

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13664

Docket No. 13598

01-2-01-2-6

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers' International Association
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

- "1. That the National Railroad Passenger Corporation (hereinafter referred to as Carrier), violated Rule 23 of the current controlling Agreement between the Sheet Metal Workers' International Association and the National Railroad Passenger Corporation, effective October 1, 1977, subsequently revised on December 22, 1992, when they unjustly terminated Sheet Metal Worker Wesley Williams (hereinafter referred to as Claimant) for allegedly being in violation of Carrier's Standards of Excellence titled Professional & Personal Conduct.**
- 2. That the Carrier compensate Claimant for all lost wages, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and all other rights that are a condition of employment, and that the entire investigation digest be expunged from Claimant's 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.

The Claimant was employed at the Carrier's Los Angeles, California, Mechanical Facility when, by letter dated March 17, 2000, he was directed to attend a formal Investigation regarding the charge that the Claimant violated the Carrier's Standards of Excellence, Professional and Personal Conduct. In particular, the Claimant was charged with the following specification:

"[O]n February 28, 2000 at approximately 12:00 (noon) you allegedly said to fellow worker, Dora Horabuena while working on train #3, dumping toilets, 'Get the f* out of the truck you f***ing bi***, I am driving the truck,' in the presence of Andrew Alexander, Sheet Metal Worker."**

The Investigation was postponed by mutual agreement and held on May 2, 2000. By letter dated May 16, 2000, the Carrier notified the Claimant that he was terminated from service. The Organization appealed the dismissal and, after a conference between the parties, the Claimant was notified by the Carrier letter dated July 6, 2000 that the discipline was reduced to a suspension without pay for all time out of service. The Claimant was returned to service on July 18, 2000. The appeal before the Board is for lost time incurred by the Claimant prior to his reinstatement.

The Organization contends as a preliminary matter that the Claimant was not afforded a fair and impartial Investigation. After careful review of the record as a whole, the Board does not find that contention persuasive. On the contrary, the Board finds no evidence of partiality, bias or unfairness on the part of the Hearing Officer. Moreover, the Claimant and his representative were given full opportunity to present evidence and to conduct direct and cross-examination of witnesses. In the absence of evidence that the Claimant's due process rights were ignored or infringed upon in any way, we must reject the Organization's threshold argument.

The Organization also contends that the Carrier did not sustain the charges and specifications against the Claimant. In the Organization's view, the witnesses presented at the Hearing simply did not substantiate the charges. Additionally, the Organization argues that, even if any guilt is found, it did not rise to the level of a dischargeable

offense, or even one that merited a substantial suspension. The quantum of discipline must be commensurate with the alleged offense, and in this case it is evident to the Organization that the penalty assessed was overly harsh, and amounted to an abuse of the Carrier's discretion.

The Carrier claims that the record amply established the Claimant's guilt. It notes that the profane, abusive language directed by the Claimant to a co-worker was clearly inconsistent with workplace norms of which all employees are or should be aware. The Carrier does not tolerate such behavior and it argues that serious discipline was fully justified.

Based on our examination of the record, it is apparent to the Board that resolution of this case centers on two issues - credibility and reasonableness of remedy. With regard to the former issue, the Board's function is well known. The Board does not sit in place of the Hearing Officer and make judgments as to the credibility of the witnesses. The Board's role is to examine the record and determine whether substantial evidence exists to support the findings of the Hearing Officer. If the findings made at the Hearing bear a rational relationship to the evidence in the record, then the Board is obliged to accept those findings.

In the instant case, the charges and specifications directed against the Claimant were sustained by substantial evidence. The incident at issue took place during the course of the Claimant's shift when he and four co-workers were performing their duties pumping waste from a train. The Claimant had been driving the truck until about noon, when he left the area. His co-workers did not know where he was, and so it was agreed that Horabuena would drive the truck. According to Horabuena's testimony, she was in the driver's seat when the Claimant returned and began screaming at her to "get the f*** out of there you f***ing bi***." Horabuena was surprised and she hesitated for a moment, whereupon the Claimant repeated, "Get out, Goddammit, you bi***." Horabuena stated that she was frightened by the remarks and immediately left the truck.

The Claimant flatly denied that the incident occurred as Horabuena testified. He stated that he went to the door of the truck and told Horabuena: 'Dora, come on. You know I have to dump the truck. We didn't pump it the last time.' And she got out.

We cannot say that the Hearing Officer erred in crediting Horabuena's testimony over the Claimant's. Horabuena was a fellow worker with no apparent motive to concoct a story or fabricate testimony against the Claimant. Moreover, this was not simply a case of "he said, she said." Co-worker J. Salazar testified that he was crossing to the other side of the train but came running back when he heard the Claimant screaming. According to his testimony, he heard the Claimant use profanity and saw the angry look on the Claimant's face. Despite the Organization's attempts to cast doubt on Salazar's testimony by suggesting that there was opportunity for misperception or error, there was sufficient evidence on this record for the Hearing Officer to have properly credited his testimony as probative.

The two other employees on the crew, A. Alexander and R. Ramirez, testified that they were not in a position to see or hear what transpired between the Claimant and Horabuena. However, Foreman R. Tevis, testified that Alexander reported to him after the incident that the Claimant ordered Horabuena to "get her ass out of the truck." In fact, the record discloses that Alexander's report prompted Foreman Tevis to conduct further inquiry into the incident. We find that resolution of that credibility dispute was properly a function of the Hearing Officer, and, in crediting the Foreman, the Hearing Officer reasonably concluded that his testimony provided additional corroboration for Horabuena's account.

All told, there was substantial evidence on the record upon which the Hearing Officer could base his findings and the record does not disclose that the credibility determinations were arbitrary or capricious. Accordingly, we find that the Carrier met its burden of proof as to the charges and specifications alleged and the only remaining issue concerns the remedy.

On that point, the Organization argues that the discipline imposed amounted to an abuse of the Carrier's discretion. The Organization maintains that the Claimant was issued more serious discipline than he otherwise would have been assessed had he accepted the waiver of Investigation. However, the Board adheres to the well-established policy of not trenching upon offers of settlement discussed between the parties. Before a case reaches the Board, it is expected that the parties will make efforts to resolve the claim through compromise. There may be many different reasons for suggesting and rejecting waivers and offers of settlement. These discussions should not be restricted or limited in any way by fear that such action will prejudice the rights of either party should the dispute be submitted to the Board. To find otherwise would

discourage settlement of claims in the future if the parties believe that an offer made could be introduced against them before the Board.

The Claimant's proven misconduct was more serious than shop talk. Directing profane and abusive language at a co-worker was a breach of acceptable employee conduct. The Carrier stayed its hand in imposing discharge and instead assessed a suspension for time served. We find no basis for interfering with the Carrier's judgment with respect to the quantum of discipline ultimately imposed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 11th day of December, 2001.