

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 7846
Docket No. 7766
2-A&S-CM-'79

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: { System Federation No. 2, Railway Employees'
{ Department, A. F. of L. - C. I. O.
{ (Carmen)
{ Alton and Southern Railway Company

Dispute: Claim of Employees:

1. That under the current agreement, Carmen W. J. Younger and J. Horvath were improperly dismissed as Carmen on February 9, 1977.
2. That accordingly, the Carrier be ordered to restore Carmen W. J. Younger and J. Horvath to service with all rights unimpaired and compensated for all time lost including payment of all fringe benefits with six (6) percent interest on wages.
3. That Carrier violated the procedural provisions of Article V of the National Agreement dated August 21, 1954, when letters dated April 22nd and 29th, directed to Mr. Emmett D. Cox, Local Chairman, from Mr. D. K. Medley, Superintendent, The Alton and Southern Railway Company, failed to be complete or concise by not setting forth in writing forth in writing the reason for declining the 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 employees 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.

Claimants were dismissed from service on March 9, 1977 following an investigation held on March 3, 1977, wherein they were charged with, "your alleged participation in the theft of seven bars of copper on Alton and Southern Railway Company property at approximately 10:50 P.M., February 9, 1977 and on the part of Carman Younger his alleged attempt to inflict bodily harm on an Alton and Southern Railway Police Officer."

Claimants argue that they were not provided with a precise statement of the charges and specifications or a fair and impartial hearing as required by Agreement Rule 19. They contend that these due process violations resulted in unjust dismissals, which were further predicated upon the admissibility of dubious testimonial evidence. They, additionally, assert that Carrier violated the procedural provisions of Article V of the National Agreement, dated, August 21, 1954, when Carrier failed to articulate in writing, its reasons for declining the claim.

Our review of the record indicates a contrary conclusion, namely, that Claimants were afforded a fair and impartial hearing, that was consistent with the requirements set forth in Rule 19 and the definitional due process standards of the Second Division.

We also find, moreover, that Carrier complied with the provisions of Article V of the National Agreement. When Superintendent Medley wrote to Local Chairman Cox on April 29, 1977 (which was within sixty (60) days from date of the claim letter dated April 13, 1977), he fulfilled the requirements of Article V.

Claimants were charged with a very serious infraction that is absolutely prohibited in any employment relationship. Theft, in any form or amount, is a dismissable offense. In the instant case, we have, as to be expected, conflicting versions of the specific fact occurrences on February 9, 1977.

The Chief Special Agent testified that he saw the Claimants load the copper bars into the trunk of Carman Younger's automobile and that he was subsequently struck by this car, when he attempted to intercept it. The Claimants denied it.

The precise configuration of events, however, provide a detailed cause-effect mosaic that, although, reflect the presence of circumstantial developments, nevertheless, substantially confirm the allegations. The Chief Special Agent and the Assistant Mechanical Superintendent testified that they saw the seven copper bars in the Carmen's shanty before the claimants arrived there that night. The former official, stated, that he later saw the claimants load the copper bars into the trunk of the car. One of the copper bars was located in this vehicle, after the claimants were apprehended.

There was no contradiction or effective refutation of the Chief Special Agent's charges that he was struck by the vehicle while trying to stop it.

When the collateral or circumstantial happenings are directly linked to the direct evidence such as here, with no apparent or presumptive inconsistencies, we find more than sufficient evidence to substantiate the charges. We will not belabor the application or efficacy of the circumstantial evidence rule, except to note the pertinence of Third Division Award 12491, where Referee Ives eloquently conceptualized its application:

"The mere fact that the evidence is circumstantial, makes it no less convincing and the Board cannot say as a matter of law that the carrier was not justified in reaching its conclusion following the trial."

We will deny the claim.

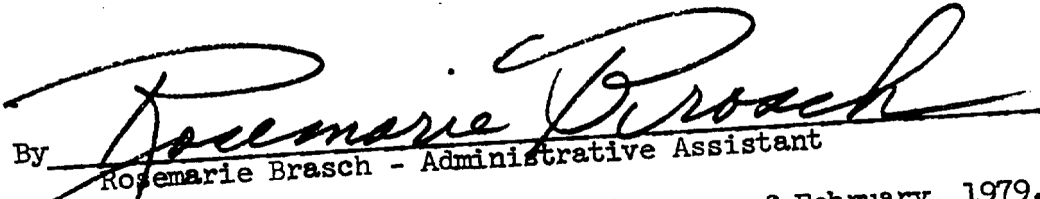
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of February, 1979.