

The Second Division consisted of the regular members and in addition Referee Thomas A. Bender when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace
(Workers, AFL-CIO
(
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation be ordered to restore Machinists Allen Elias to service and compensate him for all pay lost up to time of restoration to service at the prevailing Machinist rate of pay.
2. That Machinist Allen Elias be compensated for all insurance benefits, vacation benefits, holiday benefits, and any other benefits that may have accrued and were lost during this period, in accordance with Rule 7-A-1 (e) of the controlling Agreement which was effective May 1, 1979."

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 are respectively carrier and employee 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.

The Claimant in this matter has been charged with three very serious offenses:

- A. Insubordination: Specifically leaving tools unattended prior to check-in after being ordered to stay with the tools until the shop superintendent arrived.
- B. Use of profane language to a supervisor.
- C. Threatening a supervisor with bodily harm.

Because of the nature and gravity of these charges we will examine each in turn.

A. Insubordination

The transcript of investigation provides a number of references to this charge. At page four (4) of the transcript the Claimant's foreman, Sam Edwards, testified that he had been directed to have the Claimant bring his tools to the tool room at

"...about a quarter to 7:00 and not to leave the tools unattended. Elias brought (sic) over to the tool room and left them." Mr. Edwards further testified that he had instructed all the people to bring in their tools but not to leave them unattended. (There was no regular tool room attendant on this shift). Mr. Edwards also testified that when he arrived at the tool room there were no persons from any other crafts around. The testimony on this point was substantiated by the Shop Superintendent C. Roberts. Mr. Roberts notices the tools unattended at approximately 6:35 A.M. At that point he ordered Mr. Edwards to locate the Claimant. The Claimant testified that he did in fact leave the tools to go to the restroom. However he claimed that one or two other employees were at the tool room and that they would watch his tools while he was absent. None of the witnesses corroborated the Claimant's version of the incident.

Subsequent to the Claimant being paged by Mr. Edwards he appeared at the tool room. His arrival and meeting with Mr. Roberts leads into the second charge.

B. Use of profane language to a supervisor.

According to the transcript Mr. Roberts discussed the leaving of tools unattended with the Claimant. Mr. Roberts reminded the Claimant that Mr. Edwards was his foreman and that he was to follow Mr. Edwards' directions. There is no support in the record from either the Claimant, Mr. Roberts or Mr. Edwards that this discussion became loud, heated or emotional. Yet, at its conclusion, while Mr. Roberts was walking away from the Claimant, the Claimant was heard to say, "Listen Mother F., I will knock your f---ing head off." Mr. Edwards recalls the statement as relating to Mr. Roberts neck not head but the objectional language was present. The Claimant acknowledges the use of the profanity but explains it was follows, "Mr. Roberts he accusing me I call him MF which I didn't tell that man, I tell myself that." Such an explanation is difficult to believe. Further, assuming the Claimant's explanation is accurate, how is Mr. Roberts suppose to know that the profane phrase was not directed at him?

The third charge grew out of the objectionable language.

C. Threatening a supervisor with bodily harm.

At the hearing, the Claimant first denied making the statement referred to in Part B, supra, which represents a change in his story from the explanation of the MF statement he gave at p. 42 of the transcript. The Claimant went on to testify at p. 43 that he did not intend and does not now intend to do Mr. Roberts bodily harm. Mr. Roberts testimony on this point is particularly interesting.

"Blum: Such as SOB this MF this, in a figure of speech. Shop talk...

Roberts: I imagine it occurs with everybody on the Railroad.

Blum: So in talking MF is continuously used term in any shift as a figure of speech?

Roberts: Yes, I would say so. But the tone it was directed toward me or what ever directed, it was not a tone we would use working." (Emphasis added)

If Mr. Roberts would have refused to acknowledge the common use of rough language in a shop, his testimony would have lost a good deal of credibility. He did not do this, instead he testified that the tone of the Claimant's statement took it out of the realm of what this Board has on numerous occasions, countenanced as merely shop talk.

At the hearing, the Organization argued that the notice of investigation was so vague as to preclude a fair investigation. After carefully reviewing this transcript, and noting the very perceptive questions posed by the Claimant's representative, we must overrule this objection.

In reaching a final decision in this matter we are guided by the findings in Second Division Award No. 6456 (Bergman) reading as follows:

"There was substantial evidence to support the hearing officer's conclusion. Many prior Awards have established that the policy of this Board is to leave undisturbed a decision based on substantial evidence produced at a hearing which has been fairly conducted after proper notice. Likewise, it is the policy of this Board to avoid interference with penalties unless the penalty is unreasonable and excessive to the point where it is arbitrary and capricious. The uncontradicted evidence is that claimant has not been a cooperative or willing employee. In an industry where everyone should work together for their own safety as well as in the public interest, we do not find that the penalty imposed was arbitrary or capricious.

Second Division Award No. 6984 (Wallace) is also worthy of note:

"Lastly, Petitioner argues that the angry words were in the nature of shop talk" which does not deserve this severity in punishment. It should be noted that this view was neither discussed nor argued on the property and it may be that it is not properly before us. In any event Claimant is not helped. The awards cited by Petitioner for the most part make the point claimed but they involved long service employees whose guilty actions resulted from provocative statements by supervisors or other provocative actions. These facts are not present here. It cannot be said the discipline imposed was arbitrary, capricious or unreasonable."

Neither Mr. Edwards nor Mr. Roberts did or said anything to provoke the Claimant's outbursts.

The Claimant has been employed by this Carrier for approximately ten (10) years. Such a circumstance might normally call for a second look at the discipline involved. However, the Claimant's record shows several prior incidents which resulted in discipline.

The matters presented to this Board are serious and the action taken by the Carrier cannot be said to be unreasonable, arbitrary or capricious.

A W A R D

Claim denied.

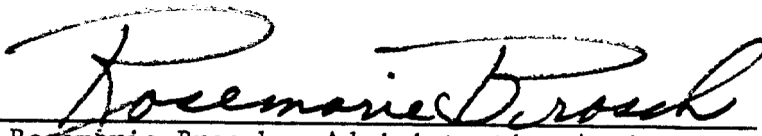
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Award No. 9231
Docket No. 9212
2-CR-MA-'82

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.