

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employees'
(Department, A. F. of L. - C. I. O. '
((Firemen and Oilers)
(
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Laborer Stephen Penrod was unjustly assessed a ten (10) day overhead suspension as a result of investigation held on February 6, 1976. This resulted in the actual serving of ten (10) days suspension which was overhead from previous disciplinary action by the Carrier.
2. That accordingly the Carrier be ordered to remove the ten (10) day overhead suspension from the Claimant's record and fully compensate him for all time lost. This is to include vacation rights, health and welfare, insurance benefits, Railroad Retirement, lost wages, as well as being made whole for any other benefits he would have received during this time he was held out of service from Friday, March 5, 1976 through and including Sunday, March 14, 1976.

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.

This claim arises out of an incident at the Cumberland Locomotive Shop on January 11, 1976. The claimant was a fireman and oiler, second shift, working under the supervision of Roundhouse Foreman Himmelwright. The claimant also served as Local Chairman of the International Brotherhood of Firemen and Oilers. He was accused of refusing to perform his assigned work and leaving his workplace without permission. This is contested on the grounds claimant maintains he became ill as a result of fumes in the roundhouse and he notified the foreman he was going home because of such illness. The matter was the subject of investigation and hearing. The

Carrier relied upon the testimony of the foreman while the claimant testified in opposition and produced a witness who overheard the significant aspects of the confrontation and supported claimant's story that he had not been insubordinate and he had notified the foreman he was leaving because of illness.

As a result of the investigation claimant was assessed a ten day overhead suspension and the actual serving of a ten day suspension from a previous disciplinary action by the Carrier. The claimant appealed the discipline and the matter progressed on the property to the Carrier's highest officer and was the subject of conference.

The Organization asserts that Carrier failed to meet its burden of proof and that claimant was denied a fair hearing because of the manner and substance of questions insofar as we conclude the carrier failed to meet its burden of proof regarding the charges.

The insubordination charge is based upon three elements, in that claimant is alleged to have -

1. Spoken to his supervisor in an insulting, belligerent manner;
2. Refused to perform assigned work;
3. Left his assignment and the property without permission.

Carrier relies entirely upon the testimony of the foreman to support these charges. No other evidence is offered. There are awards of this Board and the Third Division to the effect that the Carrier may rely upon the uncorroborated and contested testimony of its supervisory employees. We do not question the concept as far as it goes. However, where such testimony may be based upon bias or animosity the principle must be qualified. Award 4981 (Weston). While this matter was under consideration on the property consideration was directed to possible bias on the part of Mr. Himmelwright and this was denied by the Carrier. The matter was not lost in the presentations before this Board. We have examined the record carefully with this question in mind. For instance, during the hearing when he replied to a question concerning claimant's attitude during the period he had been under his supervision, Himmelwright answered:

"Laborer Penrod had a very negative attitude all the time under my supervision. He also resents authority and requires constant supervision."

Claimant denied these allegations. Still later in the hearing Himmelwright answered claimant's assertion that he had been instructed by Himmelwright not to hold conversations with any employes, only to accept union dues for the labor organization. Himmelwright stated:

"Mr. Penrod was never told he could only talk to someone in accepting union dues. It was made very clear to him that he could only talk with individuals in the performance of his duties because he spent excessive amounts of time talking to other craft employes, keeping them from their duties. He was never told eight hours work was expected of him. He was told by me he was being paid to do his assigned work and not talk to other employes."

These statements by Himmelwright manifest clearly enough there was considerable tension between claimant and his foreman. More important, Himmelwright's strong views amount to a bias against claimant. Award 7465 (Franden).

We do not suggest that this Board has the function of resolving conflicts in testimony. Clearly, we must not disturb findings in discipline cases where they are supported by substantial evidence that demonstrates clearly that the employee is guilty of the charge levied against him. Award 6957 (Lieberman). As we noted above, the uncorroborated testimony of a supervisory employee may accomplish this in a given case and satisfy Carrier's burden of proof. However, where such testimony is tainted by apparent bias we must conclude Carrier's requirement of producing substantial evidence is not met without further proof. Award 4981 (Weston). Moreover, where such supervisory testimony is controverted by the testimony of an impartial witness there is, a fortiori, grounds to overturn the findings.

Witness Goss, called by claimant, provided clear testimony that contradicted Himmelwright in material respects and denied that claimant had been insulting, or belligerent or had failed to inform the foreman he was sick.

In addition, we are impressed with the fact that the record provides support for claimant's view that there were fumes in the roundhouse which could have occasioned the sickness he claims. Carrier did not introduce evidence or testimony that would indicate that such fumes were nonexistent or improbable. In fact, it appears that such condition was acknowledged. It follows that claimant, if he was ill from such fumes, would be justified in notifying his supervisor of his condition and leaving his post.

We conclude the Carrier has failed to substantiate the guilt of the claimant under these circumstances. Accordingly, the Carrier violated the contract in imposing discipline and claimant should be compensated for lost wages for the period of suspension.

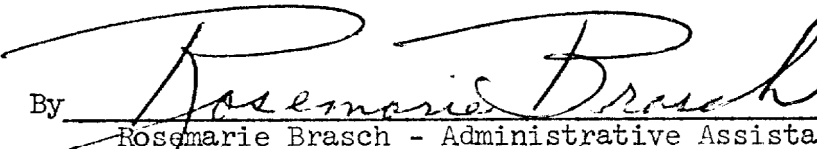
A W A R D

Claim sustained in accordance with the opinion.

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 12th day of July, 1978.