

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28507
Docket No. MW-28562
90-3-88-3-389

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (formerly the Chesapeake
(and Ohio Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The ten (10) days of suspension imposed upon Laborer T. L. Townsend for alleged violation of Safety Rule 8 and conduct unbecoming an employe on October 6, 1987 was on the basis of unproven charges (System File C-D-4184/12(87-1171).

(2) The Claimant's record shall be cleared of the charges leveled against him, he shall be compensated for all wage loss suffered and he shall receive credit for proper days toward his vacation qualifying time."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimant is employed by the Carrier as a Laborer. His service dates from July 13, 1981. Claimant was accused by his Foreman of having struck him twice and cursed him, without provocation, on October 6, 1987, while in the North Yard washroom. On the basis of that accusation, the Carrier charged Claimant with violations of Safety Rule 8 and Conduct Unbecoming an Employe and convened a Hearing, at which the Foreman testified that the incident followed harsh words between them earlier in the morning. The Foreman testified, further, that the incident was witnessed by a Laborer.

Claimant denied striking his Foreman and denied having been in the washroom with him. He denied having had harsh words with his Foreman earlier in the day. The Laborer acknowledged having been in the washroom with the Foreman but denied seeing Claimant strike him.

The Carrier found Claimant guilty as charged and assessed him a suspension (actual) of ten working days. The Organization protested the discipline. The Claim was progressed in the usual manner and is before this Board.

The Carrier argues that the Claimant was afforded a fair and impartial Hearing and that the Hearing produced substantial and convincing evidence of his guilt. It asserts that the words between Claimant and his Foreman are substantiated; and asserts that the Laborer's denial is unconvincing and is explained by his desire not to get involved. The Carrier urges that, under Board precedent, credibility determinations are properly for the Hearing Officer; and it asserts that the determinations made in favor of the Carrier's witnesses must stand. The Carrier asserts that fights between employees and Supervisors constitute serious offenses and that the penalty imposed in this case was not arbitrary, capricious, or in bad faith. The Carrier asserts that the Organization failed to raise on the property the argument that the Claimant did not receive a fair and impartial Hearing; and it urges that it is estopped from doing so for the first time before the Board.

The Organization argues that the Carrier did not afford the Claimant a fair Hearing because the Carrier's Plant Manager rendered the decision after having investigated the charge and having testified at the Hearing. It asserts that the subject matter of Safety Rule 8 was not raised at the Hearing. The Organization urges that the Carrier failed to prove the charges against the Claimant and urges, in addition, that the discipline imposed was improper.

It is well established that arguments which have not been raised on the property may not be raised for the first time before this Board. A thorough review of the record reveals that the Organization's argument on the property was that the Carrier had failed to prove its Claim. Nowhere did the Organization raise the issue of the Carrier's denial to Claimant of a fair Hearing because of the Plant Manager's multiple roles or because of the Carrier's failure to deal with the subject matter of Safety Rule 8. Thus, the Board does not consider those arguments.

Of the argument that the Carrier failed to offer substantial evidence that Claimant committed the offense the Board is not persuaded. The Laborer's testimony established a hostile exchange between Claimant and his Foreman earlier in the day, an incident denied by the Claimant. That inconsistency undermines Claimant's credibility. Consistent with Board precedent, the Hearing Officer determined the issue of credibility in the Carrier's favor. There is no extrinsic evidence requiring a contrary conclusion; nor is there other unusual, compelling reason to overturn that determination.

Based on review of the record, including the Claimant's service and satisfactory performance, the Board concludes, however, that the penalty of ten days was excessive and that the corrective purposes of discipline are served by a penalty of a five day (actual) suspension. Claimant shall be made whole for wages and benefits for the difference between the discipline imposed by the Carrier and the discipline sustained by the Board.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.