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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25266
Docket Number MS-25339

Paul C. Carter, Referee

(Louis J. Boyed

PARTIES TO DISPUTE: (

(Southern Pacific Transportation Company
(Western Lines)

STATEMENT OF CLAIM:

"Investigation by SPTCO Dec 14, 1981 was not fair and impartial as required by rule 46 of the BRAC-SPT Agreement and the National Railway Labor Board. Actually it was entirely unjust. Evidence to this fact is that the Carrier did not permit me, nor BRAC representative D D Dehart to have a single witness for the defense despite the fact that there were 3 witnesses we had requested standing by and available to testify for the defense. They were Train Dispatcher Jim Ellwood, Yardmaster Woodrow Jones, and Signal Mtr. Bruce Thomas. Mr. Jones was detained outside in the hall during the investigation by the Carrier so that he couldn't testify for us. And neither Ellwood, nor Thomas were permitted to testify, although the Carrier itself shows them as being requested by the defense on the Transcript of the Investigation Dec 14, 1981. Prior to the Investigation above, the Carrier exhibited the most unfair, and humiliating treatment toward me, when officer W M Whaley pulled me out of service upon arrival to work Dec 9, 1981 without any prior notice of Charge. The testimony of Carrier witnesses against me at Dec 14, 1981 Investigation definitely conflicted with one another, leaving very serious doubt that they told the truth.

And, in addition to the actions by the SPTCO against me, my own Union on which I desperately depended, the BRAC, mishandled my March 27, 1983 request for the Appeal to July 1983 Convention floor, as indicated in Bobo's letters of 4/14/83 and 6/28/83 where it is evident I was by-passed beyond the July 1983 Convention, and too late for anything before my retirement age.

Because of this treatment, and Agreement violations by the SPTCO and the BRAC, I request reinstatement. and compensation as of Dec 9, 1981 as outlined in Local Chairman's original Appeal letter Dec 31, 1981 to the Carrier SPTCO to be so judged by this Dec 14, 1981 Dismissal, and not biased by any past record."

OPINION OF BOARD: The record shows that Claimant (Petitioner herein), with service from November 11, 1942, was. on December 8, 1981, assigned and working as FD Operator at Phoenix, Arizona. The Carrier contends that while on duty at approximately 10:30 P.M., December 8, 1981, Claimant was quarrelsome with, extremely discourteous to and threatened the life of another employe who was also on duty. Upon reporting for work on December 9, 1981, and following a preliminary inquiry into the facts by Carrier, Claimant was suspended from the service by the Trainmaster, pending the outcome of formal investigation. On December 10, 1981, Claimant was notified by the Trainmaster:

'You are hereby notified to be present at the office of the Trainmaster, Phoenix, Arizona at 9:00 a.m. Monday, December 14, 1981 for formal investigation to develop facts and place responsibility, if any, in connection with your alleged act of misconduct by allegedly stating threats and hostility toward fellow employee during your tour of duty as FD Operator, Job 002 at approximately 10:30 p.m., December 8, 1981.

You are hereby charged with responsibility which may involve violation of Rule 801 first paragraph. that part reading:

'Employees will not be retained in the service who are ...**quarrelsome or** otherwise vicious...'

and Rule 801 second paragraph, that part reading:

'Any act of hostility, misconduct or willful disregard **or** negligence affecting the interests of the Company is sufficient cause for dismissal and must be reported.'

and Rule 802 first paragraph, ~~that~~ part reading:

'Indifference to duty **or** to the performance of duty, will not be condoned.'

and Rule 802 second paragraph, that part reading:

'Courteous deportment is required of all **employees** in their dealings with...**their** subordinates and each other. Boisterous, profane **or** vulgar language is forbidden.'

and Rule 802 third paragraph, that part reading:

'Employees must not enter into altercations... while on duty.'

of the General Rules and Regulations of the Southern Pacific .
Transportation Company.

You are entitled to representation and witnesses in accordance with your Agreement Provisions. Any request **for** postponement must be submitted in writing, including the reason therefor, to the undersigned. Please acknowledge receipt of this letter on attached copy by signature **and** dating, returning same to this office."

The investigation was conducted as scheduled. A copy of the Transcript has been made a part of the record. Following the investigation, Claimant was dismissed from Carrier's service by letter from the Division Superintendent dated December 28, 1981. We have carefully reviewed the Transcript of the investigation and find that none of Claimant's substantive procedural rights was violated. The charge against the Claimant was sufficiently precise to meet the requirements of the Agreement. The suspension from service pending formal investigation was not in violation of the Agreement. Claimant was present and represented at the investigation by the Local Chairman of the Collective Bargaining Organization. Following Claimant's dismissal, claim in his behalf was handled up to and including Carrier's highest designated officer of appeal by representatives of the Organization. and, failing of solution, was appealed to this Board by Claimant.

Objection was raised in the investigation and is continued before the Board because certain witnesses that Claimant requested were not present at the investigation. This issue was discussed at length between the Conducting Officer and Claimant's representative during the investigation. It was developed that the witnesses requested, a Train Dispatcher, a Signal Maintainer, and a Yardmaster, were not in the office or at the scene where the occurrence under investigation took place, and, therefore, had no first-hand knowledge of what actually transpired. Under such circumstances, we consider it proper for the Conducting Officer to decline to call the witnesses requested, as the purpose of the investigation was to develop the facts in connection with the occurrence that resulted in the charge.

There was substantial evidence in the investigation from witnesses who were present at the time of the occurrence to support the charge against the Claimant. An Assistant Chief Clerk testified ~~that~~ when he asked Claimant for certain information about 10:30 p.m. on December 8, 1981, the Claimant shouted at him, ordered him from the office, called him names and threatened to kill him (~~the~~ Assistant Chief Clerk] if Claimant were reported; that Claimant repeated the abuse and threats when the Assistant Chief Clerk entered the office a few minutes later, and yet a third time soon after the second incident. The Assistant Chief Clerk's testimony was corroborated by two other witnesses, who were present at the time of the occurrence.

There were conflicts between the testimony of Claimant and other witnesses. However, it is well settled that this Board does not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses. Such functions are reserved to the Carrier. Further, the Board is not justified in reversing the determination of the Carrier simply because of conflicts in testimony.

The Board has considered the seriousness of Claimant's actions in the present case, his prior discipline record, including two prior dismissals and reinstatements on the basis of leniency, and the numerous cases resulting in demerits and cautions. The record shows that Claimant had been formally disciplined eleven times. Any Carrier may always properly consider an **employee's** prior discipline record in arriving at the discipline to be imposed for a proven offense.

Based on the entire record. the Board does not consider the Carrier's actions in imposing the discipline that it did in the present case to be arbitrary, capricious, in bad faith, or in violation of the Agreement. The claim will be denied. Any dispute that Claimant ~~may~~ have with his Organization is not referable to this Board.

FINDINGS: The Third Division of the Adjustment Board. upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

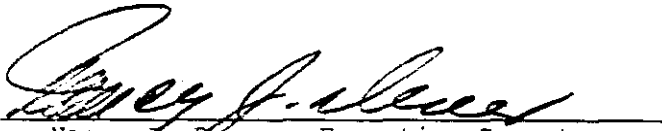
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985.

