

The Fourth Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union - Yardmasters Department
(CSX Transportation, Inc. (formerly The Baltimore and Ohio Railroad Company)

STATEMENT OF CLAIM:

Yardmaster W. R. Hamlett is claiming one day's pay at the Yardmaster punitive rate for attending investigation March 18, 1988 and requesting that his service record be cleared of the discipline of 15 days overhead suspension assessed as the result of that investigation.

FINDINGS:

The Fourth 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.

By letter dated February 17, 1988, Claimant was notified that he had been charged with insubordination. Following an Investigation held on March 18, 1988, Claimant was found guilty and was assessed a fifteen (15) days overhead suspension.

The Organization argued at the Investigation and on the property that the charge was not precise, that the use of a tape recorder violated Article 22 requiring a stenographic report, and the Carrier's letters of February 11 and 12, 1988, were not supplied to the Organization. It further argued that the declination was defective in being denied by the wrong Carrier officer. The Organization maintains that Claimant was not guilty of insubordination.

This Board finds that the charge was precise in that the Claimant was fully aware of the issues to be investigated (Second Division Award 7103; Third Division Awards 19877, 19745). There is precedent establishing that insubordination goes beyond the narrow constraints argued by the Organization, and the Board finds the charge includes Claimant's alleged actions (Second Division Awards 7193, 7128). A full reading of the Agreement finds no current language that prevents the Carrier from using a tape recorder during the Investigation (Fourth Division Awards 3754, 4617). As for the failure of the Carrier to provide the Organization with two letters, that failure cannot be deemed fatal. The content of the letters was a part of other exhibits and was fully brought out by the facts of this case. The absence of those letters would provide no change in the probative evidence necessary to reach a conclusion or protect the Claimant's rights.

The most serious issue in this Board's view is the charge made by the Organization that "the initial appeal is defective in that it was declined by Mr. G. L. Gibson." The Organization argues that Mr. Gibson is not the proper officer. While the Organization quotes Article 22(c) it focuses its complaint on the fact that Carrier correspondence of October 29, 1987, lists Officers designated to receive claims. While the appeal was sent by the Organization to Division Manager Smirl as listed in the October 29 letter, it was declined by Superintendent of Operations Gibson.

A review of the Agreement provides in Article 21 that the Organization should file its claim or grievance "to the Officer of the Carrier authorized to receive same." This the Organization did when it appealed to Mr. Smirl. The same Article states that "the Carrier shall" respond. The Carrier did respond in its letter from Mr. Gibson and in so doing did not violate the Agreement (Second Division Award 10066). This charge of the Organization is serious in that the Carrier's response is wholly deficient in failure to either challenge or refute the assertion. The Carrier by now should be well aware that unrefuted on-property statements must be accepted as fact (Fourth Division Awards 3480, 2863; Third Division Awards 20041, 12840). However, the Board is confronted herein with a failure on the part of the Carrier to rebut an assertion that appears clear and obvious from the record to be false. The Board cannot under the instant circumstances, where the Agreement and record are clear as to no violation, hold the Carrier to be in violation simply because its officers were deficient in a full on-property record of rebuttal and refutation. The Board therefore finds no violation in its close examination of this record.

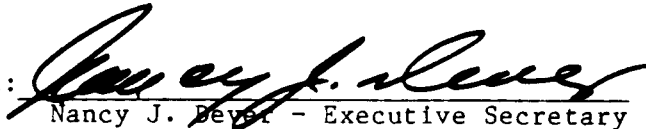
As to the merits of this case, the probative evidence supports a conclusion of guilt. Having found the Claimant guilty of insubordination, the only task left is to examine the quantum of discipline. The Board finds the discipline to be neither arbitrary, capricious nor excessive. The Claim cannot be sustained and the judgment of the Carrier will be left undisturbed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1990.