

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Chicago, Rock Island and Pacific Railroad Company

Dispute: Claim of Employees:

- (1) That under the controlling agreement Coach Cleaner L. D. Brandon was unjustly dismissed from the service on May 12, 1979.
- (2) That accordingly, the Carrier be ordered to restore Coach Cleaner L. D. Brandon to service with all seniority and service rights unimpaired, and compensate him for all time lost retroactive to May 12, 1979.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant, a carman at 47th Street, Chicago, Illinois, had been in the Carrier's employ for less than one year when on May 2, 1979, he was allegedly found sleeping by his supervisor on two occasions during the 11:00 p.m. to 7:00 a.m. shift. After the second instance, he was sent home. His duties had not been completed, so the supervisor removed two other coach cleaners from their jobs to finish the Claimant's work. On May 9, 1979, an investigation was held and, as a result, the Carrier determined that the Claimant had violated Rules Q and N of Form G-147 Revised by sleeping on duty. The Carrier dismissed the Claimant effective May 12, 1979.

The Claimant argues his "check had been held up pay day May 2" and he "had things to take care of so I (he) was tired". He denies sleeping in the car, but acknowledges that his supervisor came into the car about 12:30 a.m. and 2:30 a.m. and touched him on the shoulder. Nothing in the record indicates that the Claimant was suffering from any mitigating circumstances, such as a physical illness for example, which might have adversely affected his ability to remain alert that night.

The Board's decision on the merits of this case hinges on the respective credibility of the Claimant and his supervisor. The supervisor testified that he had to shake the Claimant and shout at him on both occasions that night in order to awaken him. The Claimant testified that he was tired, but denies that the

supervisor shook him or shouted at him during their first encounter. He admitted that, on the second occasion, the supervisor touched him on the shoulder. He did not explain how the supervisor might have gotten close enough to touch him on the shoulder without the Claimant realizing that the supervisor was in the railroad car with him. Furthermore, the fact that the supervisor called in two other coach cleaners to finish the Claimant's work is well-documented. On balance, the record seems to suggest that the supervisor's version of the events of May 2, 1979, is the more credible. Therefore, the Board has concluded that discipline was appropriate.

The question of the severity of the discipline must be addressed as well. The Carrier acknowledges that dismissal may, on the surface at least, appear to be severe. It points out, however, that the Claimant's short service (less than one year) and unsatisfactory attendance record (25 instances of absence) justify such a penalty. The Board agrees.

The Organization has raised a procedural issue as well. It claims the Carrier violated Rule 34 (Discipline) of the controlling Agreement when it failed to provide the General Chairman with a copy of the notice of discipline within 10 days of the completion of the investigation. The Carrier acknowledges its failure to do so, but maintains it was an oversight and in contrast to normal practice.

Rule 34 was negotiated by the parties to provide due process to disciplined employees, and the Board generally holds that its procedural requirements must be met. However, such a posture does not mean that a procedural infraction by a Carrier automatically results in the setting aside of an otherwise just disciplinary action. The important question here is whether the Claimant's position in this case and his right to due process were adversely affected by the Carrier's failure to send a copy of the discipline decision to the General Chairman within the prescribed 10 days. We think not. Both the Claimant and his local representative received timely copies of said notice, and the investigation itself afforded the Claimant and his representative ample opportunity to question Carrier witnesses. Furthermore, the General Chairman was apparently apprised of the discipline decision within the contractual 60-day appeal period, for he mentioned in a letter of June 18, 1979 that he had not received a copy.

Clearly, the Carrier did violate a procedural aspect of Rule 34. The Board has concluded, however, that such violation did not adversely affect either the Claimant's right to due process or the spirit of the Rule. Accordingly, the Board will not set aside the Claimant's dismissal for this procedural violation.

Finally, the Carrier has raised an important jurisdictional question. By the time this matter had advanced to the Board (February 4, 1982), the Carrier had been ordered in connection with bankruptcy proceedings to liquidate. The liquidation order was handed down by a United States District Court on January 25, 1980. The Carrier claims it has not existed as such since that date and that it is no longer under the jurisdiction of the Railway Labor Act. It further argues that the Board has no jurisdiction in this case.

This very issue was addressed in Award No. 8970 (Second Division). In that Award the Board concluded that it had jurisdiction over the Carrier. We will not attempt to restate the full reasoning in this case, but will reiterate that Congress established the Adjustment Board to function as the sole arbiter of disputes growing out of labor agreements in the railroad industry and thus all controversies

arising over the interpretation of agreements in that industry must be submitted to the Board. The Carrier concedes that it was a carrier at the time this claim arose. and that it arose out of an employment relationship. Nothing in the Act requires that the employment relationship exist throughout the entire process of administrative adjudication. Accordingly, the Board has concluded that, for the purpose of processing the instant claim, the Board has jurisdiction to resolve this dispute.

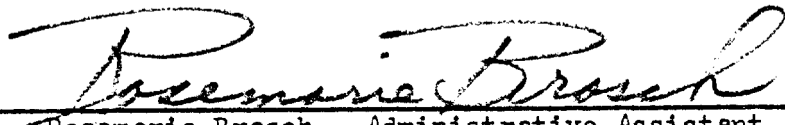
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.