

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38055
Docket No. CL-39262
07-3-05-3-655

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-13018)
that:

1. Carrier acted in an arbitrary, capricious and unjust manner violating Rule 24 and other related rules of the agreement, when by letter dated September 17, 2004, it addressed discipline of “A thirty (30) working day suspension, covering the period August 1, 2004, through September 11, 2004. Commencing September 12, 2004, you will return to your position as a Ticket Clerk.” against Claimant Paula Stogner.
2. The Carrier violated the provisions of Rule 24 when it removed the Claimant from service.
3. Carrier shall now compensate Claimant an amount equal to what she would have earned, including but not limited to daily wages, holiday pay and overtime had discipline not been assessed from August 1, 2004 through September 11, 2004.
4. Carrier shall now expunge the charges and discipline from Claimant’s record.”

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 were given due notice of hearing thereon.

By letter dated July 31, 2004, the Carrier notified the Claimant to appear for a formal Investigation on August 10, 2004, concerning charges that she failed to follow the Carrier's Standards of Excellence pertaining to Teamwork and Professional and Personal Conduct. The notice specified that on July 31, 2004, the Claimant refused to follow the direct order of the District Manager of Stations to train a Relief Ticket Agent. The Hearing was postponed to and held on September 8, 2004. By letter dated September 16, 2004, the Hearing Officer found that the charges were proven. By letter dated September 17, 2004, the Carrier notified the Claimant that she had been assessed a 30-day suspension.

The record reflects that on July 31, 2004, the District Manager of Stations telephoned the Claimant and requested that she train another employee who had displaced her as Relief Ticket Agent. The Claimant responded that she felt she could not do that because she feared the other employee. She indicated that she felt intimidated by him and feared that he might sue her. Several hours later, the District Manager of Stations called back. He had two Road Foremen of Engines on a telephone conference as witnesses. He gave the Claimant a direct order to train the employee and the Claimant replied that she could not comply because she feared him. The District Manager of Stations asked the Claimant if she was refusing a direct order. According to the District Manager and both Road Foremen of Engines, the Claimant told the District Manager that if he had to fire her, he should do so. The Claimant denied making such a statement, but testified that she asked the District Manager why he was doing this to her and begged for her job. The Claimant testified that she was crying during the telephone conversation. Her testimony in that regard was corroborated by one of the Road Foremen of Engines.

After the Claimant declined the initial request to train the other employee, the District Manager asked another Ticket Clerk to conduct the training. The Ticket Clerk declined. After the Claimant refused to train the other employee

despite the direct order that she do so, the District Manager ordered the Ticket Clerk to conduct the training and he complied to the extent of showing the other employee where various items were located.

The Lead Ticket Agent testified that the District Manager had requested that she train the other employee on several occasions and that she consistently declined to do so because she was afraid to be alone with the other employee. She testified that the other employee had verbally intimidated her on several occasions and described his demeanor as violent, but conceded that he had never physically threatened her. She also testified that the other employee had sued her, that the court had dismissed the suit as frivolous, but it nevertheless cost her emotionally and financially.

A Baggage man testified that he had been asked by the Lead Ticket Agent to train the other employee and declined. The Baggage man explained that he did not want to train the other employee for fear of being sued. He further testified that many employees at the facility felt intimidated by the other employee.

The other employee testified that he never had any difficulties in his relationship with the Claimant. He denied threatening or intimidating the Lead Ticket Agent. He admitted that he sued her for slander and that the suit was dismissed by the court.

There was evidence that the other employee had been involved in an incident where he threatened a co-worker with a baseball bat. The Claimant testified that because of the law suit, the baseball bat incident, and the other employee's intimidating demeanor, she was afraid to be alone with him. She refused to train him because it would have involved being alone with him.

The Hearing Officer credited the testimony of the District Manager, the Road Foreman, the Baggage man and the Ticket Clerk. He discounted the credibility of the Lead Ticket Agent and the other employee due to their "apparent attempt[s] to place [their] own actions in the best possible light and . . . [their] equally apparent dislike [of each other]." With respect to the Claimant, he found: "Your own testimony is deemed to be a self-serving, although unsuccessful, attempt to fabricate a response in order to void the consequences of your actions."

Generally, as an appellate body that does not observe witnesses testify, we defer to the credibility determinations made by the Hearing Officer. The instant case is one of the very rare instances where we are unable to accord the credibility findings made on the property such deference. The Hearing Officer's finding that the Claimant fabricated her testimony finds absolutely no support in the record. No one involved in the proceeding, not even the Charging Officer, maintained that the Claimant was insincere in her fear of the other employee. The Claimant's testimony that she was distraught and crying during the telephone conversation with the District Manager and the Road Foremen was corroborated by the witnesses to the conversation. Moreover, the Claimant's fears had a factual basis. The evidence that the other employee had previously threatened a co-worker with a baseball bat was not denied and the other employee conceded that he did sue the Lead Ticket Agent and that his case was dismissed. It is apparent that the basis for the Investigation was not a belief that the Claimant fabricated her fears but, rather, that her fears constituted an overreaction and did not justify her refusal to train the other employee. Indeed, both the District Manager and the Charging Officer expressed their regret at having to charge the Claimant, but expressed the need to do so to uphold management's authority. There is simply no basis in the record on which a reasonable trier of fact could conclude that the Claimant "fabricate[d] a response in order to avoid the consequences of [her] actions."

The Carrier's Standards of Excellence recognize an exception to the duty to comply with directives where "compliance with a particular instruction would cause a clear, immediate danger to you. . . ." Arbitral authority is in accord with this approach. In the absence of such a danger, the general expectation is that the employee will obey and challenge the directive through the grievance procedure. The Claimant's fear stemmed from the other employee's actions toward her co-workers and from his having voiced his displeasure when he arrived and found the Claimant performing his duties, duties that he had yet to be trained to perform. Fully crediting the Claimant's testimony, we are unable to reject the Hearing Officer's finding that the Claimant did not face an immediate threat to her safety and that she should have made an attempt to comply with the directive, as did the Ticket Clerk.

This brings us to the penalty imposed. In this regard, the Hearing Officer's finding that the Claimant fabricated her testimony is very significant. The purpose of discipline is to correct an employee's behavior. Insubordination is a very serious offense and usually justifies discharge. This is because insubordination poses such

an affront to managerial authority that an employer is not required to run the risk of its repetition by imposing a lesser penalty and hoping that the penalty will correct the employee's behavior.

In the instant case, the Claimant's refusal to train the other employee was not the type of willful defiance of managerial authority that warrants a severe sanction in the typical insubordination case. There is no question that the Claimant sincerely feared for her well-being if she complied with the order and although her fears may not have met the justification standard in the Carrier's Standards of Excellence, they did have a factual basis. Furthermore, the Claimant was a 29-year employee with an outstanding work record and no prior discipline. Regardless of whether we accept the Claimant's testimony that she begged for her job or the District Manager and Road Foremen's testimony that the Claimant said if the District Manager had to fire her he should do so, it is clear that the Claimant realized the seriousness of her refusal to train the other employee and the potential consequences. The "go ahead and fire me" was a statement that she was resigned to the consequences of her sincerely perceived need to protect herself from the other employee rather than a statement of defiance of managerial authority.

We further note that the District Manager candidly testified that he did not "realize how fearful these people were of this man. . . . I did not consider him to be a threat." When presented with evidence of the baseball bat incident, the District Manager testified:

"I was not aware of this and I did not see any of that. I did not see the intimidation factor when I witnessed employees together. Would this make a difference in my judgments? Perhaps.

* * *

"I would have asked her to do so. I would have instructed her to do so. I would - probably would have paid a lot more attention to what she was telling me and given it more weight."

Thus, we are presented with an otherwise exemplary employee who failed to comply with a directive under highly peculiar circumstances that do not reflect a willful defiance of managerial authority and reflect no significant risk of repetition. But, if the Claimant fabricated her testimony, that would be a major aggravating

factor that would reflect defiance of authority and would justify a severe sanction. However, as discussed above, we find that there is absolutely no evidentiary support for the finding of fabrication. Because that finding is the only factor that could justify the severe sanction imposed on the Claimant, it is clear that the penalty is grossly excessive.

The only justification for a penalty presented in this record is the need to officially instruct the Claimant that her actions, while sincere, were not compliant with the Rules and thus to uphold management's authority. We conclude that nothing more severe than a written reprimand is necessary to accomplish this objective. Accordingly, we shall award that the Carrier reduce the penalty to a written reprimand and compensate the Claimant for all wage loss suffered as a result of the 30-day suspension.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 25th day of January 2007.