

The Third Division consisted of the regular members and in addition Referee Elmer F. Thias when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(National Railroad Passenger Corporation (Amtrak) -  
(Northeast Corridor

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

(1) The forty-five (45) days of suspension imposed upon Camp Car Attendant C. D. Aaron for alleged violation of Rules 'I' and 'J' on September 23, 1984 was without just and sufficient cause and on the basis of unproven charges (System File NEC-BMWE-SD-1113D).

(2) 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 employees 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 waived right of appearance at hearing thereon.

The Claimant had been employed by the Carrier for a period of five years and was assigned as a Camp Car Attendant on the date of the incident which precipitated the dispute before us. The Claimant and the Engineer of Undercutter Operation had a "few words" on the evening of September 23, 1984 and the Claimant was taken out of service. Under date of September 26, 1984, the Claimant was charged with a violation of General Rules "I" and "J" by reason of having threatened the Engineer Undercutter Operation with physical harm in a vicious, quarrelsome and violent manner.

A trial was originally scheduled to be held on October 15, 1984, but was postponed and rescheduled for October 29, 1984, because the Engineer could not be present to testify. This resulted in the Claimant being withheld from service during the period September 23 through October 29, 1984, awaiting trial and decision on the charge. The Claimant was restored to service on

October 31, 1984, and the Hearing Officer's written decision was issued on November 7, 1984, imposing a forty-five calendar day suspension.

Aside from that portion of his testimony which concerns being threatened, the testimony of the Engineer does not differ significantly from the testimony of the Claimant. The Engineer testified that the Claimant threatened him while the Claimant repeatedly and vehemently denied having threatened him. The Claimant and his Representative sought to develop evidence of supplementary incidents indicating the Engineer had favored other employees but discriminated against the Claimant.

The position of the Carrier is that the testimony of the Engineer concerning the conduct of the Claimant is unimpeached and unequivocally establishes the Claimant to be guilty of the violation of rules as charged. The position advocated by the Carrier is not sound. It perceives the testimony of the Engineer as sacrosanct while it dismisses the testimony of the Claimant because his testimony is said to be self-serving. Thus, the argument the Carrier suggests would result in discipline arbitrarily imposed and upon a basis which is destructive to the principles of industrial justice.

This Board has diligently reviewed and considered the entire record and we confine our consideration to the question of whether the Carrier has met its burden of proof on the charges.

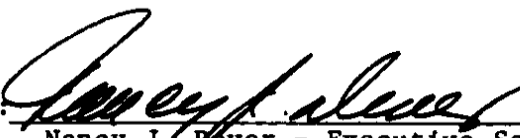
The Carrier properly points out that an offense involving a threat to a Supervisor is serious. Such an offense is unacceptable in the railroad industry where an essential service is provided. This is particularly true on this property where the comfort and safety of the traveling public are involved. This Board will not condone conduct of the kind included in the charges but we do expect the proof of such conduct to be convincing. That is not the case in this dispute. The evidence of record is neither sufficient nor convincing to the point where it may be found the charges are substantiated. Hence, we set aside the discipline imposed.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 28th day of January 1988.

CARRIER MEMBERS' DISSENT  
TO  
AWARD 26790, DOCKET MW-27057

(REFEREE THIAS)

Without benefit of first-hand observation or proof of arbitrariness, and contrary to the well established principle precluding such determinations referenced in numerous Awards of this Board, the Majority in this case improperly made their own credibility determinations as evidenced by the following quotation:

"Aside from that portion of his testimony which concerns being threatened, the testimony of the Engineer does not differ significantly from the testimony of the Claimant. The Engineer testified that the Claimant threatened him while the Claimant repeatedly and vehemently denied having threatened him."

\* \* \* \*

"The position of the Carrier is that the testimony of the Engineer concerning the conduct of the Claimant is unimpeached and unequivocally establishes the Claimant to be guilty of the violation of rules as charged. The position advocated by the Carrier is not sound. It perceives the testimony of the Engineer as sacrosanct while it dismisses the testimony of the Claimant because his testimony is said to be self-serving. Thus, the argument the Carrier suggests would result in discipline arbitrarily imposed and upon a basis which is destructive to the principles of industrial justice."

While the testimony of supervision may not be "sacrosanct," the finding of guilt made in this case was not based on such an unfounded premise. The testimony of the Supervisor, like that of the Claimant, had every entitlement to be heard and weighed by the Trial Officer in the context in which it was given. The Trial Officer heard that testimony first-hand, along with that of the Claimant. The Trial Officer also observed the demeanor of the two employees and was in a far better position to determine

Carrier Members' Dissent to  
Award 26790, Docket MW-27057

the credibility of the testimony than was the Majority, who did not enjoy that insight. There is no showing in the record that the Trial Officer erred or was biased in his determination.

In Second Division Award 7542 the Board held:

"The only way for us to sustain the claim is to make a credibility determination by rejecting the Patrolman's version and accepting Claimants. On the state of the record before us the Hearing Officer could have easily done so, but his acceptance of the Patrolman's story is not per se arbitrary, unreasonable and capricious. Even if Carrier believed the wrong man where the issue is narrowed to credibility alone, we are unable to resolve such conflicts. Rightly or wrongly it is firmly established by a host of Awards that this appellate tribunal shall not resolve pure credibility questions. See Second Division Awards 6408, 6604, 7144 and 7196. See also Third Division Awards 14556, 19696 and 21258. We often are frustrated by this anomolous precedent, but the principle is established, it is understood and acknowledged by the parties and it is dispositive of the claim before us. We have no alternative but to deny the claim."

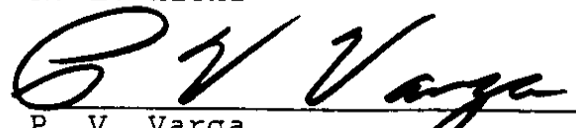
In this case the Majority clearly exceeded its authority by improperly assuming the posture of the "trier of the facts."

We dissent.

  
M. C. Lesnik

  
M. W. Fingerhut

  
R. L. Hicks

  
P. V. Varga

  
J. E. Yost