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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13222

Docket No. 13143

98-2-96-2-44

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

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Dispute - Claim of Employee

(1.) The Soo Line Railroad Company violated the controlling agreement, specifically Rule 31 when it improperly and unjustly suspended from service Machinist J. F. Danielsen, Shoreham Shops, Minneapolis, Minnesota.

(2.) Accordingly, the Soo Line Railroad Company pay Machinist Danielsen for all time lost and restore all other rights and privileges due to his unjust and improper suspension 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 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.

By letter dated January 23, 1995, Claimant, a Machinist at Carrier's Shoreham Shops and the Organization's Local Chairman, was instructed to attend an Investigation on charges of insubordinate attitude, threatening behavior and use of profane and vulgar language on January 18, 1995. As a result of an Investigation held on March 2, 1995, Claimant was found guilty of charges of insubordinate attitude and use of profanity against a Shop Supervisor and assessed a 60 day suspension. This claim protests such discipline.

The transcript of the Investigation reveals that the basis for the discipline assessed against Claimant was a discussion which occurred around 10:45 a.m. on January 18, 1995 between Claimant in his capacity as Union representative and his Supervisor, Arlon Tesch in Tesch's office. The record makes clear that Boilermaker Gary Lemke was present during the relevant parts of the exchange in issue. Lemke, Tesch and Claimant all testified that the discussion involved Claimant and employees' concerns with Carrier's new policy that Supervisors would have a master key for all employee lockers. It appears that there was lingering hostility as a result of a strike that occurred the prior summer, and an atmosphere of distrust between those who worked during the strike and Union representatives. Claimant expressed to Tesch his fear that the master key could get into the wrong hands and be used to set him and others up for discipline, as well as threats at the time when internal Union charges were being processed against those who worked during the strike.

Tesch testified, and submitted a written statement, to the effect that during this discussion, Claimant jumped up and started screaming about "f— s—" and accused Tesch of being a "f— s— of a b—" and scab. Tesch testified that Claimant charged toward the end of his desk with his fist clenched like he was going to hit him, but pulled his fist back, did not hit or harm him and complied with Tesch's request that he leave his office. Tesch stated that he felt threatened, intimidated under Carrier's Harassment Policy, and thought that Claimant was insubordinate under Safety Rule 0. Tesch admitted that everyone raises his voice when trying to get his point across and that while the words used by Claimant were profane and vulgar, there is profanity used daily at the work place and that he himself has used it on occasion.

Claimant testified that he did raise his voice to make a point, used profanity, got up and pointed his finger, but made no movement toward Tesch's desk nor clenched his fist in any threatening manner. He recalled moving toward the door to leave when he got up from his chair. Claimant denied ever threatening Tesch and indicated that Tesch did not react like he was intimidated and just sat there and did not respond. Claimant stated that the profane language he used was normal shop talk, and nothing worse than used by others on a daily basis. He explained the cause for his anxiety about the accessibility of lockers, indicating that just previously he and other Union representatives had been threatened by some of the employees who worked during the strike with false accusations in an effort to get him fired, and that Carrier had reneged on its agreement not to place such false charges in writing in his file. Claimant apologized for any misunderstanding and made clear that he did not intend to be discourteous to Tesch in any fashion. Claimant testified that he had never been formally disciplined in his 18 years of service.

Lemke testified that he heard Claimant raise his voice to make a point, but disagreed that he was screaming. He noted that it was not unusual for people to do that at work. Lemke recalled Claimant using the terms "f— s—" and "f— c—", and indicated that these words were used daily around the shop, especially since the strike. He admitted to having used such terms and having heard Tesch use similar profane phrases. Lemke testified that Claimant did not make any threatening gestures or refuse to comply with any instructions, and stated that Claimant did not lunge forward toward Tesch's desk or make a fist, but rather got out of his chair and went toward the door to leave. He explained that his written statement indicating that Claimant was "out of control" only referred to his heated verbal comments which took only a brief moment in the conversation prior to his leaving.

The Organization attempted to introduce evidence and ask questions concerning other instances of allegations of profanity and threats made against other employees in the past and the resultant discipline in an effort to support its argument that Claimant was being discriminated against as a result of his Union position in violation of Rule 32. The co-Hearing Officers refused to let the Organization pursue that inquiry, although it did include the documentation in subsequent correspondence on the property.

Carrier argues that there is sufficient evidence in Tesch's testimony to support its charges of threatening behavior, profanity and insubordinate attitude. It contends

that this type of conduct is very serious and is more than acceptable "shop talk" and argues that a message must be sent to employees through appropriate discipline that it will not be sanctioned, relying upon Second Division Awards 7643, 8149, 10750; Third Division Awards 29227, 22026, 22114, 22826, 24381. Carrier states that Claimant is not insulated from receipt of discipline due to his position with the Union, citing Fourth Division Award 4951; Third Division Award 31931. Carrier argues that a fair Hearing was conducted and that the discipline imposed was not arbitrary considering Claimant's prior record which showed that he had been spoken to in the past.

The Organization argues that Claimant was not provided with a fair and impartial Hearing on the basis of the fact that two company Hearing Officers were used and they disallowed pertinent testimony and evidence in the record, citing Second Division Awards 9079, 8898. The Organization further contends that Carrier failed to sustain its charges since the weight of the evidence does not support any finding that threatening or harassing conduct took place, or that the interchange involved other than acceptable shop talk and a proper attempt by a Claimant to represent employee interests in a forceful manner. The Organization avers that the evidence establishes that the penalty imposed against Claimant was excessive, was not supported by the facts or his prior record, and was discriminatory with respect to treatment of other employees for similar allegations.

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 Carrier met its burden of presenting substantial evidence to prove that Claimant exhibited an insubordinate attitude or threatened or harassed his Supervisor during the conversation of January 18, 1995. Tesch clearly testified that these allegations were based upon Claimant charging toward him with a clenched fist. The neutral testimony of Lemke supports Claimant's denial of doing so. It is interesting to note that in issuing the suspension to Claimant on March 23, 1995, Carrier's representative did not make a finding that Claimant engaged in any threatening or harassing conduct, but merely relied upon his insubordinate attitude and the use of profanity and vulgar language to support the penalty imposed.

The Board is of the opinion that the record does support a finding that Claimant used profane and vulgar language during his conversation with Tesch on January 18, 1995. He admitted to doing so. However, we are unable to conclude that Carrier sustained its burden of proving that such comments were more than common shop talk which had been accepted by Carrier without the need for disciplinary measures in the past. Carrier has failed to show that it consistently enforced either Safety Rule 0 or its Harassment Policy against the use of similar profanity in the work place.

In finding that the record does not support the charge of threatening or harassing conduct or insubordinate attitude, this Board is mindful of the context of the conversation at issue in this case. This was clearly a discussion between a Union representative and a Supervisor concerning a disagreement about a new management policy. While not excusing inappropriate behavior, in representing the interests of its members, a Union official must be permitted some latitude in making his point and disagreeing with management. The fact that Claimant raised his voice to make his point, and used harsh and vulgar language to describe the reasons for his concerns does not rise to the level of insubordinate behavior under the circumstances of this case. This is especially true where it is common for employees and Supervisors to raise their voices to make their points, and a daily occurrence in this work place for employees and Supervisors to use profanity, even outside the context of a protected discussion challenging a new Carrier policy.

Under the specific circumstances of this case, the Board is unable to conclude that Carrier sustained its burden of proving that Claimant exhibited an insubordinate attitude, engaged in threatening behavior, or otherwise acted in a manner deserving the harsh and excessive penalty imposed upon him. Even absent proof that Claimant was treated disparately due to his position with the Organization, we find no basis in either the January 18, 1995 conversation or Claimant's prior record to uphold the 60 day suspension herein. Thus, we find it unnecessary to address the Organization's contention that Claimant was denied a fair Hearing due to the exclusion of evidence from the record. Accordingly, the claim is sustained.

AWARD

Claim sustained.

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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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of February 1998.