

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8658
Docket No. 8567
2-WT-CM-'81

credibility

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

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Washington Terminal Company

Dispute: Claim of Employees:

1. That the Washington Terminal Company violated the controlling agreement when they unjustly suspended car cleaner J. A. DeBose seven (7) calendar days as a result of investigation held on October 24, 1978.
2. That accordingly the Washington Terminal Company be ordered to reimburse Mr. DeBose his net wage loss due to this unwarranted and unjust suspension.

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 October 13, 1978, the carrier charged the claimant with violations of general Rules N and O for his alleged departure from company property during his tour of duty on October 7, 1978. After a hearing held on October 24, 1978, the carrier imposed a seven day suspension on the claimant.

The facts underlying both charges are identical. According to a carrier patrolman, the claimant left company property, in his automobile, at 12:10 p.m. and was observed back on the property at 12:35 p.m. The claimant and a fellow employe testified that the claimant interrupted his lunch to walk to his car to obtain some aspirin. These witnesses stated claimant was only absent from the lunch area for approximately ten minutes. Claimant's lunch break runs from 12:00 noon to 12:20 p.m.

The issue to be decided is whether or not the carrier has proffered substantial evidence in the record as a whole to support a finding that either: 1.) the claimant left the carrier's property at any time on October 7, 1978 or 2.) the claimant was not present at his assigned duties after his lunch break on that date. The organization argues that the patrolman's testimony fails to fulfill the carrier's burden of proof because he was unable to sufficiently identify claimant's car. Also, the organization presented evidence ostensibly showing the patrolman's testimony is biased because there is some personal animosity

between the claimant and officer. The carrier urges us to sustain the discipline because the patrolman is a disinterested witness who is specifically obligated to enforce company rules while the claimant's testimony is self serving.

out This Board has consistently ruled that, as an appellate body, we are unable to resolve credibility conflicts because the hearing officer who observes the demeanor of each witness is in a better position than this Board to evaluate the veracity of each witness. ~~where the testimony is patently speculative or unreliable, this Board will attach little weight to such testimony in our review of the record to determine if there is substantial evidence to support the carrier's finding that claimant committed the offense.~~ In this case, none of the witnesses are very reliable. It is obvious that the personal tension among the patrolman, the claimant and his co-worker interfered with their ability to coherently relate the events of October 7, 1978. Therefore, this Board must carefully peruse the record to determine what testimony is consistent with the uncontradicted facts.

Using this guideline, we find substantial evidence demonstrating that claimant was absent from duty between 12:20 p.m. and 12:35 p.m., but we find little evidence to support the charge that claimant left the property. The patrolman positively identified the claimant walking by a pile of railroad ties at 12:35 p.m. (after expiration of claimant's lunch period) but did not observe his auto returning to the property. The patrolman's testimony concerning claimant's alleged departure from the company property is undermined by evidence showing a car very similar to claimant's is parked in the same area. During his lunch break, claimant may, of course, go to his car to procure an aspirin since he is not technically subject to duty but he must be ready to report to his assigned duties at the conclusion of his lunch period. Here, he was absent without permission for fifteen minutes. The seven day suspension was imposed on the finding that claimant was absent for twenty-five minutes and that he went off the property. Because we rule that claimant was absent for only fifteen minutes and there is not substantial evidence demonstrating that he ever left carrier property, the discipline should be adjusted. Second Division Award No. 8549 (Roukis); Second Division Award No. 7081 (Wallace). The suspension shall be reduced from seven days to one day. The claimant is entitled to back pay lost during the remaining six days of the suspension at the rate of pay in effect under the applicable agreement when he served the suspension.

A W A R D

Claim sustained 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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of March, 1981.