

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32384
Docket No. MW-32965
97-3-96-3-341**

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension imposed upon Mr. P. Acree for his alleged conduct unbecoming an employee in connection with an alleged incident that occurred on May 17, 1995 near Lexington, Kentucky at approximately 10:00 A.M. was unwarranted, on the basis of unproven charges and in violation of the Agreement [System File C-TC-6062-SPG/12(95-725) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be '... paid for the 30 days discipline he was given at 10 hours a day at Class A SPG operator rate plus overtime he may have lost for the dates between May 18, 1995 through June 28, 1995, and that these days be accredited towards vacation and retirement. ****"**

FINDINGS:

The Third 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.

Claimant, an Equipment Operator, was part of a 60-plus member tie gang, SPG Gang 6XT3, assigned to replace ties in the Lexington, Kentucky, area on May 17, 1995, under the direct supervision of Gang Supervisor C. L. Fitchett. Because of stormy weather, the gang was held in busses from its 7:00 A.M. start time until approximately 9:00 A.M. Claimant objected to working in the weather conditions, contending that they posed a safety hazard because of thunder, lightning and rain, and was taken out of service by the Gang Supervisor at 10:00 A.M. Because of Claimant's discussion of this matter with Gang Supervisor Fitchett in Fitchett's truck at the site, and on the basis that Claimant threatened to complete an accident report if not "treated better" by the Carrier, with particular reference to working in the weather conditions that day, the Carrier took the instant disciplinary action against Claimant.

By letter dated May 22, 1995 Claimant was charged with creating a disturbance on the radio in regard to working in the rain and with being argumentative and uncooperative in a subsequent discussion with Supervisor Fitchett. The letter continues that upon Fitchett's determining that Claimant's attitude and demeanor were such that his safe job performance was in question, Fitchett removed him from service pending an Investigation. Claimant was charged with conduct unbecoming an employee and/or insubordination.

An Investigation was held on May 31, 1995. On June 20, 1995 Carrier notified Claimant that the Investigation transcript revealed that he was argumentative and uncooperative in his dealings with Fitchett and that he used profanity in arguing with Fitchett and told him that he might have to fill out a P.I.-1 injury report if forced to work in the rain. Claimant was found guilty of conduct unbecoming an employee and assessed a 30-day actual suspension from May 18 to June 28, 1995, inclusive.

The record shows that the misconduct charged to Claimant did in fact occur. The Organization argues that the record is procedurally deficient in that the Carrier did not conduct a fair and impartial Investigation as required by Rule 39, Sections 1 and 4 of the Seaboard Agreement. According to the Organization, the Carrier produced at the Investigation only witnesses - Supervisor Fitchett and Assistant Foreman and

Timekeeper Lockridge - who would favor its position and did not produce two witnesses identified and requested by the Organization. However, the record shows that the Carrier notified the two witnesses of the Organization's request and gave them permission to attend the Investigation not under pay and that they failed to do so. A statement from one of the witnesses was read into the record. The Organization contends that the Carrier had an obligation to have them present under pay. No authority was cited to support that contention. The Carrier's May 22 letter advised that Claimant could bring any witness who may give testimony on Claimant's behalf, but that it would be his responsibility to arrange for their attendance.

The Organization also contends that the Investigation was unfair in that it did not receive copies of witnesses' statements in advance of the Investigation. We have reviewed the record carefully, but we find no citation to an Agreement provision for discovery. We find no precedential provision for the type of discovery sought by the Organization here. See Second Division Award 12971 and Third Division Award 14187. In this case, the Notice of Investigation fairly apprised the Claimant of the subject matter and documentation was furnished to the Organization at the Investigation. See Third Division Award 13671.

On the merits, Claimant denied having threatened to file a personal injury report if he were required to work in the rain or not "treated better" by the Carrier. We are satisfied, however, that the record contains substantial evidence to the contrary and that the Carrier's decision, including the resolution of the credibility issue on the property, finds substantial support in the record.

The Organization also objects to consideration of Claimant's PS-10 Personnel Data Summary at the Investigation. That consideration becomes relevant only if the determination is made that Claimant committed the infraction with which he was charged. The prior record may be of assistance in determining degree of discipline either favorably or unfavorably to Claimant. See Second Division Award 8467. There is no evidence in the record to suggest that the prior record considered at the Investigation was inaccurate.

We reviewed and considered the two Awards submitted by the Organization - First Division Award 23936 and Third Division Award 18551. We do not find that the reasoning of those Awards controls the result here. We note that the Organization has

not shown that the two witnesses whose names were presented at the Investigation were witnesses to the disputed conversations between Claimant and Fitchett.

In conclusion, we note that the serious nature of the infraction, constituting insubordination and conduct unbecoming an employee, is sufficient as a basis for the Carrier's exercise of judgment in imposing the discipline at issue.

We find that the Organization's contentions of procedural defects in the Investigation have not been sustained and that the record does not demonstrate a basis for this Board to overturn the disciplinary decision reached by the Carrier.

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 Third Division**

Dated at Chicago, Illinois, this 30th day of December 1997.