

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

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers
(
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. That under the current Agreement and the Chicago and North Western Transportation Company schedule of rules, the Carrier unjustly dismissed Machinist Elbert Fuery from service effective August 7, 1978.
2. That, accordingly, the Carrier reinstate to service and compensate machinist Fuery for all wages lost while dismissed from service from August 7, 1978, to present, with seniority rights unimpaired, and all other rights and privileges restored.

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.

Claimant was subject to an investigative hearing on the following charge:

"Your responsibility for sleeping while on duty at approximately 7:50 A.M. Thursday, June 22, 1978 in the cab of Unit 421 while assigned as Machinist at M19-A."

Claimant's working hours were from Midnight to 8 a.m.

The principle thrust of the Organization's position is that the Claimant was denied a fair and impartial investigative hearing. Rule 35 states in part:

"No employe will be discharged for any cause without first being given an investigation."

Implicit within this rule is that the "investigation" should be conducted without presumption of guilt by the hearing officer and in a manner to provide for a fair and full review of the facts and testimony adduced. Only in such manner can the "investigation" serve the purpose for which it is designed.

Examination of the hearing record by the Board offers convincing support for the Organization's view. The agreed upon facts are that the Claimant and another employe were found sitting in the cab of a locomotive, where they had no work assignment. Two witnesses for the Carrier testified that the Claimant had his eyes closed when observed. Beyond this, the record clearly shows that the hearing officer led the Carrier witnesses to say considerably more than in their initial testimony.

For example, Witness Jozwiak originally testified: "... I observed Mr. Fuery had his head down, eyes closed in the fireman's seat. And, ah, after I observed him for approximately ten seconds, I opened up the door and, ah, woke Mr. Fuery up."

Later the hearing officer asked:

"Q. Mr. Jozwiak, you stated that you were on the steps of Locomotive 421. Is it your testimony that Mr. Fuery awoke because of the opening of the door?

A. Yes, it was." (emphasis added)

On pages 25-26 of the transcript, an Organization representative attempted to ask Witness Jozwiak concerning a different version of the incident given by Witness Deyo. The hearing officer cut off this line of questioning. The Board finds it would have been proper for the Organization to question concerning this testimony by Witness Deyo in order to get Witness Jozwiak's reaction.

There was also a Carrier representative present, S. Mondek, General Foreman, who was not a witness but listed as "Co-Interrogator". In questioning Jozwiak at Transcript pages 26-27, Mondek attempted to lead the witness into an account of his opening the locomotive door and speaking to the Claimant. When this was objected to by the Organization Mondek stated: "I withdraw the statement at this point". (emphasis added)

The Board is left with the distinct impression that the hearing officer and his "co-interrogator" were not acting as impartial fact-finders but as advocates seeking to prove the charge.

Many previous awards have emphasized the essential requirements for a fair hearing. In this instance the improprieties by the hearing officer were not simply peripheral but went to the core of the Carrier's charge -- that is, whether or not the Claimant was asleep. As such, the Organization's argument as to a defective hearing will be sustained. As stated in Award No. 6795 (Eischen):

"On this record we have both hearing officer prejudgement at the hearing and an improper overlapping of prosecutorial and judgemental rules, the net effect of which is to deprive claimant of a fair hearing. Carrier bears the serious

"responsibility of assuring an accused employe a fair and impartial hearing. This responsibility is ignored only at the peril that serious and prejudicial procedural defects may prove fatal to Carrier's substantive case."

In addition, comment is required on the testimony which was adduced, even under the circumstances described above. General Regulations and Safety Rule 23 reads as follows:

"Employes must not sleep while on duty. Lying down or in a reclining position with eyes closed or covered will be considered as sleeping."

The Claimant was found sitting in an erect position. Two witnesses testified that they observed his eyes closed. But testimony showed he was immediately responsive when spoken to and/or when the door was opened. The record fails to support the Carrier's finding of guilt under the specific terms of Rule 23, and the charge of "sleeping" is the only one made against the Claimant.

Thus, the resulting discipline based on the charge was based on improper conduct of a hearing and was arbitrary as to the evidence set forth at such hearing.

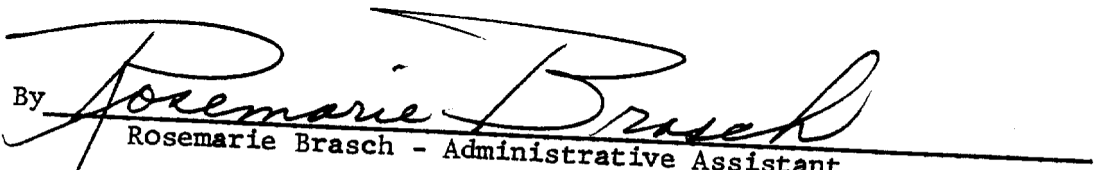
A W A R D

Claim sustained. The Claimant shall be promptly offered reinstatement to service and paid for all regular time lost, less deduction of outside earnings.

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 8th day of October, 1980.