

The Second Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
{ Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That under the current agreement the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician Helper Robert D. Buckeye, Jr., from service effective March 16, 1979.
2. That prior to the dismissal the Consolidated Rail Corporation (Conrail) unjustly withheld Electrician Helper Robert D. Buckeye, Jr., out of service since about February 2, 1979, through the effective date of dismissal.
3. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Electrician Helper Robert D. Buckeye, Jr., to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electrician Helper's rate of pay for each day he has been improperly withheld from service; and with all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the above mentioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the above mentioned period; and all other benefits that would normally accrue to him had he been working in the above mentioned period in order to make him whole.

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.

Electrician Helper Robert D. Buckeye, Jr., claimant, was dismissed from service on March 16, 1979, for being absent from work without permission and for bringing discredit to carrier as the result of a drug-selling conviction. A hearing into the matter was held on February 21, 1979. He was subsequently dismissed from service on March 16, 1979. A review of the stenographic record shows that claimant was not denied any substantive and procedural rights and that he was afforded a full and fair hearing.

Claimant was convicted of selling a controlled substance and of criminal conspiracy. He was subsequently sentenced to a minimum of three months in jail. He had received letters of support from fellow employees, supervisors, community leaders, and friends. In addition, his clean work record and past evidence of his integrity were cited as arguing for leniency on the part of both the court and carrier.

A work release program was discussed by claimant, the court, and carrier, but was ultimately rejected by carrier as unworkable. Claimant therefore began to serve his sentence on January 31, 1979, and was unable to report to work thereafter.

During his subsequent hearing before carrier, procedural objections were raised. He charged that his parents were not allowed to testify and that he was not allowed the representation of his private attorney. An objection was also raised about carrier's lack of equal treatment by allowing others to engage in work release programs. Further, exception was taken to the carrier's letter of February 15, 1979, which held claimant out of service beginning January 31, 1979. The organization contended that this ruling made it impossible for claimant to report to work and thereby avoid disciplinary action.

After pursuing this case through successive levels of appeal, the organization has now brought it before this Board. After a very careful study of the complete record, the Board finds the following:

Claimant's procedural objection to the denial of representation by his private attorney is dealt with by the controlling agreement, which states that the representative must be duly authorized. Such objection must therefore be denied. In regard to carrier's refusal to allow claimant's parents to appear as witnesses, the organization has failed to show that these witnesses had any evidence of a probative value to contribute. Their testimony regarding either the issue of absence from work or claimant's bringing discredit to the company could only be of a nonmaterial nature.

Claimant was clearly absent from work without permission when he was serving his jail sentence on or around January 31, 1979. On numerous occasions, this Board has stated that incarceration is not considered an unavoidable absence from work for good cause. Carrier's subsequent notice of February 15, 1979, only served to formalize claimant's removal from service after claimant had been absent for two weeks. That carrier is somehow responsible for claimant's absence is an argument that we find strained and one that cannot prevail.

The issue of the carrier's right to engage in a work release program has been dealt with by this Board in the past. It is neither a legal nor a contractual obligation for carrier to participate in such a program. Carrier has the right to determine whether to participate in such a program with an employee or not.

In regard to the charge of claimant's bringing discredit to the carrier, this Board is mindful that it functions as an appellate tribunal. It is not our policy to substitute our judgment for that of carrier as the original trier of facts. In the instant case, however, the Board feels that the discipline imposed in this instance is unwarranted. While such a serious infraction would normally call for the strictest penalty, the circumstances in this case dictate a more corrective approach.

Because of the claimant's arrest and long incarceration, the Board believes that he is sufficiently impressed with the severity of his crime. In addition, the statements of support from his fellow employees, supervisory personnel (including a general foreman), community leaders, and neighbors leads the Board to conclude that, should claimant return to work he will become a model employee, having learned an important lesson. Claimant must understand, however, that he is being returned to work on a "last-chance" basis. Any further violation of the rules will undoubtedly result in his permanent termination from service.

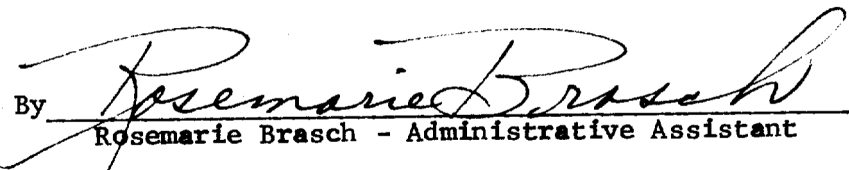
A W A R D

Claimant is returned to employment with all rights and benefits, but without back pay.

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 30th day of September, 1981.