

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (David M. Wildey
(
(CSX Transportation, Inc. (former Chesapeake & Ohio
(Railway, Pere Marquette District)

STATEMENT OF CLAIM:

"Carrier be required to remove discipline imposed against David M. Wildey, including his personal record be cleared of all reference to the matter involved." Case #7284-C&O(PM)

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 Carrier convened an Investigation on February 19, 1987, to determine if Claimant, a Signalman, assaulted a fellow employee and engaged in conduct unbecoming an employee. At the commencement of the Investigation, the Organization asked the Hearing Officer to clarify the latter charge. The Hearing Officer responded that the unbecoming conduct allegation arose out of the same incident as the alleged assault.

At approximately 8:45 A.M. on January 14, 1987, Claimant, a member of an extra signal gang, was unloading flashers at Lake Odessa, Michigan. He became involved in a physical altercation with an Assistant Signalman. Claimant and the Assistant Signalman related differing renditions regarding who instigated the fight. Claimant declared that he asked the Assistant Signalmen to move the chains off one flasher while Claimant, who was situated in front of the boom truck controls, lifted another flasher. Claimant further testified that the Assistant Signalman responded with profane and obscene language. On the other hand, the Assistant Signalman asserted that Claimant started the profane verbal exchange by calling the Assistant Signalman an obscene name. Unfortunately, the other members of the gang did not overhear the exchange of words between Claimant and the Assistant Signalman. In any event, it did not take long for the verbal dispute to escalate into physical violence.

The Assistant Signalman threateningly approached Claimant waving a nine inch long pliers in Claimant's face. Claimant pushed the pliers away. According to the Assistant Signalman, he instinctively reacted by hitting Claimant several times with the pliers. Although the Assistant Signalman testified that Claimant returned the blows, Claimant and the other witnesses related that they did not see Claimant strike the Assistant Signalman. Another Signalman quickly seized the pliers from the Assistant Signalman but not before Claimant had sustained facial lacerations requiring twelve stitches.

Immediately after the altercation, Claimant reported to his Supervisor that his facial injury occurred when he accidentally fell off the boom truck. A short time later, Claimant recanted and told his Supervisor the true cause of his injury. At the Investigation, Claimant explained that he initially gave a false excuse for his injuries to protect the Assistant Signalman.

During the Investigation, both the Signal Supervisor and a Carrier Police Sergeant testified that Claimant was not guilty of either assaulting a fellow worker or engaging in conduct unbecoming an employee. Nevertheless, the deciding official determined that Claimant had committed conduct unbecoming an employee and imposed a ten-day overhead suspension, remaining in effect for six months. Claimant was exonerated on the assault charge.

The Carrier presented substantial evidence that Claimant engaged in conduct unbecoming a Carrier employee for two reasons. First, even if the Hearing Officer credited Claimant's testimony that he was not the instigator of the verbal and physical altercation, Claimant was an active and continuing participant in the fight after it started. If the Assistant Signalman was calling Claimant profane and obscene names, Claimant should have reacted peacefully instead of fomenting the Assistant Signalman's misbehavior by returning the insults. Second, after the fight, Claimant misrepresented the cause of his facial injuries. An employee is obligated to truthfully report the circumstances surrounding any on-duty injury. Thus, even though the Carrier found Claimant not guilty of assaulting the Assistant Signalman, it properly determined that Claimant engaged in conduct unbecoming an employee.

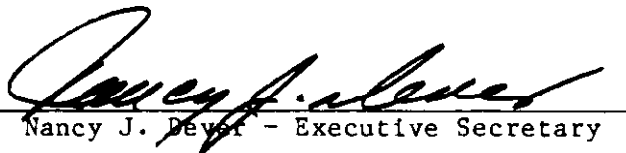
Claimant argued that once the Carrier exonerated him on the assault charge, he must be found not guilty on the second infraction because the Hearing Officer represented to Claimant that the unbecoming conduct charge arose out of the same incident as the assault charge. However, as we discussed above, Claimant's unbecoming conduct occurred during the altercation. Although Claimant was not the aggressor, he foolishly screamed profane and obscene insults at the Assistant Signalman. Next, Claimant relies on the testimony given by the Police Sergeant and Signal Supervisor. Both declared that Claimant was not guilty of conduct unbecoming an employee. Suffice it to say, these two witnesses were merely relating their personal opinion (Claimant expressed the same opinion), and their opinion testimony is not binding on the Hearing Officer or the trier of fact. Whether or not the factual evidence was sufficient to demonstrate that Claimant committed conduct unbecoming an employee is an ultimate conclusion reserved to the Carrier's deciding official and, on appeal, this Board.

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 16th day of October 1990.