
((Texas & Pacific)

STATEMENT OF CLAIM:

- "1. That the Union Pacific Railroad Company (Texas & Pacific) violated the controlling agreement, particularly Rules 23 and 24, when they unjustly and arbitrarily withheld Electrician R. D. Walter from service beginning April 10, 1992, following investigation held on April 27, 1992, and was assessed a sixty (60) day suspension from Carrier's service May 7, 1992.
2. Accordingly, the Union Pacific Railroad Company (Texas & Pacific) be ordered to compensate Electrician Walter as follows:
 - (a) Compensate him for all wages lost, at the prevailing rate of pay of electricians and all applicable overtime;
 - (b) Make him whole for all vacation rights;
 - (c) Make whole for all health and welfare and insurance benefits;
 - (d) Make him whole for all pension benefits including Railroad Retirement and Unemployment Insurance;
 - (e) Make him whole for any and all other benefits that he would have earned during the time withheld from service;

- (f) Any record of this arbitrarily and unjust disciplinary action be expunged from his personal record."

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 received Notice to attend a formal Investigation to determine his responsibility, if any, for violation of several Rules pertaining to Claimant's alleged failure to report the possession of a firearm by a fellow employee. Following an Investigation held on April 27, 1992, the Claimant was found guilty as charged and assessed a 60 day suspension.

The Organization alleges that the Carrier violated the Agreement in not providing the Claimant a fair and impartial Investigation. The Organization alleges that the Carrier failed to respond to a pre-Investigation discovery request. During the Investigation the conducting officer did not seek the full development of facts, but limited testimony, coached a Carrier witness and restricted the introduction of information. On the facts, the Organization holds that the Carrier lacks the necessary proof to discipline the Claimant. It maintains that the Carrier's sole witness did not confirm the charges against the Claimant. The Organization takes issue with any testimony confirming the Carrier's allegations.

The Carrier denies any procedural violation of the Agreement, and holds strongly to its position on both procedure and merits. On procedure, the Carrier finds that the conducting officer fulfilled all his responsibilities to provide a full, complete and fair Investigation. On merits, the Carrier supports the testimony of the Special Agent who witnessed the event which constituted the basis for the charges against the Claimant. The Special Agent's testimony was clear and in the Carrier's view sufficient to sustain its burden.

The Board has considered the procedural issues raised by the Organization. We find no Agreement support in any Rule cited by the Organization that would be violated by Carrier's failure to turn over, prior to the Investigation, all documents and materials in the Carrier's possession. A review of the Investigation finds it to have provided the Claimant with his Agreement rights.

On merits, this case turns on the testimony of the sole witness presented by the Carrier. The Board has very seriously searched the record for all relevant testimony and documents in reaching its decision. The Special Agent issued an incident report that stated an employee was observed while on duty carrying a .38 caliber stainless steel snubnose revolver. She observed it and testified that the gun was also seen by the Claimant, among others. Her statement indicates that the Claimant requested that she look at what the employee had under his jacket. Following her observation, the employee stated he brought it to work by mistake. She reported that the Claimant and other employees laughed about the incident.

A review of the testimony indicates that her position is strengthened. She testified that the Claimant asked her to see what was in the employee's hand under his jacket. The Special Agent testified that she was sure that the Claimant witnessed the event in that the Claimant was the one who approached her and "was standing next to me." She testified that it was a clear day, she was certain of what she saw and what occurred. An examination of her testimony indicates she had no doubt that she saw the weapon. She testified that the Claimant "was standing right beside me" and estimated the distance away as "a foot, maybe, if that far away."

Against that testimony, the Claimant was unsure as to what occurred and did not remember much, but he was sure that he did not see a gun. His testimony is best summed up by his statement that:

"I recall an incident where she walked up and (the employee) had told me to tell (her) to come talk to him because he had something he wanted to tell her or show her or whatever..."

While it is true that the incident occurred while the Special Agent worked undercover on January 16, 1992, and the Investigation was conducted in April, 1992, the testimony, supra, is the basis for the Carrier's action. There were no other witnesses who testified and no evidence of record of any ill feelings or problems between the Claimant and Special Agent.

This Board does not resolve issues of credibility in its appellate role. Our role is to determine if substantial probative evidence exists for a conclusion of guilt. Nowhere in the record of testimony and cross examination was the Special Agent's statements shown to have been based on presumption, rather than fact; shown to have been motivated by extraneous factors; shown to have been exaggerated, mistaken, or manufactured. We find the testimony adequate to support the Carrier's conclusion of guilt.

Having found the Claimant guilty of violating various Rules of the Agreement, the issue left to be resolved is the quantum of discipline. This Board has so often ruled that discipline should be based upon the Claimant's record, seriousness of the offence and as a corrective that we need not list Awards. Here, the Claimant is a twenty-seven year employee who has never before been in an Investigation. We find no record of prior discipline. There is no showing that the Claimant's behavior or the incident at bar demonstrates horseplay, recklessness, threat of violence or violence. In these instant facts, there is no evidence of record that the Claimant was anything other than tangentially involved in another employee's error in bringing a "gun to work by mistake in his lunch bag." While we certainly understand the Carrier's view of said behavior by the Claimant as most serious, we consider the discipline as excessive given a full analysis of the case at bar and Claimant's past record, if any. The Claimant's discipline is modified to a thirty calendar day suspension. Claimant is to be paid for time out of service beyond the thirty days, less deductions for outside earnings. All other parts of the Claim inconsistent with Rule 24(b) are denied.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 24th day of February 1995.