

PUBLIC LAW BOARD NO. 3530

Case No. 23
Award No. 23

PARTIES TO DISPUTE:

Norfolk and Western Railway Company

And

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

Pay for time lost with seniority and Vacation
Unimpaired - Maurice A. Alexander

FINDINGS:

Claimant, at the time of the incident in question, was employed by the Carrier as a Laborer at Radford, Virginia.

On August 31, 1982, Claimant was dismissed from service as a result of alleged insubordination. An investigation was held by the Carrier on October 25, 1982. As a result of the investigation, Claimant was assessed a 90 day suspension.

The issue to be decided in this dispute is whether the Carrier's discipline of Claimant was justified under the Agreement.

The position of the Carrier is that it proved by substantial evidence that Claimant was guilty of insubordination on the date in question. The Carrier maintains that the Claimant failed to assume his duties as ordered, and that

he further made a derogatory gesture towards his Supervisor.

The Carrier cites the testimony of Supervisor D.R. Lytton to support its allegations. Lytton testified that Claimant was argumentative and insubordinate on the date in question. Lytton also testified that he subsequently turned back to see the Claimant make an obscene gesture toward him.

Carrier further cites the testimony of Foreman D.M. Harriston. Harriston testified that he saw the Claimant give Lytton an obscene gesture and was certain that that the gesture was directed toward Lytton. The Carrier contends that the corroboration of Lytton's testimony by Harriston clearly establishes that the Claimant was guilty of the offense charged.

The position of the Organization is that the Carrier failed to establish by substantial evidence that the Claimant was guilty of the offense charged.

The Organization cites the testimony of Laborer D.R. Hodge to substantiate its position. Hodge testified that Claimant merely "threw his hands up in the air" after speaking to Lytton. The Organization also refers to the testimony of Laborer J.A. Jordon, who testified that Claimant "... just waived his hand ..." and at no time gave Lytton an obscene gesture. The Organization finally cites the testimony of C.A. Alexander, who also stated that the Claimant "threw up both hands and turned around and walked away."

The Organization also cites the testimony of the Claimant, who testified that "I threw my hands up in the air and walked

away from him". The Claimant also testified in reference to his alleged insubordination that "I questioned Mr. Lytton why he was directing his conversation specifically to me when there was other people involved in the same thing." It is the Organization position that the Claimant was not insubordinate in any way toward Lytton on the date in question. The Organization contends to the contrary that Lytton, and not the Claimant, should have been disciplined for his unwarranted harsh treatment toward the Claimant.

The Carrier has shown by substantial, credible evidence that the Claimant was guilty of the charges proffered. The Carrier weighed the evidence presented and determined the relative credibility of the witnesses, and in our view did not abuse its discretion in finding the Claimant culpable.

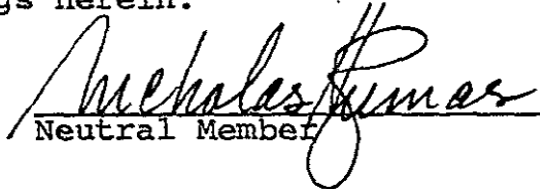
The testimony of Lytton and Harriston provided substantial evidence that the Claimant was guilty of insubordination on the date in question. Although conflicting evidence was presented, we cannot find that the Carrier's decision was arbitrary or without basis. This Board has consistently held that it is the Carrier's province to weigh conflicting evidence, and we will not upset the Carrier's decision when there is sufficient evidence to support its conclusion. In the present case, we find there is sufficient evidence to support the Carrier's decision.

Although the Board finds that the Carrier has proven the charges brought by substantial evidence, we must also find that

the discipline imposed was excessive under the circumstances. Normally, we will not upset the Carrier's determination of appropriate disciplinary measures. However, we agree with Second Division Award 2066 wherein it states, "As we regard the subject of discipline, it should be considered from the standpoint of reasonable effectiveness. Punishment of the violation should be of a degree compatible with the seriousness of the violation". In the present case, we find that the penalty was excessive under the circumstances. We further find that a suspension of 30 days is commensurate with the severity of the offense.

AWARD:

Claim disposed of per Findings herein.



Neutral Member



Carrier Member



Organization Member

Date: 8/7/85