

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33381
Docket No. MW-34218
99-3-97-3-763**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [fourteen (14) day suspension] imposed upon vehicle operator J. F. Sheipe for alleged conduct unbecoming a Conrail employee on July 2, 1996 when he was allegedly involved in an altercation with a Corman employee at Spring Street Yard, was without just and sufficient cause and on the basis of unproven charges (System Docket MW-4351-D).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant’s record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”**

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 employee of the Carrier for approximately 20 years, was assessed a 14 day suspension following a Hearing for conduct unbecoming an employee in violation of "General Rule E, Paragraph 1 of the NORAC Operating Rules Fifth Edition," arising out of an incident involving an employee of the Carrier's contractor. The witnesses to the incident were solely the Claimant and the employee of the contractor. Each supplied significantly different versions of the incident. However, other witnesses were able to supply collaborating testimony on facts alleged by the parties involved in the incident.

General Rule E, Paragraph 1 of the NORAC Operating Rules states:

"E. Prohibited Behavior

The following behaviors are prohibited:

- 1. While on duty or on company property: Gambling, fighting or participating in any illegal, immoral or unauthorized activity."**

The Claimant, a Vehicle Operator on a Log Loader, testified that he drove into Reading Yard to unload ties from his truck, and that the employee of the contractor, who was delivering ties, blocked his access to a certain area. The Claimant described both his vehicle maneuvers and actions, as well as the contractor's employee's vehicle maneuvers and actions. The Claimant testified that, as he climbed the ladder on the back of his log truck, the contractor's employee "jumped off his truck and come running over and grabbed me." On questioning, the Claimant testified that the contractor's employee "grabbed me by the arm and pulled me off the truck and yelled what the hell are you doing. Then he hit me, knocked my helmet off. I turned around, went over, got in the truck, locked the doors and called my supervisor."

The contractor's employee testified that the Claimant in a series of maneuvers of his vehicle interfered with the performance of his duties:

"... the driver started unloading his timber in such a way as to block my access from hooking back up to my trailer. He unloaded his truck in a neat manner. It was orderly but wasn't where ties were put in this yard because it was put right on the access trail which all the drivers use to

either load or unload their timbers . . . effectively blocking off the path which cut me off from my trailer.”

The contractor’s employee continued his description of the Claimant’s actions which included the Claimant at one time leaving the yard and returning to again block his path. Then, he testified that he “came along the other side, met at the ladder and I told him to knock it off. The driver wouldn’t pay any attention to me, was ignoring me. I put my hand on his shoulder and I said knock it off. He wheeled away from me, don’t touch me, backed up, threw his hard hat and his ear protection at me, put his fist up, I put my fist up. He got into his truck and called on the radio.”

Claimant denied leaving the yard and then returning. Also, the Claimant testified that the contractor’s employee had plenty of room to maneuver his tractor and “had access and was able to drive around” his truck.

The Assistant Supervisor of Production testified that the Claimant called him and told him he was assaulted by the contractor’s employee and he wanted the Assistant Supervisor there as soon as possible. In addition, to describing the portrayal of the events related to him by the parties to the incident, the Assistant Supervisor testified regarding the Claimant’s shirt:

“You could see where somebody with dirty, greasy hands grabbed a hold of his shoulders and there were imprints on his shirt there . . . it was a hand, handprints.”

Later, the Assistant Supervisor identified the shirt and specifically identified the imprints as being on the arm of the shirt, as well as marks elsewhere on the shirt. When specifically asked whether such marks were consistent with “somebody grabbing hold of an individual on one side in two locations,” the Assistant Supervisor said that it looked like it as far as he could tell.

A Foreman that was in the yard area after the incident occurred generally supported the testimony of the Assistant Supervisor. However, the Foreman testified that he found damage to the helmet and, when asked whether such was consistent with being hurled or thrown with force, he responded, “Yes.”

The Organization contends that the Carrier failed to proof the charges against the Claimant, asserting that there was no evidence introduced into the record that the Claimant engaged in the proscribed conduct, that the testimony shows that the Claimant avoided the possible altercation, and that the incident or confrontation occurred based on perceptions of the contractor's employee that were inaccurate according to the testimony of the Claimant.

Additionally, the Organization asserts that the Carrier disregarded the testimony of the Claimant and the Assistant Supervisor and relied solely on the testimony of the employee of the contractor, stating that the Assistant Engineer that rendered the decision was a different person than the Hearing Officer who heard the testimony and could resolve issues of credibility. Therefore, the Organization contends that "this dispute must be resolved on the evidence presented during the investigation.

The Carrier submits that the evidence demonstrates that the Claimant is "guilty of conduct unbecoming a Conrail employee based on his repeated and deliberate attempts to prevent a contractor's employee from performing the work the Carrier had paid the Contractor to complete," and that as "direct result" of the Claimant's conduct, "an altercation between the two men ensued."

It is apparent that the Carrier relied on the sole testimony of the contractor's employee in reaching its determination. In response to the Organization's appeal, a Carrier official stated that "review of the testimony and exhibits supports the issuance of discipline imposed here," and that the testimony of the contractor's employee appeared to be a "more genuine, credible account" and "more detailed and plausible." Specifically, the Carrier points to several reasons that the Claimant's account is less credible: he did not admit to provoking the contractor's employee, and he did not explain the "reason or motive" why the contractor's employee acted the way the Claimant alleges.

The same Carrier official states that the contractor's employee "admitted that he grabbed" the Claimant's shoulder. In fact, the claimant testified that he was "grabbed," and the contractor's employee emphasized that he "put his hand on his shoulder." The testimony of the Carrier's Assistant Supervisor regarding the "handprints" on the "arm" of the shirt is consistent with the Claimant's version of the events.

The Carrier cited many Awards for the principle that the credibility of witnesses and weight of their testimony is for the trier of facts, the Hearing Officer, because he is in the best position to determine issues of credibility. These cases do not appear relevant in this instance. There is no evidence as to what the Hearing Officer's assessments of credibility were, and there is no indication they were relied on. In fact, the Carrier states that its decision was based on the "testimony and exhibits." Specifically, the Carrier explained the "less credible" nature of the Claimant's account of events as being the Claimant's failure to admit any responsibility and his failure to explain the alleged actions of the contractor's employee.

Regarding the Carrier's rationale for finding their employee less credible than the contractor's employee, it is noted that the contractor's employee admitted only to placing his hand on the Claimant's shoulder, and this admission was inconsistent with the Claimant's testimony, the Assistant Supervisor's testimony, and the physical evidence, the Claimant's shirt, that was made an exhibit to the record. Also, neither the Claimant nor the employee of the contractor gave a "reason or motive" as to why the other acted the way each alleged.

In essence, the evidence is clear that two individuals had a confrontation. The weight of evidence suggests the contractor's employee grabbed the arm of the Claimant, the Claimant never touched the employee of the contractor, and the Claimant immediately reported the incident to his supervisor. The testimony of the Assistant Supervisor supported, in part, the testimony of the Claimant and was inconsistent with the testimony of the employee of the contractor.

After a careful review of the entire record, Board finds that the Carrier failed to meet its burden of proof, and the disciplinary suspension assessed the Claimant cannot be upheld.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 1999.