

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

Parties to Dispute: { International Brotherhood of Firemen and Oilers  
{  
{ Western Pacific Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current agreement, Firemen and Oiler James O. King, was unjustly dismissed from the service of the Western Pacific Railroad; following formal hearing held on date of January 16, 1979.
2. That accordingly the Carrier be ordered to make the aforementioned James O. King whole by restoring him to Carrier's service with seniority rights unimpaired, plus restoration of all holiday, vacation, health and welfare benefits, pass privileges and all other rights, benefits and/or privileges that he is entitled to under rules, agreements, custom or law, and compensated for all lost wages.
3. In addition to money claimed herein the Carrier shall pay the Claimant an additional amount of 6% per annum compounded annually on the anniversary date of this 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.

On January 12, 1979, claimant was working as a live vest attendant at the carrier's Stockton Diesel Shop. Claimant was charged with failure to wear and use proper safety equipment while performing his duties. After notice and hearing, claimant was discharged on January 25, 1979.

The organization first argues that the hearing was unfair because the hearing officer allowed the introduction of testimony concerning alleged prior safety violations by this claimant. While such testimony may be only dubiously relevant to the instant charge, we see no harm in permitting the evidence to show the claimant has a poor attitude about shop safety. However, the testimony cannot be used to prove the claimant committed this particular rule violation or to show he

has a propensity to violate safety rules. The charge must be proved with more reliable evidence.

At 9:05 a.m. on January 12, 1979, the Shop Superintendent, the Assistant Shop Superintendent and the Diesel Shop Foreman observed claimant steam cleaning railroad equipment without using the proper safety devices. Specifically, the claimant's face shield was in a raised position (which exposed his face to the steam and chemicals) and was not using or wearing a portable respirator. The carrier had provided the claimant with the respirator at the claimant's insistence. None of the supervisors instructed the claimant to immediately engage in the proper use of the face shield and respirator. Later, one of the supervisors told claimant he would be formally charged with failure to use safety equipment. The claimant testified that at the time he was observed, he was merely adjusting the face shield and because he was outside with the wind blowing away from him, the respirator was unnecessary. The carrier held regular safety lectures and provided all safety equipment at its expense.

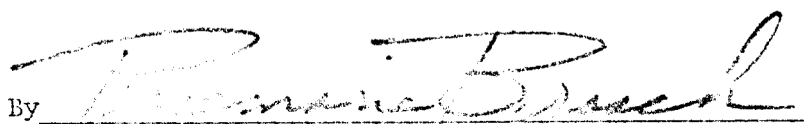
There is substantial evidence demonstrating that at 9:05 a.m. on January 12, 1979, the claimant was performing his assignment without using the proper safety devices. Even if the claimant sincerely believed that a favorable breeze rendered the respirator useless, he should wear it in case the wind ceases or changes direction. In addition, the mere fact that the safety equipment is uncomfortable is not a recognized excuse to break safety rules. The organization also argues that the assessed discipline was excessive and arbitrary under the circumstances. We agree. The record reveals that the three supervisors failed to immediately enforce the safety rule. Safety is of critical importance to the worker's safety and health that a detected safety infraction should be immediately corrected. Due to the mitigating circumstances present in this case, the penalty of dismissal is excessive and the claimant should be reinstated with seniority unimpaired but without back wages and without the other financial relief requested by the claimant. By reinstating the claimant, this Board is not ratifying the claimant's conduct. On the contrary, upon his return to work, we expect the claimant to scrupulously obey all safety regulations and to wear all the required safety devices while performing his duties.

A W A R D

Claim is sustained but 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 7th day of January, 1981.