

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24698
Docket Number MW-24724

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation (former Penn
(Central Transportation Company)

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

(1) The nine (9) days of suspension imposed upon Machine Operator T. A. Poling for alleged violation of Rule "D", "E" and "N" was arbitrary and capricious (System Docket No. 623).

(2) The Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: An investigation was held on September 16, 1980 to determine whether Claimant, a machine operator, assigned to Tie Gang Tk-314 violated Rules D, E and N of the Conrail Rules of Transportation Department. The asserted violations related to an altercation between Claimant and Foreman M. A. Speece on May 28, 1980 in the vicinity of M.P. 368.2. Claimant was initially removed from service on the date of the aforesaid incident and subsequently was assessed the discipline of nine (9) days suspension with time held out of service to apply.

In defense of his petition Claimant contends that Carrier prejudicially adjudged him guilty by solely relying upon the testimony of Foreman Speece. He asserts that he was physically compelled to restrain Mr. Speece when the latter threatened him with bodily harm. He avers that he was merely exercising his right to self defense when Foreman Speece threatened to shoot him and poked him in the eye, and maintains that Mr. Speece should have been removed from service and charged with an offense. He argues that Carrier's disciplinary action in this instance was not even-handed nor impartial, but predicated upon the theory that he was singularly at fault. He asserts that Foreman Speece was personally hostile to him and this incident underscores the Foreman's personal animus.

Carrier contends that Foreman Speece's version of the incident is amply supported by several witnesses including the testimony of one of Claimant's witnesses. It asserts that Claimant wilfully precipitated the altercation which resulted in Foreman Speece's injury. It acknowledged that Mr. Speece uttered the statement, "If you come to my house, I'll just shoot you", but pointedly noted that it was in response to Claimant's statement, "I'll come to your house and get you after work." It maintains that Claimant's defensive assertions are unsupported by the record, particularly his allegation that Foreman Speece poked him in the eye. It asserts that none of the witnesses testified they saw Mr. Speece perpetrate this assault and avers that Claimant himself never denied his guilt. In fact, it asserts that Claimant admitted Foreman Speece did not offer any physical resistance.

In our review of this case, we agree with Carrier's position. Close reading of the investigative record does not reveal that Claimant justifiably acted in self defense nor that he was palpably confronted with imminent bodily harm. Even a presumption of danger was not present. Instead, we find that Claimant overreacted to a situation which by definition and context did not warrant such behavior. It may well be that Foreman Speece's behavior contributed to the initial volatility, but it cannot be shown that he provoked the altercation. By Claimant's own admission that Foreman Speece did not resist him and the consistent testimony of the witnesses that they saw Claimant tackle Mr. Speece, we must conclude, of necessity, that Foreman Speece never placed Claimant in a position where a physical defensive response was justified. The cause-effect nexus just does not exist. Claimant was guilty of the offenses cited in the notice of investigation, and the penalty imposed was neither unreasonable nor an abuse of managerial discretion. Nine (9) days suspension was relatively lenient when the gravity of Claimant's deportment is considered.

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. Lever - Executive Secretary

Dated at Chicago, Illinois this 24th day of February, 1984

