



**Award No. 6291**

**Docket No. 6134**

**2-EL-EW-'72**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 78, RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L. - C. I. O. (Electrical Workers)**

**ERIE LACKAWANNA RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1. That under the current agreement, Electrician H. Halvorsen was improperly dismissed from the service of the Carrier.

2. That accordingly, the Carrier be ordered to return the aforesaid employe to service with all seniority rights restored and all pay due him since he was discharged up to the date he is returned to service at the applicable Electrician's rate for each working day he has been improperly held from service; and all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him including unemployment insurance and sickness benefits for the above described period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the above described period; and all other benefits that would normally accrue to him had he been working in the above described period in order to make him whole.

**EMPLOYEES' STATEMENT OF FACTS:** Electrician H. Halvorsen, hereinafter referred to as the claimant was ordered by the Erie Lackawanna Railway Company, hereinafter referred to as the Carrier, to present himself for Investigation account alleged violation of Rule 101 and Rule 106 of the General Rules—Safety Rules—Maintenance of Equipment Employees, October 1, 1969.

The Claimant at the time was an employe of the Hoboken Passenger Car Department under the jurisdiction of the Mechanical Department.

The Organization is not party to the rules of the General Rules—Safety Rules—Maintenance of Equipment Employees.

The letter addressed to the claimant ordering him to appear for investigation was signed by a Mr. F. J. Flynn, Passenger Trainmaster, who is not

an election of civil remedies, and after pursuing one, attempts to pursue the other.'

We believe that the pendency of the criminal charges had no effect upon Claimant's rights under the agreement.

\* \* \* \* \*

From a review of the record we find that Claimant was provided a fair and impartial hearing and was granted every right he was entitled to under the agreement. Claimant has not been deprived of due process of law."

In view of the foregoing, Carrier avers it is manifest that (1) claimant was afforded due process; (2) the transcript contains more than enough substantial evidence to support Carrier's findings of claimant's violation of Rules 101 and 106; and (3) the discipline imposed was not unreasonable based upon the severity of the offense, nor was it arbitrary, capricious or discriminatory. This and other Divisions of the NRAB have consistently denied claims where dishonesty is involved, as in the instant case. See Second Awards 3834, 4407, 4747, 4925, among many others.

Any and all other issues not specifically dealt with herein are deemed immaterial and irrelevant to the claim and are categorically denied.

Should this Board find good and sufficient reason to sustain the position of Petitioner, which Carrier avers there is none, Carrier should be allowed to deduct from payment due, if any, all wages which the claimant earned or could have earned with reasonable diligence. See Third Division Awards 14063, 13804, 13613, among others.

Based upon the facts and authorities cited, Carrier avers that this claim is wholly without merit or support and respectfully submits that same should be denied in its entirety.

**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 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.

Rule 32 of the Agreement requires that prior to disciplinary action being taken an employe shall receive a prompt fair hearing. The employe may be suspended pending the hearing in proper case. At a reasonable time prior to the hearing the employe and his representative will be apprived of the precise charge and be given a reasonable time to secure witnesses for the hearing.

Rules 101 and 106 effective July 1, 1964 provide for conduct and integrity of employes with regard to safety of person and property and attention to duty. Violation of these rules subjects the employes to dismissal.

It is made clear at the outset that the Award in this case has nothing to do with the innocence or guilt of the employe with regard to the criminal charges against him.

The letter dated October 3, 1969 informed the employe precisely on what facts and subject the hearing would be held and which rules were violated.

The hearing was called promptly for a date one week after the event. It is reasonable to expect that someone charged with a crime will immediately start to prepare for his defense. Therefore, a reasonable time was provided for a fact finding hearing. The employe at the hearing admitted the facts which were relevant to the purpose of the hearing so that he was not prejudiced by lack of witnesses as to these facts.

Preceding Awards have held that the hearing officer may be involved with the preparation of charges and conduct of the hearing without conflict or harm to a fair hearing. The transcript reveals that the hearing officer was courteous and objective. The transcript demonstrates that the employe was aware of and alert to the implications of the questions and his answers. His responses and obedience to his representative's advice exhibited intelligence and understanding.

Since the failure to suspend an employe for violation of rules pending the hearing may be prejudicial to the safety of the public and fellow employes, it is cautious to eliminate that possibility. A wrongful suspension can be remedied by vindication of the employe and restoration to duty with pay for time lost. This was a proper case for the exercise of caution by suspension pending the hearing.

The employe's testimony supports the conclusion that he was off the company property without permission from a supervisor while no other electrician was on duty, before the arrest.

No conclusion is reached as to the merits of the criminal charge. However, by selling cigarettes while on duty the employe was engaged in an activity which is not permissible during his working time, by any standards. If the cigarettes sold did not comply with law, the employe left himself open to removal from company property during working hours by arresting officers.

The testimony of the employe at the hearing, as reported in the transcript, was truthful and was not evasive. This is to his credit. Unfortunately, honesty after the fact is not sufficient to mitigate the penalty in this situation.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: E. A. Killeen  
Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1972.

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