

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26435
Docket Number MW-26324

Elliott H. Goldstein, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Union Pacific Railroad Company

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

(1) The five (5) day deferred suspension imposed upon Steel Erection Foreman K. A. Collins for alleged 'violation of rules General Notice, Rule B, General Regulation 700 and General Regulation 702(B)' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File 5-18-12-15-55/013-210-C).

(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: On November 23, 1983, Claimant was assigned Steel Erection Foreman on Gang 1971, working in the vicinity of Lisco, Nebraska. At approximately 3:30 P.M. on that date, the B & B Supervisor stopped at the gang site and instructed Claimant to secure the gang welder, bunk cars, tool cars and truck. At the close of the shift that date, Claimant and Steel Bridgeman Jara left the bunk car site, all other employees on the gang having left earlier because of the Thanksgiving holiday. The next day, November 24, 1983, the B & B Supervisor stopped at the bunk car location and, in checking to see whether the equipment had been secured, discovered that two tool boxes on the gang truck had not been locked.

Claimant insisted at the Hearing that prior to leaving the work site on November 23, he made certain that the equipment and tool boxes were securely locked.

Subsequent to the Hearing, the Organization submitted the written statement of Steel Bridgeman Jara to corroborate Claimant's testimony. It stated in part: "I went over to chain the welder to the pole and he [Claimant] said to me 'We had better check and make sure everything on the truck is locked.' [Claimant] walked around the truck checking and said everything was locked."

Throughout the handling of this Claim on the property, Carrier refused to consider the foregoing written statement of Mr. Jara, contending that its decision must be based solely on the evidence of record as presented during the Investigation.

Before the Board, the Carrier maintains that the Hearing was fair and impartial; that the evidence adduced at the Investigation, while conflicting, was properly weighed by the Hearing Officer in sustaining the charge; that the discipline was neither arbitrary nor excessive; and that any alleged procedural objections are without merit.

The Organization asserts that the Carrier failed to provide Claimant a fair and impartial Hearing; that the charges were not sustained; and that the Claim for wage loss during the fifteen-day suspension period must be allowed inasmuch as that portion of the original Claim was not declined.

After careful consideration of the record evidence in its entirety, the Board finds no basis upon which it should overturn the discipline imposed herein. It is true that there was no direct eyewitness testimony that Claimant neglected to lock the tool boxes, and to this extent the evidence against him is circumstantial. However, the Board has often held that circumstantial evidence is not only appropriate but can be more probative than direct testimony where the direction and weight of the evidence all point inescapably to the conclusion that Claimant in fact committed the acts or violations of which he stands accused. (See Third Division Awards 26135, 25942, 20781, 21419.) Here, though the Organization suggested that intervening forces such as theft may have caused the tool boxes to become unlocked after Claimant left the work site on November 23, 1983, those arguments are mere speculation, not evidence, particularly since no tools were missing or otherwise disturbed. In our considered judgment there is no other reasonable conclusion than that substantial evidence of record supports the findings against Claimant.

Nor do we agree with the Organization that Claimant was denied a fair and impartial Hearing when Carrier failed to call the Claimant's crew as witnesses at the Investigation. The pertinent Rule reads as follows:

"Rule 48(C). Prior to the hearing, the employee alleged to be at fault shall be apprised in writing of the precise nature of the charge(s) sufficiently in advance of time set for hearing to allow reasonable opportunity to secure representative of his choice and the presence of necessary witnesses."

Pursuant to the foregoing Rule, it was Claimant's responsibility to arrange for the presence of witnesses on his behalf at the Hearing and his failure to do so does not render the Hearing unfair or arbitrary. By the same token, the Board agrees with Carrier that the post-hearing statements offered by the Organization can be accorded little, if any, weight. The Hearing Officer must make his determination based on the evidence adduced at the Investigation and absent any rule or agreement cited by the parties which would permit posthearing evidence to be introduced, we cannot say that the Carrier acted improperly when it refused to consider employee Jara's written statement.

Finally, we are not persuaded by the procedural argument raised by the Organization, the crux of which is that the Carrier did not specifically decline the fifteen day deferred suspension which Claimant was required to serve as a result of the five day deferred suspension imposed herein. This Board has been confronted on numerous occasions with similar arguments and has consistently held that a denial, similar in nature to that presented here, was all inclusive and had the effect of denying all other claims presented. (See Third Division Award Nos. 23306, 23563, 19255.)

In sum, this Board finds no justification for the Organization's Claim that a procedural violation occurred. We will not disturb Carrier's decision where it is supported by substantial evidence and is not arbitrary or capricious, and, therefore, we will deny the Claim.

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

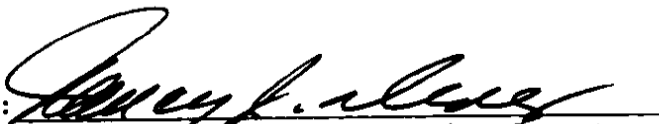
That the Agreement was not violated.

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 24th day of August 1987.