

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4316
Docket Number 4280

Referee Edward L. Suntrup

PARTIES Allied Services Division/Brotherhood of Railway, Airline and
TO Steamship Clerks, Freight Handlers, Express and Station Employees
DISPUTE: Chesapeake and Ohio Railroad

STATEMENT OF CLAIM: It is the claim of the System Committee of the Brotherhood (P-157) that:

1. The Carrier acted in an arbitrary, capricious and unjust manner and in violation of the (sic) of the Agreement, especially Rule 22, among others, when it suspended A. Alfieri commencing July 7, 1981 and ending July 11, 1981 a total of five (5) days.
2. The Carrier shall now compensate A. Alfieri for all time lost due to the suspension and that his record be cleared of same.

OPINION OF BOARD: The Claimant was advised to attend an investigation on May 14, 1981 to establish facts and place responsibility, if any, in connection with his alleged failure to comply with a Supervisor's instructions and with failure to execute a recovered property report on April 18, 1981. After request for postponement the investigation was held on June 3, 1981. The Claimant was thereafter informed on June 16, 1981 that he had been found guilty of failure to execute the property report and was assessed five (5) days actual suspension.

The record shows that two refrigerators were stolen from Carrier car TP 269044 sometime prior to April 14, 1981 and that the Claimant was assigned to investigate the robbery. The Claimant was issued seals B&O RR 8660553 and 8669551 which were applied to the car in question. The Claimant also filed an exception report covering the robbery and an incident report. These reports are part of the record. The investigation into these matters by the Claimant took place on April 14, 1981. The next three days were his rest days. On April 18, 1981 Lieutenant L.D. Pace placed a note in the Claimant's mailbox with a request that a recovered property report also be filled out. Undisputed testimony during the investigation shows that it is customary to have the officer who makes out the exception and incident reports to also execute the recovered property report form. According to testimony of Carrier's witnesses, the requested report had not been filed by April 27, 1981.

It is the position of the Claimant that he received verbal instructions from Sergeant D. Raschke on April 18, 1981 to make out said report but that he objected to doing so since he had not handled the merchandise which had been recovered on April 14, 1981 by the Chicago Police Department on the Carrier's property in the west yard at 48th Avenue. It is also the position of the Claimant that he did, however, file the report on April 19, 1981. Normally, one copy stays with the merchandise and one copy is sent to the office. The testimony of the Claimant is that he sent the total report to the office "per instructions from Sergeant Raschke" but that he retained a photographic copy for himself. This copy is entered into the record as an exhibit. Since the Claimant's tour of duty was 11 PM to 7 AM on the day of April 18, 1981 the copy's date coincides with the end of the Claimant's tour of duty.

There are some evident inconsistencies in the testimony and evidence before the Board with respect to this case. The most important inconsistency from an evidentiary point of view hinges on whether the Claimant followed orders given to him on April 18, 1981 irrespective of whether these orders were given by means of a memo from the Lieutenant, or orally by the Sergeant for the Lieutenant. The position of the Carrier is that the form was not filed because it did not receive it. The position of the Claimant is that he did file the report at the end of his shift on April 18, 1981, and he presents a photographic copy of this report as corroborating evidence.

By long established precedent this Board cannot set itself up as a trier of fact to resolve conflicting testimony and under such conditions will not substitute its judgment for that of Carriers (Third Division Awards 16281, 21238, 21612). At the same time, however, the Board is bound by criterion of substantial evidence which has been defined as 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). The Claimant presents factual, corroborating evidence to the effect that the disputed report was filed. Although the Carrier questions the Claimant during the investigation about why he made a copy of the report, it appears to the Board that this is adequately and reasonably answered by the Claimant when he states that he did so as a precaution because past experience showed that the office sometimes did not receive original reports which he had submitted. Nor does the Carrier, in the record, argue that such procedures as those used here by the Claimant are so extraordinary. The burden of proof in discipline cases rests with the Carrier (Second Division Awards 5526, 6054; Third Division Awards 22292, 22760). In the instant case the Carrier has not sufficiently shouldered that burden to warrant conclusion that the claim not be sustained. The Carrier shall, therefore, compensate the Claimant for all time lost due to the suspension at bar and shall clear his record of the same.

FINDINGS:

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

The Carrier and the 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.

The parties to said dispute were given due notice of hearing thereon.


The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:


Nancy J. Deyer
Executive Secretary

Dated at Chicago, Illinois, this 15th day of August, 1985