

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25187
Docket Number CL-25261

M. David Vaughn, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9785) that:

(a) Carrier violated the Clerks' Agreement at Argentine, Kansas, when it improperly suspended A. A. Romero from service, and

(b) Carrier shall now allow Claimant eight (8) hours' pay for each work day (forty (40) hours per week), commencing April 8, 1982, up to and including date of return to service of the Carrier at the rate of Chauffeur II position at Argentine, plus any subsequent wage adjustments, and

(c) Claimant's record shall be cleared of all charges that now appear in the transcript of the investigation held March 22, 1982, and

(d) In addition to the monies claimed, A. A. Romero shall now receive fifteen per cent (15%) interest on monies claimed, such interest to be compounded on each and every pay period from date of suspension forward for the period of time Claimant is held out of service (40 hours per week).

OPINION OF BOARD: Claimant A. A. Romero was employed by the Carrier as a Chauffeur II. On February 24 and 26, 1982, Claimant was on duty and operating a hi-lift forklift. The Carrier assigned H. J. Hauschild, an Industrial Engineer, to work sampling duty on both dates, observing the operations of the area where Claimant and other employees were working. During the course of his assignment, Hauschild observed Claimant at work about twenty times each day. Following his observations, Hauschild reported to the Carrier that Claimant was operating his forklift in a careless and unsafe manner. The Carrier thereupon notified Claimant of and conducted an investigatory hearing to determine possible violations by Claimant of various Carrier's Safety Rules.

At the investigatory hearing, evidence indicated that, on the dates in question, Claimant had been operating his forklift at excessive speed, did not have sufficient control of his vehicle, and had dropped two loads. Following the hearing, the Carrier notified Claimant that he was suspended from service for a period of ten days for violation of Rules 1, 2, first paragraph of 16, Rule 26 and Rule 29 of the Carrier's General Rules for the Guidance of Employees, and Rules 1, 3, 4, and 243 of the Safety Rules for the Carrier's employees. Those Rules require, in summary, that employees perform the duties of their jobs in a safe manner.

The Organization's appeals on behalf of Claimant were unsuccessful, and the claim was brought before the Board. The Organization raises before the Board five arguments in support of its position that the Carrier's action must be overturned: that the notice was defective because it was imprecise as to the time of the violations and the precise nature of the charges, that the Carrier's failure to confront Claimant at the time of the violations denied Claimant the opportunity to defend himself, that the Carrier representative did not conduct a fair and impartial hearing, that the Carrier failed to meet its burden of proof, and that the penalty was more severe than warranted by the offense.

The Notice in this case informed Claimant that the investigation would involve charges that he had operated his forklift in a careless and unsafe manner on two specified dates and cited the Rules which Claimant was charged with having violated. Since the charges against Claimant were based on numerous observations over the course of two days, the notice of hearing could not reasonably be required to be more specific.

The Carrier's failure to confront Claimant at the time of the alleged violations does not constitute a basis for overturning the suspension. Rule 24-B of the applicable Agreement requires only that the Carrier provide notice of the charges "sufficiently in advance [of the hearing] to afford an opportunity to obtain the presence of necessary witnesses and representatives." The Organization makes no claim that the delay so impeded its presentation of the case.

The Organization's assertion that the hearing officer was hostile is not without merit. A review of the transcript indicates that the hearing officer was unduly restrictive in his conduct of the hearing in his refusal to permit Claimant to make a closing statement and his refusal to permit even written communication between Claimant's representative and his Assistant during the course of the hearing. The Carrier's conceded right to conduct the hearing in an orderly manner does not give the hearing officer the right to prevent the Organization from presenting the case with a reasonable amount of latitude. Neither the labor relations process nor the confidence of employees in the grievance procedure are furthered by the rigid, legalistic approach to the hearing process adopted by the hearing officer.

Mere hostility, or even erroneous rulings on the part of the hearing officer, will not, standing alone, constitute grounds to set aside an otherwise sustainable action. The Organization must demonstrate that the officer's actions denied Claimant fundamental due process under the Agreement. In that regard, it is the duty of the Organization to make offers of proof or otherwise indicate on the record the substantive evidence or testimony which it sought, and was denied, the opportunity to present. The Organization has offered no indication that the Carrier's actions in this case resulted in Claimant's inability to present material evidence. Indeed, the factual record appears complete and the issues to have been properly joined. Accordingly, the Board declines to set aside the suspension based on the conduct of the hearing in the absence of demonstrated harm.

The Organization also argues that the Carrier failed to meet its burden of proof. At the hearing, Hauschild testified that Claimant was operating his forklift at excessive speed and that the weaving of Claimant's forklift indicated that he had less control over his forklift than other forklift operators. He testified further that he observed Claimant ineffectually gunning the engine of his forklift in an effort to dislodge it when it became stuck, that two refrigerators which Claimant had just unloaded fell to the ground, indicating improper placement, and that Claimant dropped a load of pipe which he was carrying. Claimant denied speeding and attributed the weaving and damage to the refrigerators to defective equipment. His testimony was otherwise unsubstantiated. Claimant was unable to recall whether he dropped a load of pipe.

The Carrier clearly resolved the conflicting testimony in Hauschild's favor. Under Board precedent, credibility determinations are the responsibility of the hearing officer. The Carrier's conclusion based on factual determinations will not be disturbed if supported by substantial evidence in the record. The Board concludes that the record contains such support and, accordingly, declines to overturn the Carrier's determination that the Rules were violated.

With respect to the severity of the penalty, the Carrier made its determination based in part on the Claimant's record. Claimant had been disciplined for failure to observe Safety Rules on four previous occasions during his two and one-half years of service. Under such circumstances, a ten-day suspension was not excessive.

Accordingly, for the reasons set forth in the Opinion, the claim must be, and it is, denied.

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. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1984.