

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ A Division of TCU  
(  
(Northeast Illinois Regional Commuter Railroad  
( Corporation

STATEMENT OF CLAIM:

1. That Carman Feliz Diaz was unjustly dealt with, in violation of Rule 29(a) and that his hearing was neither fair nor impartial.
2. That the Carrier be ordered to compensate Carman Feliz Diaz for all lost time from November 6, 1987 through November 19, 1987 during which time he was unjustly assessed a fourteen (14) calendar day actual suspension.
3. That the Carrier be ordered to make Carman Feliz Diaz whole for any benefits which are a condition of employment which he may have lost as result of his unjust suspension.
4. That the Carrier be ordered to pay Carman Feliz Diaz interest at the 12% rate per annum for any payment he may receive as result of this claim.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Following a rather extensive Investigation concluded on October 28, 1987, Claimant, assigned as a Carman at Carrier's Western Avenue Coach Yard, was assessed discipline of fourteen days actual suspension, effective November 6, 1987 for allegedly violating Rules L and N of Carrier's Employee Conduct Procedure.

The Board has carefully examined the transcript of the Investigation which resulted in the discipline assessed Claimant. We find that the Investigation was properly conducted; none of Claimant's Agreement rights was violated.

In discipline cases the burden is upon the Carrier to adduce in the Investigation substantial evidence in support of the charge against the employee. The "substantial evidence" rule was set forth by the Supreme Court of the United States as:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."  
(Consol. Ed. Co. vs Labor Board 305 U.S., 197, 229).

See Second Division Awards 11626, 11237, 11180 among others.

The matter of proof in the present dispute gives the Board serious concern. We find that the Carrier has not adduced substantial evidence in support of the charge. Discipline must be based on evidence adduced in the Investigation, and not on speculation or conjecture.

The Claim will be sustained except we find no proper basis for Part 4. There is no provision for the payment of "interest at the 12% rate per annum."

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Devel - Executive Secretary

Dated at Chicago, Illinois this 27th day of September 1989.


RECEIVED

CARRIER MEMBERS' DISSENT  
TO  
AWARD 11767, DOCKET 11636  
(Referee Carter)

DEC 19 1989

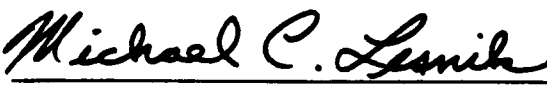
Discipline in this claim was not based on speculation or conjecture as intimated in the Award. The employee admitted he did not have a hold of the brake pipe air hose when he disconnected it. Further, his testimony proved there was still pressure in the hose when it was disconnected. This was contrary to safe procedure described by the Mechanical Foreman and also in contravention of Safety Rule 50 in place at the facility. Finally, we are asked to believe that two men standing within an arm's length of one another were completely aware of one another.

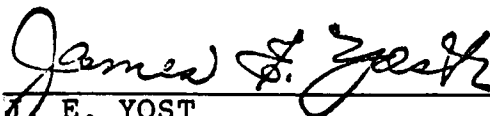
In cases where it is critical of the carrier's reasoning, it behooves the Board to be more detailed in its own reasoning.

  
P. V. VARGA

  
M. W. FINGERHUT

  
R. L. HICKS

  
M. C. LESNIK

  
E. YOST