

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
{ National Railroad Passenger Corporation

Dispute: Claim of Employees:

1. That the National Railroad Passenger Corporation (Amtrak) was arbitrary, capricious and unjust when they suspended from service Electrician S. Claywell on April 3, 1979 and subsequent dismissal from service on April 17, 1979 of Electrician S. Claywell.
2. That accordingly, the National Railroad Passenger Corporation (Amtrak) be ordered to restore Electrician S. Claywell to service unimpaired with compensation for all wages lost during time out of service, vacation rights, insurance benefits and his record clear of the charges.

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 involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant, an electrician, whose seniority date is August 1, 1977, was suspended from service on August 3, 1979 in connection with his allegedly insubordinate behavior toward a Foreman who claimed to have discovered him loafing. The Investigative Hearing scheduled for August 9, 1979 was postponed by request of the Claimant's representative to August 13, 1979. As a result of that investigation Claimant was dismissed from service on August 17, 1979 for his alleged violations of Rule I and Rule K of the N.R.P.C. Rules of Conduct.

A review of the transcript of the investigation does suggest that the hearing was pervaded by an atmosphere of tension and testiness that is less than ideal for such a proceeding. For example, on pages two and three of the transcript there is a suggestion that the Organization representative may have been impeded from asking questions going to the credibility of a Carrier witness. Also, there is material on page seven of the transcript which might be interpreted as the Hearing Officer threatening, during a line of questioning designed to ascertain whether Claimant was legitimately held out of service, that the Organization representative will be replaced, by another representative, if the current representative does not confine himself to relevant questions.

At other times as well it seemed there was an environment of hostility and abrasiveness generated between the Hearing Officer and the Organization representative.

For example, there is some static in the colloquy between the Hearing Officer and the Organization representative reflected on page three of the transcript. However, it does not ultimately really interfere with a sound development of the factual basis of the Investigation. Similarly, although the Organization has contended that its representative was not fully permitted to develop material concerning a Foreman's prejudiced questions relevant to this issue were, in fact, as indicated on page six of the transcript, asked and answered. While it is true that page eight of the transcript reflects questions by the Hearing Officer designed to establish lack of prejudice on the part of the same Foreman, in order to resurrect, as it were, the Foreman's non-prejudiced character from any contrary intimation that the Organization had succeeded in leaving (by its above mentioned questions) this does not negate the fact that the Organization's queries, on this score, were, indeed, asked and answered.

Also, while the Hearing Officer's admonition, as found on page four of the transcript, to the Organization's representative to refrain from making statements, in lieu of asking questions, might be though unnecessarily harsh in form it is within permissible limits designed to keep the Investigation orderly and within relevant territory. As stated in Award No. 7560, Second Division, "The Hearing Officer has some discretion to limit cross examination to prevent the examination from becoming embroiled in tangential matters."

It should also be noted that at one point the Hearing Officer adjourned the Investigation so that the Organization might have time to get one of its witnesses to appear.

Thus, as indicated, while there were times when the conduct of the hearing might have been less than ideal its essential fairness and impartiality, in terms of the Claimant having adequate opportunity to make his case and challenge the one of his accusers, was not impaired.

Carrier has proved by substantial evidence that on August 3, 1979 Claimant was not attending to his duties, and also uttered something to the effect, "After I finish this article", when a Foreman ordered him back to work after finding Claimant with his feet propped up and reading a newspaper. This constituted insubordinate conduct on the part of Claimant but is somewhat mitigated by the fact that by the time the Foreman returned with another Foreman the Claimant had left the site of this incident, presumably to return to work. (It is well established, in previous awards, that verbalized defiance of a direct order need not be shown to make out insubordination -- conduct inconsistent with complying with a supervisor's directions is sufficient to establish it. See Award No. 7128, Second Division: "Insubordination may occur without a stated refusal to do the work ... where the employee's actions were diametrically opposed to complying with the lawful instructions of his supervisor.") The Carrier is entitled to believe that the Claimant told the Foreman that he would finish the article rather than that he requested whether he might do so. It is also well established that it is not the function of the Board to substitute its assessment of witnesses' credibility for that of the Hearing Officer or, in general, to weigh evidence. However based on this mild rebuke of the Foreman's authority over him, (it might be noted that the Foreman in question was not Claimant's immediate supervisor) of the nature of "I'll do it when I'm ready" (followed immediately by

his doing what the Foreman told him to do) it does not seem that it was then necessary to hold Claimant out of service for fear that retaining him in service could be, as required by Rule 23(a), "detrimental to (himself), another person, or the Company". Consequently, the claim is sustained to the extent that he should not have been suspended from August 3, 1979 to August 17, 1979 and he should be compensated for all wages lost during the time he was suspended as well as made whole for all loss of rights and benefits he may have suffered during that period, excluding the period August 9 to 13, 1979.

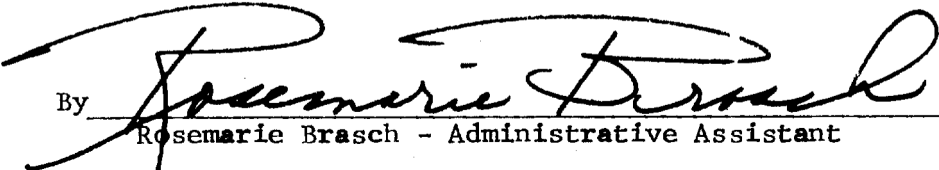
Claimant had been employed for approximately two years at the time of the incident here in issue and on December 27, 1978 had been issued a letter by his then General Foreman warning that he'd been observed away from his location, not working, and that recurrences would result in formal disciplinary action. Thus the Carrier, on the substantiation of the instant charges certainly had colorable cause to dismiss Claimant. However, bearing in mind industrial reality, i.e., many employees, even those generally considered "very good", will occasionally slack off in their efforts, as well as the relative mildness of Claimant's insubordinate act here, it is felt that the imposition of the extreme penalty of dismissal is unjust. Claimant should be restored to work but, because the dismissal can, from another point of view, be well understood this reinstatement should be without any compensation, or restoration of fringe benefit rights lost, during the period of dismissal. Further, it should be with the clear understanding that any future behavior of the type of which Claimant was here found guilty, to any degree whatsoever, would meet with irrevocable dismissal.

A W A R D

Claim sustained to the extent indicated above.

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 27th day of January, 1982.