

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30442
Docket No. SG-30264
94-3-91-3-743

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Chicago and North Western Transportation Co.

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago North Western Transportation Company involving the question:

"Claim on behalf of G.H. Garner, for reinstatement to service with all rights and wages beginning on the date of dismissal, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 51, when it dismissed him." Carrier File 79-91-2. GC File No. S-AV-36. BRS Case No. 8468. CNWT."

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 employee 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.

By letter dated September 25, 1990, Claimant was charged with a) failing to report for duty timely; b) threatening the district foreman; and c) insubordination in failing to follow instructions. Following an Investigation conducted on October 1, 1990, the Carrier notified the Claimant that he was dismissed. Although the Organization had acknowledged that in the course of the Investigation, "it was determined that the Claimant was late for work through his own admission", it was argued that the "discipline of dismissal was unusually harsh and excessive."

With respect to the charge of insubordination, the record indicates that the foreman told Claimant to call his supervisor when he arrived 45 minutes late. According to the foreman, Claimant upon receiving the direct order responded: "F--- you, I'll call him when I get ready to." Claimant denied the profane response, but testified instead that the foreman began "badgering" him and allegedly provoked him with profane language as follows: "Well, we got you now you stupid m----- f-----." Subsequently, in Claimant's account, the foreman relieved him of the task of calling his supervisor by stating, "Well, I'll do it myself."

Despite the conflicting testimony, the Board finds substantial evidence to sustain the charge of insubordination. Notwithstanding the testimonial conflict concerning which employee initiated the use of profane language, the record clearly established that at no time did Claimant comply with the direct order to call his supervisor. Given Claimant's acknowledgement of the order and his initial response that he "didn't answer because I wanted to go to the bathroom", his assertion that he was relieved of the task is doubtful. Absent evidence supporting Claimant's contention that the foreman changed his mind regarding the order, Claimant, irrespective of the context in which the order was given, provided it was not a threat to his safety or unlawful, had a duty to obey now and grieve later pursuant to a longstanding axiom in labor relations.

The Board, however, is not persuaded that the Carrier has met its burden of proof with respect to the charge that Claimant threatened his supervisor. A wide disparity exists between the testimony of the Claimant and that of his immediate supervisor regarding the conversation which occurred on September 25, 1990. On the one hand, the foreman testified, as noted above, that when he asked Claimant: "What time he started work that day?", his response was "F--- y--." He then testified as follows:

"Q. In your statement you also stated that after you told him to page Dan, he started to threaten you with physical harm. Can you recall what he said?

A. He was, at that time, walking around the Maintainer's headquarters yelling and screaming and at this time he came up very close to me and said, 'It's only you and me in this office right now, and I can kick your ass.'"

Claimant, on the other hand, denied using any threatening or profane language but instead testified that the foreman began to badger him and referred to him in derogatory terms, noted supra.

The absence of evidence to corroborate the foreman's version combined with evidence supporting Claimant's testimony that the foreman had a propensity to provoke employees, specifically "verbal abuse" and "badgering a guy (who) is trying to get the problem done" compels the Board to find that the Carrier did not meet its burden of proof. Since it is well established that the Carrier has the burden of proof, the charge of threatening a supervisor is unsubstantiated by this record.

The Board has often held that its appellate function precludes consideration of credibility issues as these determinations are reserved for the hearing officer at the Investigation. Inasmuch as the Board cannot assess witness demeanor or other indicia of credibility, it must, of necessity, defer the resolution of conflicting testimony to the Carrier provided the resulting record is one which substantiates both Claimant's culpability and the penalty imposed.

In this regard, the Board retains the authority in disciplinary matters to ascertain whether substantial evidence of guilt has been provided or whether the record indicates the Carrier has acted in an arbitrary or capricious manner under the circumstances. This principle was enunciated in Third Division Award 7473 as follows:

" The scope of our Board's review in a discipline case is well defined. As an appellate Board, we may not substitute our judgment for that of the Carrier or decide the case as we might have done were we to consider it de novo. We can only decide, from the record, whether there is substantial evidence to support the charge. If the record contains such substantial evidence, then the assessment of discipline rests in the Carrier's discretion and we are not authorized to disturb the penalty imposed unless it can be clearly shown that the Carrier's actions were unjust, unreasonable or arbitrary. These sound principles have been upheld by all Divisions of this Board, in awards too numerous to cite."

Having proven the charge of lateness and insubordination but not the most serious charge of threatening a supervisor, the penalty of dismissal imposed by the Carrier is deemed excessive. The appropriate penalty is reinstatement without back pay.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of August 1994.