

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13314
Docket No. 13168
98-2-96-2-73

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

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

- "1. That the Duluth, Missabe, and Iron Range Railway Company violated the terms of Rule 28 and in particular paragraph (a), when they unjustly suspended Carman R.A. Kari from service effective March 17, 1995 at 1:50 p.m.**

- 2. That accordingly; the Duluth, Missabe, and Iron Range Company be ordered to compensate Carman, R.A. Kari eight (8) hours pay at the regular rate of pay commencing March 17, 1995 and continuing through June 14, 1995 including all overtime pay. We also include the following:**
 - a.) Made whole for all vacation rights;**

 - b.) Made whole for all health, welfare and insurance benefits;**

 - c.) Made whole for pension benefits including railroad retirement and unemployment insurance;**

 - d.) Made whole for any other benefits he would have earned during the time he was out of service;**

 - e.) All correspondence and record of the investigation be removed from his personal record and file."**

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 March 17, 1995, Claimant, a Lead Carman at Carrier's Proctor, Minnesota, Car Shops, was instructed to attend an Investigation on charges of insubordination, failure to comply with his Supervisor's instructions, and entering into an altercation on that date. He was removed from service at that time. As a result of an Investigation held on March 23, 1995, Claimant was found guilty of violating Rules 12, 14 and 15 and assessed a 90 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 took place between Claimant and Assistant Supervisor Scott Carlson commencing around 10:00 A.M. on the morning of March 17, 1995. Aside from the testimony of Carlson and the Claimant, four other witnesses gave evidence at the Hearing.

Carlson testified that at approximately 10:25 A.M. on March 17, 1995 while he was speaking with Assistant Foreman Ward in the Storehouse, Claimant approached him to discuss the rotation of Leadmen which had recently been the topic of conversation among the Leadmen. According to Carlson, Claimant stated that he wanted to work outside, and Carlson reminded him that the Leadmen decided that they would not be involved in the rotation. Claimant replied "bullshit" and stated that he would find a way to get out there. Carlson stated that the rotation pertained to inside tracks only and testified that Claimant left the storehouse saying "you're full of . . . shit."

Carlson testified that Ward was present for part of the conversation, but not at the end and he attempted to find him to see what he had heard. He then went into the shop to find Claimant and approached him while he was talking to the Wheel Gang. In the presence of Hannan, Goerts and Fontaine, Carlson told Claimant to report to his work area, and Claimant replied that he should not talk to him since he is "so full of shit." According to Carlson, Claimant walked a distance from the Wheel Gang, lifted his left leg, patted his buttocks and said "kiss my ass" twice. Carlson directed Claimant to accompany him to the Manager's Office and Claimant refused, indicating that he was going to work. Carlson testified that Claimant refused this order a second and third time after being warned he was being insubordinate. Carlson referred the matter to Manager Payne, and Claimant was removed from service at approximately 1:50 P.M.

Claimant's version at to what occurred is quite different. He testified that he had gone into the storeroom to get materials, saw Carlson, and approached him about when they were going to start the Leadmen job rotation. Claimant recalled Carlson replying that there was not going to be any rotation, and instructing him to go back to work. Claimant stated that he did not want to talk about it further at that time. Claimant denied making the statements attributable to him by Carlson or using profanity toward him, and testified that he was not agitated, but Carlson appeared to be.

Claimant testified that he was on his way back to his work area when Carlson stopped him at the Wheel Gang. Claimant said he was going back to his own work area (Track 3) and Carlson told him to do so. According to Claimant, Carlson brought up the subject about changing jobs again and Claimant stated that he did not want to talk about it and walked away from him. While Claimant does deny using profanity or stating "kiss my ass," he does not deny making a gesture toward his buttocks which he indicated was directed at the Wheel Gang. Claimant explained that he refused to accompany Carlson to the Manager's Office without a Union representative, because a few years prior when Carlson had been working with Claimant and had been in a similarly agitated state he had punched Claimant in the mouth. Claimant testified that he has a heart condition, and attempted to walk away from Carlson who was agitated for fear of becoming unduly excited.

The three Wheel Gang employees, Hannan, Goerts and Fontaine, testified that they disagreed with Carlson's account of the events. None heard any profanity from Claimant, with the exception of Goerts who indicated that Claimant did say "kiss my ass." All agreed that Claimant asked Carlson to leave him alone, indicated that he did

not wish to discuss the subject, and walked away toward his work area. All also testified that Carlson followed Claimant and continued the discussion thereafter. Claimant and the Wheel Gang agreed that profanity was common shop talk and that the same type of gesture had been made between them in the past.

Ward testified that he was finished with his business with Carlson prior to Claimant's discussion, and that he did not recall Claimant approaching them in the Storehouse. Ward stated that he did not recall hearing Claimant using any profanity or abusive language toward Carlson, although he did overhear part of their disagreement about the location of Claimant's job assignment.

The record also contains written statements from three other employees concerning previous intimidating behavior by Carlson toward them and other employees. It is undisputed that Claimant is a 22 1/2 year employee with no prior disciplinary record.

Carrier argues that there is sufficient evidence in Carlson's testimony to support its charges of insubordination, entering into an altercation, and failing to comply with his Supervisor's instructions. It notes that the Board does not resolve credibility conflicts, and that it is common for it to accept conclusions made by a Hearing Officer in a disciplinary matter based upon the testimony of a single witness, citing Second Division Awards 12804, 9366; Third Division Awards 28177, 24388, 21290; Fourth Division Award 1063. It contends that Claimant, as Lead Carman, should be held to a higher standard of performance, citing Third Division Awards 27468, 25132, 24319; Fourth Division Awards 4453 and 3591. Carrier argues that this type of conduct is very serious and that the penalty imposed was reasonable and should not be overturned by the Board.

The Organization argues that Claimant was not provided with a fair and impartial Hearing in that the Hearing Officer acted as a prosecutor. It contends that Carrier failed to sustain its charges because the weight of the evidence does not support any finding that Claimant used profanity, was insubordinate or engaged in an altercation, and avers that the Hearing Officer ignored the bulk of the testimony in crediting Carlson's uncorroborated version. The Organization alleges that the Investigation reveals that the Supervisor was the aggressor and that Claimant was not at fault, and argues that the penalty imposed against Claimant was excessive and not supported by the facts or his lengthy prior clean record.

While long established precedent reveals that the Board cannot set itself up as trier of fact when confronted with conflicting testimony and may not resolve credibility disputes, *Second Division Awards 8566, 8280 and 7542*, 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 and 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 entered into an altercation with his Supervisor or was insubordinate to him. Unlike the cases cited by Carrier where the Board upholds discipline based upon a single witness' testimony, this is not a situation where a one-on-one encounter occurred. In fact, all witnesses cited by the Supervisor as being present during the alleged confrontation gave evidence, and none corroborated his version that they heard Claimant use profanity towards the Supervisor or commence an argument with him. The weight of the evidence supports a finding that Carlson himself pursued Claimant after their disagreement about rotation of Leadmen became clear, and, rather than neutralizing the situation, attempted to bring it to a head. As noted by Carrier, Supervisors are held to a higher standard of performance, and we are unable to find that Carlson did not share in creating the situation which formed the basis for Claimant's discipline.

However, the Board is of the opinion that the record does support a finding that Claimant made a suggestive gesture and said "kiss my ass" to Carlson and failed to follow his instruction to accompany him to his office, and that Carrier was within its rights to discipline Claimant for that improper conduct even if it had occurred in the shop on prior occasions.

Under the specific circumstances of this case, the Board is unable to conclude that Carrier sustained its burden of proving that Claimant engaged in all charges for which he was disciplined, or otherwise acted in a manner deserving the harsh and excessive penalty imposed upon him. Based upon the facts elicited and Claimant's lengthy unblemished record, we direct Carrier to reduce the penalty imposed upon Claimant to a 30 day suspension for failing to comply with his Supervisor's instructions, and to compensate Claimant for the difference in pay occasioned by the 90 day original penalty assessed against him.

AWARD

Claim sustained in accordance with the Findings.

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 6th day of August 1998.