

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated Rule 32 of the controlling Agreement, April 22, 1977, when they unjustly dismissed Carman Apprentice W. R. Wren, Dupo, Illinois, without cause.
2. That the Missouri Pacific Railroad Company be ordered to compensate Carman Apprentice as follows:
 - (a) Compensated for all time lost starting April 27, 1977 and continuing until returned to service with all rights unimpaired;
 - (b) Made whole for vacation rights;
 - (c) Made whole for loss of health and welfare and insurance benefits;
 - (d) Made whole for pension benefits, including Railroad Retirement and unemployment insurance;
 - (e) Made whole for any other benefits he would have earned during the period he is withheld from service;
 - (f) In addition to the money amounts claimed herein, Carrier shall pay Car Apprentice W. R. Wren an additional amount of 6% per annum compounded annually on the anniversary date of 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 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.

Following an investigative hearing, Claimant was dismissed from service by the Carrier on May 12, 1977, "account your responsibility in connection with your acting in a discourteous, belligerent manner, directing foul and profane language toward Car Foreman M. W. Cliff, while working as Carman Apprentice, at approximately 2:45 p.m., April 22, 1977..."

The cause for the disciplinary action rests entirely upon a verbal exchange between the Foreman and the Claimant. The Foreman testified as to his version of what happened as follows:

"On April 22 at approximately 2:45 p.m. I was walking North on Track #9 of the Big Rip. I noticed a loud noise striking sound metal against metal. Looking over I saw Car Apprentice Wren standing by the crane car. I walked over to Track #7 where this occurred. I ask Carman Apprentice Wren 'what was the matter'. He said 'it is none of your God Damn business what I am doing'. I said 'I come over here to find out what is the matter'. I tried to explain to him that I was a supervisor in charge and that all actions that take place on the Big Repair Track was my responsibility. He in turn said to me 'get away from me, you are nothing but a no good white racist son-of-a-bitch'. I said 'No sir, I am not the racist one' you are acting in the racist manner. I informed him then due to his action I would have to write him up for insubordination and foul language used. I started to walk away, looking over my left shoulder I was turning around when Mr. Wren spit towards my direction. That is when I noted that Carman Pickering was standing in the same locale. I ask him if he had saw what happened. He said 'Yes'. I then walked directly to the office without saying another word and made out a report of this incident to Mr. E. C. Bolle, General Car Foreman."

The Claimant's testimony as to what happened is as follows:

"April 22, 1977 Big Rip Track, Dupo, Illinois Mr. Pickering and I had been assigned to secure doors on Big Rip Track. Mr. Cliffe at approximately 2:45 p.m. came down the track, came down track #9. At this time I were in my work area, Mr. Cliffe came storming and raging made up to me, in my face, he began to call me obscene profane language. I ask Mr. Cliffe why was he doing it. Mr. Cliffe again cursed me, calling me black son-of-bitches and try to provoke a fight. He said hit me hit me, said 'I don't like you' then he called me another black son-of-bitch."

Were this the only testimony as to the incident, the Board would have to judge whether the Carrier's officer determining the disciplinary penalty had sufficient reason to accept the version of the Foreman rather than that of the Claimant. There are, however, other elements and the testimony of at least two other witnesses. One witness, called by the Carrier, was the Carman with whom the Claimant was assigned to work. He testified that he was "approximately within four feet" of the Foreman, when the Foreman left the scene after the encounter. The Carman's version is as follows:

"Mr. Wren was getting ready to move a car along track 7 and we had the crane car there pulling. Mr. Wren had a hand hammer in his hand and he slapped it sharply against the front of the crane car and Marty Cliffe was walking along Track 9 and heard the slap of the hammer and he came over there to ask Mr. Wren why he did it. Well Mr. Wren said 'Get the hell away from me it is none of your business'. Then Marty said Yes it is my business and Mr. Wren stated that Mr. Cliffe was a racist son-of-a-bitch. Marty said he was not a racist and then they started arguing. So Marty turned and started to walk away and from where I was standing I heard them arguing and Mr. Cliffe turned around facing Mr. Wren and Mr. Wren spat towards Mr. Cliffe and Mr. Cliffe turned back around and started walking toward where I was standing. Then Mr. Cliffe ask me if I saw it that that was an insubordinate scene and I told him 'Yes I did'."

Finally, there was the testimony of the crane operator, who cast some doubt as to the Carman's location at the time of the encounter. He testified:

"I didn't see Mr. Pickering (the Carman) in the picture no where. All I saw was Mr. Cliffe and Mr. Wren and they were standing between the cars. They were up in each others fact talking. What they was saying to each other I don't know. I was moving some cars on 7, but they was in between the two cars and I saw them and I stopped. Then they got out from between the cars and they beckoned for me to move the cars on down, I was moving some cars. I don't know what happened after that, because I pulled the cars on down."

The crane operator then further testified as follows:

- "Q. Had Mr. Pickering been within 4 feet of Mr. Cliffe and Mr. Wren you would have saw him wouldn't you?
- A. Yes I would have saw him if they would have been on the same side of the cars.

- "Q. Then for a fact Mr. Pickering was not on the same side of the car as Mr. Cliffe and Mr. Wren, was he?
- A. Mr. Cliffe and Mr. Wren was between cars. I was on the West side of the car on track 7 and Mr. Pickering was on the East side I don't know.
- Q. After you pulled the cars down did you see Mr. Pickering in the area then?
- A. No I didn't."

An additional element in the situation is that the Organization specifically requested the presence of two other employes as witnesses. This was requested by the Organization prior to the hearing, and the Organization raised an objection to their not being present at the outset of the hearing itself.

The Board recognizes the right of the Carrier to avoid the calling of witnesses when no showing is made as to their relevant contribution to the issue directly at hand. In this instance, however, it appears that the Claimant's defense may have been substantially impaired by the absence of these two witnesses, with particular reference to what they might have said concerning the alleged corroboration by the Carman of the Foreman's testimony.

The Board notes considerable disparity between what the Foreman claims was said by the Claimant, and what the Carman said he heard. Further, the crane operator's testimony raises further doubts about the Carman's location.

The Board finds, therefore, that the Carrier (prior to the hearing) and the Hearing Officer (during the hearing) improperly denied the right of the Organization to attack the credibility of the Carrier's witnesses. This was fatal to the "fair and impartial investigation" required by Rule 32.

On this basis alone the claim must be sustained, to the degree specified below.

The record shows the Claimant was deceased on January 4, 1978, some eight months after his dismissal. While the Organization is correct that the circumstances of his death were improperly introduced into the record, the fact of the Claimant's death does limit any remedy to the date of such death.

In determining the amount due to the estate of the Claimant, the parties are bound by the provisions of Rule 32(d), which limits such remedy to "wage loss, if any" as covered in Paragraph 2(a) of the claim,

and excludes remedies requested under Paragraph 2(b) through (f) of the claim.

A W A R D

Claim No. 1 sustained.

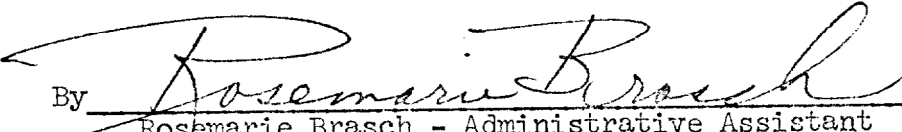
Claim No. 2 (a) sustained, but only until January 3, 1978.

Claim No. 2 (b) through (f) 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 16th day of May, 1979.