

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 13075
Docket No. 12893
96-2-94-2-36

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(System Council No. 16, International
(Brotherhood of Electrical Workers
PARTIES TO DISPUTE: (
(Soo Line Railroad Company)

STATEMENT OF CLAIM:"DISPUTE: CLAIM OF EMPLOYEES:

1. That Assistant Communication Maintainer D. E. Stoa was unjustly suspended for a period of five (5) days in violation of Rule 12 of the current Agreement, by Soo Line/C P Rail Systems prior to an investigation field on October 23, 1992,
2. That the investigation held on October 23, 1992 was not fair and impartial as required by the rules of the controlling Agreement and that the previously assessed discipline was unjust and unwarranted.
3. That accordingly the Soo Line/C P Rail Systems should be directed to compensate Mr. Stoa for all lost wages, rights, benefits, and privileges which were denied him and for the removal of entries of discipline and investigation 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 were given due notice of hearing thereon.

On October 7, 1992, Claimant, an Assistant Communications Maintainer at Carrier's Communications Control Center in Minneapolis, received notice of a five day suspension for smoking in the control room in violation of known policy. In response to his request for a Hearing, an Investigation was conducted on October 23, 1992. On November 2, 1992, Claimant was notified that the suspension was being upheld as the Investigation revealed that he had violated the No Smoking policy during his midnight shift on October 5, 1992.

The Organization argues that Claimant was denied a fair and impartial Hearing as required by the rules, when the Carrier failed to confront him about his actions on October 5 and relied upon a written statement allegedly made by the trainee working with him without presenting that employee for questioning by the Organization at the Hearing. The Organization contends that the Carrier failed to sustain its burden of proof by relying upon assumptions and hearsay evidence to support the charge.

The Carrier makes a procedural argument about the failure to hold a conference in this case, and contends that the Board cannot resolve conflicts in testimony, and should not disturb the Hearing Officer's findings since they are neither arbitrary nor unreasonable.

The Board finds that there is no merit to the Carrier's procedural objection to proceeding with the merits of the case. A careful review of the Investigation reveals that supervisor Byers' conclusion that Claimant was smoking in the control room during his October 5, 1992 shift was based upon his assertion that he smelled smoke upon entering the control room at 7:00 a.m., the trainee's written statement that both he and Claimant had been smoking there, and Claimant's alleged admission to Byers. The Board concludes that the Hearing Officer could not have properly given any weight to the written statement of the trainee, since he was not called to give testimony at the Investigation and the Organization was prevented from questioning him, and the Organization submitted another statement from the trainee explaining the circumstances surrounding his giving the first statement and contradicting any contention that he or the Claimant were smoking in the control room on October 5, 1992.

Byers admitted that he did not see anyone smoking in the control room on October 5, 1992, nor did he question Claimant as to whether he had been smoking there on that date. The Investigation makes clear that Byers knew that Claimant was a smoker, and that Claimant admitted to Byers that he had been smoking during his shift on October 5, 1992, when questioned the following day.

The only discrepancy in the testimony is Byers' contention that Claimant admitted smoking in the control room, and Claimant's testimony that he had been smoking in the designated smoking lounge on the 12th floor and that Byers never asked him where he had been smoking. There is no dispute that Claimant refused to sign a statement for Byers on October 6, 1992, indicating that he had been smoking in the control room the prior day. Neither is it disputed that Claimant was aware of Carrier's No Smoking policy at the time, which prohibits smoking in the control room, among other places, and designates the 12th floor of the building as a smoking area.

While long established precedent reveals that this Board cannot set itself up as trier of fact when confronted with conflicting testimony and may not resolve credibility disputes, (Second Division Awards 7542, 8280, 8566), it also recognizes that it is the responsibility of the Carrier to adduce substantial evidence in support of any discipline imposed, (Third Division Awards 25411, 11626). Under the circumstances of this case, we are unable to conclude that Byers' contention that Claimant admitted smoking in the control room constituted substantial evidence of proof of the violation. This is especially true in light of Claimant's knowledge of the Rule, his prior discussions and warnings on its application, Byer's failure to question Claimant about his smoking on October 5, 1992, Claimant's explanation that Byers knew he was a smoker and that he admitted smoking during his shift on October 5, 1992, but was never asked at what location he did so, and Claimant's refusal to sign a written statement indicating he had smoked in the control room when requested to do so on October 6, 1992. The Board is not convinced that the Carrier has met its burden of proof in this case, and, accordingly, the claim will be sustained.

AWARD

Claim sustained.

ORDER

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 9th day of December 1996.