

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { System Federation No. 91, Railway Employees'
Department, A. F. of L. - C. I. O.
(Carmen)
Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

1. The Carman Helper R. W. May was dismissed from service in violation of the current agreement on August 12, 1977, and
2. Accordingly, the Louisville and Nashville Railroad should be ordered to
 - (a) Restore him to service with seniority and all employee rights unimpaired.
 - (b) Compensate him for all time lost as a result of his dismissal with interest at the rate of 6% per annum on all money due him, and
 - (c) Pay premiums for his hospital, surgical, medical, group life insurance and supplemental sickness benefits for the entire time he is withheld from service.

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 waived right of appearance at hearing thereon.

Claimant May had worked for the carrier for four years and was employed as a Carman Helper on July 15, 1977. After an investigation held on July 26, 1977, he was dismissed from service on August 12, 1977. The dismissal resulted from three separate charges but all of the claimant's purported misconduct occurred within a six hour period on July 15, 1977. The charges were:

- (1) Failure to promptly comply with a supervisor's instructions;
- (2) Failure to wear a hard hat while performing assigned duties; and
- (3) Displaying disrespect to a supervisor in the presence of other employees.

The organization contends that the claimant was deprived of a right to a fair hearing on the charges under Rule 34 of the applicable agreement because a supervisor, R. P. Robinson, played several different roles at the hearing and he was intimately involved in the events leading to the latter two charges. Next, the organization asserts the evidence presented at the hearing failed to support the charges. The carrier contends the investigation was properly conducted and the evidence supports all the charges. Finally, the carrier argues, on a cumulative basis, the claimant's three offenses justify dismissal.

Whenever a carrier supervisor who is a critical witness at an investigation also engages in other quasi-judicial roles at the hearing, the carrier assumes the risk that the multiple roles of the supervisor could deprive the claimant of his right to a fair hearing. Here, Mr. R. P. Robinson was a crucial witness since he observed the claimant's conduct, preferred the charges (including the two charges in which he was involved) and signed the letter assessing discipline. The record is clear, however, that he did not control the investigation and he did not conduct the hearing. While we believe his multiple roles could have denied the claimant a fair hearing within the meaning of Rule 34, in this case they did not. The claimant had able and competent representation at the hearing. He cross-examined carrier witnesses, presented his own witnesses and testified on his own behalf. The hearing officer was an administrative assistant who had no known connection to the facts of the case. Because the hearing officer allowed the claimant to exercise his rights under Rule 34 and because the supervisor's multiple roles did not prejudice the claimant, the hearing was fair.

As a reviewing body, we lack the authority to weigh the evidence at a hearing, and we must not substitute our judgment for that of the carrier as long as the carrier's decision was based on substantial evidence in the record. Here, the record must disclose substantial evidence to support the finding that the claimant committed each of the three offenses. We conclude that the carrier failed to proffer substantial evidence supporting the charge of displaying disrespect to the supervisor but there is sufficient evidence demonstrating violations in the other two charges.

The claimant failed to timely report to the Stores Department until at least 50 minutes after he was given a direct order to immediately report to the Stores Department. The trip from the Fabrication Shop to the Stores Department normally takes approximately five minutes. Originally, the carrier was going to punish the claimant by docking his pay for the 45 minute period. Events later in the day escalated the punishment. However, the claimant was clearly insubordinate.

Several hours, thereafter, claimant was not wearing a hard hat while operating a forklift. The organization's defense is that the hard hat rule was never previously enforced with disciplinary action. The most pertinent portion of Mr. Robinson's testimony concerning lax enforcement of the hard hat rule was:

"Q. Mr. Robinson, have you ever observed any other equipment operators not complying with the hard hat rule?

A. Yes.

Q. Mr. Robinson, what type of discipline action, if any, was imposed upon these persons?

"A. As in the case with Mr. May, as well as any other employee, that I encounter, that is not wearing their hard hat, my first question is 'Where is your hard hat' the next standard question that I ask is 'Don't you know that you are suppose to be wearing your hard hat at all times - Then I instruct the Employee to go and get their hard hat on'.
Q. Mr. Robinson, why did you waiver from this practice in Mr. Mays case?
A. I told Mr. May the same thing that I tell everyone else.
Q. Mr. Robinson, how many men have been charged in an investigation for not wearing hard hats, since you have been Manager of the Car Shop?
A. In my (8) months assignment, there have been none."

The Testimony reveals that the claimant received the same treatment as all other violators. Even though there had been no disciplinary proceedings for a hard hat violation in the last eight months, other employees may have promptly obeyed the supervisor's order to wear the hat without resorting to abusive language. The employer is rightfully and vitally concerned about safety violations and must impress upon employees the necessity for wearing safety equipment. Thus, any past waiver of enforcement of a safety violation must be proved by clear and convincing evidence. The supervisor immediately reprimanded the claimant which was consistent with past practice.

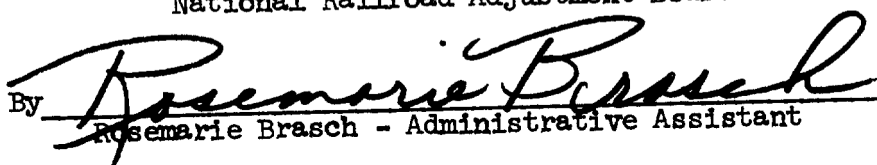
Lastly, because of the above two incidents both the claimant and his supervisor had reached the boiling point. The supervisor, in a threatening fashion, shoved his finger at the claimant while the claimant taunted the supervisor by staring at the supervisor (and moving his lips) as he drove by his forklift. Tempers flared and intimidating words were exchanged. The verbal fight was caused by a combination of the claimant's anger arising from receipt of the reprimand for the above described violations and the supervisor's provocation. There is insufficient evidence to support the charge of displaying disrespect to a supervisor and thus the carrier's discipline was excessive. The two proven violations do not, under the circumstances, warrant a dismissal. The claimant should be reinstated without any back pay, but with his seniority rights unimpaired.

A W A R D

Claim sustained only to the extent consistent with our findings.

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