

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30015
Docket No. MW-30085
94-3-91-3-500

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

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

- (1) The sixty (60) day actual suspension issued to Welder Helper M. H. Polk for his alleged failure to follow Welder R. Falin's instructions and failing to warn him of an approaching train was arbitrary, capricious, excessive and based on unproven charges [System File 1(50)(90)/12(90-924) LNR].
- (2) Claimant Polk's record shall be cleared of the charges 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 employe or employes involved in this dispute are respectively carrier and employe 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.

Claimant was employed as a Welder Helper working in Carrier's Queensgate Yard, Cincinnati, Ohio. On September 12, 1990, he was working with a Welder who was assigned to build up a switch point at OB Tower, Queensgate. One of Claimant's primary duties on this date was to watch and warn the Welder of approaching trains. Allegedly, Claimant did not comply with the instructions of the

Welder who, on September 13, 1990, submitted a written report to the Division Engineer which read as follows:

"Mr. Tucker I have been experiencing numerous incidents with welder helper M H Polk, watching for trains. The latest incident happened September 12-90 while I was welding on a switch point at O B Tower. I heard a train coming, I looked up to see where the train was and why the welder helper didn't warn me. I saw him standing a ways down the track from me. He told me the welding machine was hurting his ears. I told Mr. Polk that I thought he was to far away and that he didn't have time to come back where I was and warn me.

Mr Polk defied my instructions and remained at the same location. I had to finish the switch point under the existing circumstances in which I feel I was in danger." (sic)

On the basis of this report, the Division Engineer, on September 25, 1990, notified Claimant to appear for an Investigation on October 3, 1990, to answer the charge of "failure to follow R. Falin's (Welder) instructions on September 12, 1990 at OB Cabin when you failed to warn him of an approaching train." The Investigation was held as scheduled at which time Claimant was present, represented and testified on his own behalf. Following the Investigation, Claimant was notified by letter dated October 25, 1990, signed by the same Division Engineer who had initiated the charge notice and who was not present at the Investigation, that he had been found responsible on the charges and was disciplined by suspension of sixty days.

During the on-property handling of this dispute, the Organization argued that Claimant had not received a fair Investigation and that the decision to discipline had no basis in the record. It contended that:

"Mr. Tucker fails to refer to any evidence that remotely indicates that Mr. Polk did not follow any instructions. This letter is procedurally defective in that Mr. Polk has not received a fair reading of the transcript from Mr. Tucker. In fact, Mr. Tucker makes no reference as to why Mr. Polk was guilty of anything.

* * *

It appears that this Carrier has given this employe 60 days without pay without pointing to any proof that he did anything wrong."

In its Submission to the Board, the Organization expanded its position to include (1) charges of racial bias on the part of the Welder; (2) charges of due process violations in that the decision to discipline had been made by a Carrier officer other than the Hearing Officer; and (3) charges of prejudgment on the part of the Carrier because the same officer who made the charges also issued the notice of discipline.

For its part, the Carrier, both on the property and before this Board, argued that the Investigation was fair and impartial, that the evidence as developed at the Investigation supports the conclusion that Claimant failed to follow the instructions of the Welder and that:

"Contrary to your contention the evidence adduced at the investigation proved Mr. Polk guilty as charged, his self-serving, unsubstantiated denials notwithstanding. The Hearing Officer heard all of the testimony and resolved the credibility conflicts in the favor of Mr. Polk's immediate supervisor, Welder Falin. This is a proper function of the Hearing Officer and is not in violation of any Agreement provision. In the final analysis, Mr. Polk should consider himself fortunate that he was not permanently dismissed for his blatantly insubordinate behavior on the date in question."

The Board reviewed the hearing transcript and studied the precedential citations presented by the parties. It is our initial conclusion that the first-time arguments raised by the Organization before this Board are not proper material for our consideration and have not been determinative in our conclusions on this case.

The record is rife with contradictions and unsubstantiated statements by all parties to the dispute. On the single issue of how close the Helper should be to the Welder to afford proper protection, we find that the Assistant Division Engineer Maintenance testified that the distance should be "within 25 feet or so." The Roadmaster testified that the proper distance should be "no more than 25 to 30 feet away." Then the Hearing Officer through his asking of leading questions established on the record that the proper distance should be within a rail length which is 39 feet. None of these people however, were present at the job site on September

12, 1990. The Welder testified that Claimant was "standing a ways down the track from me" and after prodding by the Hearing Officer opined that "It was in the neighborhood of 100 feet or better." Claimant testified that he was "ten or fifteen feet away from him."

This is but one of the contradictions and unresolved allegations which make up the main body of the transcript. The Carrier's argument relative to the Hearing Officer being the one to hear the testimony and resolve credibility conflict is a valid one. This Board has so held in many cases. However, in this case, we do not see any evidence that the Hearing Officer made any credibility determinations. We do not find any evidence that he made any recommendations relative to the Hearing record which he developed. What we do have in this case is a situation which is very similar to that which is found in the Third Division Award 13180, which was repeated in First Division Award 23946, where the Board held:

"There is conflicting testimony in the transcript of the hearing as to material and relevant facts. Only the hearing officer who presided at the hearing and observed the demeanor of the witnesses was qualified to make findings as to credibility. He did not do so. In the absence of resolution of credibility by the hearing officer, it cannot be determined whether there is substantial evidence to support the findings made by General Agent Key."

Additionally, we agree completely with Carrier's contention relative to the effects of unpunished insubordination. The citations offered by the Carrier in this regard are all well reasoned decisions. However, before there can be punishment properly administered, there must be substantial evidence - that is more than a mere scintilla - to support the conclusion that the accused employee was, in fact, guilty of insubordination. On the basis of the Hearing record in this case, we do not find that there is relevant evidence which a reasonable mind might accept as adequate to support the conclusion that Claimant was, in fact, insubordinate in this instance.

Therefore, it is our conclusion that the discipline must be rescinded.

A W A R D

Claim sustained.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Catherine Loughrin*
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 21st day of January 1994.