

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 28169  
Docket No. MW-27462  
89-3-86-3-702

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The sixty (60) days of suspension imposed upon Assistant Foreman E. A. Williams for alleged violation of Rule 801 was unjust, arbitrary and on the basis of unproven charges (System File MW-85-143/441-65-A).

(2) The claimant's record shall be cleared of the charge 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 is an Assistant Foreman on Rail Gang 53 with fourteen and one-half years of service. The Claimant works under the supervision of a General Track Supervisor. As a result of an incident on August 30, 1985, an investigation was held, and the Claimant was subsequently found guilty of violating Rule 801 and, specifically, of being insubordinate to the General Track Supervisor.

The Organization charges the Carrier did not afford the Claimant a fair and impartial investigation because the Carrier assigned an Assistant Division Engineer to perform multiple roles as (1) the officer preferring charges against the Claimant; (2) the officer who rendered the decision; and (3) the officer who is designated to receive appeals at the first level of a two-step appellate process. With respect to the merits, the Organization argues the Carrier failed to present any credible evidence to support the charges leveled against the Claimant.

The record establishes the procedural issue raised in the Organization's Submission was not raised in the on-the-property handling of this matter. Accordingly, this Board, following firmly adopted precedent, cannot entertain this belatedly raised position no matter how meritorious it may or may not be. See Third Division Awards 25306, 24470, and 21394.

On the merits, the charge of insubordination is essentially based upon the testimony of the General Track Supervisor, who testified the Claimant interrupted a conversation he was having with an employee and told him three times he would "whip" his ass and subsequently stated: "You've gone too far, I'm going to kick your ass." A number of the members of Rail Gang 53 were called as witnesses and all, but one, professed not to have heard or witnessed any of the event detailed by the General Track Supervisor. The exception was a welder, who saw the General Track Supervisor and the Claimant having a conversation. The witness was walking toward them. He said he saw the Claimant shaking his finger in the General Track Supervisor's face and when he got close heard the last part of the Claimant's statement "...my ass," and then "Mr. Wakefield, you've just went too far this time." The Board notes the Claimant admitted to this last statement at the Investigation.

Although the witness's testimony did not totally confirm the General Track Supervisor's charges, given the sequence of events, it tends to circumstantially support those allegations. This Board has consistently held that questions of credibility are reserved to the Hearing Officer. Herein, we cannot conclude those determinations are against the manifest weight of the evidence. On the contrary, we find the evidence supports the Carrier's action.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bevel, Executive Secretary

Dated at Chicago, Illinois, this 16th day of October 1989.