

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employees:

1. That the Seaboard Coast Line Railroad Company violated the controlling agreement, in particular, Rule 32 when Electrician E. L. Ward was unjustly held out of service on December 23, 1980 and subsequently dismissed on February 19, 1981, at Hialeah, Florida.
2. That accordingly, the Seaboard Coast Line Railroad Company compensate Electrician E. L. Ward in the amount of eight (8) hours per day at the pro rata rate for the period commencing December 23, 1980 and ending the day he is reinstated to his position as Electrician at Hialeah, Florida, both dates inclusive. In addition Electrician E. L. Ward be allowed all other benefits that would accrue to his position.

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 employes 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.

Claimant, E. L. Ward, an Electrician with the Carrier since May 13, 1973, was held out of service on December 23, 1980, and subsequently dismissed on February 19, 1981, after an investigation. The circumstances leading to his dismissal occurred at approximately 2 p.m. on December 23, 1980, when Claimant allegedly engaged in an altercation with Coach Cleaner C. K. Barron. According to Barron, Claimant threw rocks at her car and spat at her.

The Carrier charged Claimant was violating Rules 4, 12, and 14 of the Rules and Regulations of the Mechanical Department. Those rules state:

"Rule 4: Employees are required to devote their time exclusively to the business of the Company unless expressly exempted from doing so by proper authority."

"Rule 12: Disloyalty, dishonesty, desertion, intemperance, immorality, vicious or uncivil conduct, insubordination, incompetency, willful neglect, inexcusable violation of rules resulting in endangering, damaging or destroying life or property, making false statements or concealing facts concerning matters under investigation will subject the offender to summary dismissal."

"Rule 14: Employees must not unnecessarily interrupt, by conversation, or otherwise other employees in the discharge of their duties. Anything that may distract from the good order of the shops is prohibited."

The Carrier argues that the Claimant was guilty of vicious or uncivil conduct because Claimant allegedly threw rocks at the car of fellow employee Barron and spat at her. Carrier argues the punishment is warranted because of the serious nature of the behavior of the Claimant.

The Organization argues that the Carrier's action taken against the Claimant was unjust and that it was Ms. Barron who wrongfully accused the Claimant of throwing rocks at her car. Furthermore, the Organization alleges that Ms. Barron stabbed the Claimant in his right arm. The records shows that the Claimant required five stitches to close a puncture wound in his right arm.

The Organization argues further that the Claimant did not receive a fair and impartial hearing and cites Rule 32 to support its claim. Rule 32 states:

"No employee shall be disciplined without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and the Local Chairman will be apprised in writing of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and be represented by the duly authorized representative of System Federation No. 42.

When cases are being investigated, the evidence will be written up with sufficient copies given to those concerned.

If it is found that an employee has been unjustly suspended or dismissed from service, such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The Organization argues that holding the Claimant out of service was wrong and in violation of the rules because there is no evidence that the Claimant would have endangered himself or other Carrier employees.

Moreover, based on the work history of the complaining witness and the denials of the Claimant, the Organization argues that there was not sufficient evidence on which the Carrier could have based its conclusion of guilt. The Organization points to the record of Ms. Barron which included numerous letters of reprimand and a 30-day suspension for various rule violations since her hire date of December 14, 1974. The Organization also points out the numerous inconsistencies in Ms. Barron's testimony.

However, the Organization offers no evidence of arguments to support its position that the hearing was unfair. In fact, the record of the investigation reveals a hearing that was conducted in a fair and impartial manner with sufficient opportunity for the Claimant and the Organization to examine evidence, cross-examine witnesses, and present testimony and evidence on behalf of the Claimant. First Division Award No. 5197 states:

"The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused will be apprised of the charges preferred against him, that he will have notice of the hearing with a reasonable time to prepare his defense, that he shall have an opportunity to be present in person and by representative, that he shall have the right to produce evidence in his own behalf and the further right to cross-examine witnesses testifying against him."

Those standards have been adhered to and this Board finds that the hearing in this case was fair.

After a careful review of the record of the investigation, this Board finds that the Carrier failed to sustain its burden of proof upon which the discipline was based. (See Second Division Awards 4046, 6419, and 7172.) This Board concludes that the penalty of discharge was excessive for the offense committed. This finding, of course, does not minimize the seriousness of the Claimant's conduct.

Although it is clear that there was some kind of an altercation involving the Claimant and Ms. Barron on the day in question, the record indicates that the Claimant's role in the altercation was defensive, rather than offensive. Ms. Barron, the Carrier's major witness against the Claimant, at first denied that she had a knife in her possession during the altercation, but when confronted with evidence of the Claimant having received stitches from a stab wound received during the altercation, Barron changed her story and stated that it was only a "butter knife." Furthermore, Barron's past record of numerous rule violations, plus the fact that she is the only witness who testified that the Claimant threw rocks at her car and spat at her, raises a great deal of question as to the validity of her testimony overall. No one else, other than Barron, the woman who stabbed the Claimant, testified to have seen the Claimant take any offensive action. Apparently, the Claimant was acting in a defensive manner but, unfortunately, did not make every effort to avoid the altercation.

The record indicates that Claimant is not blameless for the altercation. Certainly an employee has every right to defend himself if attacked by a fellow employee, however, the attacked employee should use only the amount of force necessary to fend off the attacker. The record indicates that he did not make every effort to avoid the confrontation.

It is clear from the record that the Claimant was engaged in behavior which merits some discipline. However, it is also clear that the dismissal of this 7 1/2-year employe with no previous disciplinary problems was unreasonable and arbitrary under the facts and circumstances of this case.

In Second Division Award No. 4401, this Board stated:

"Award 4282, and many others, state that this Division is without power to substitute its judgment for that of the Carrier unless the action taken was arbitrary or unreasonable, or not supported by the record."

Moreover, in Second Division Award No. 4408, this Board stated:

"From its inception, this Division has stated that in disciplinary cases it is without authority to substitute its judgment for that of the Carrier unless the employees affected have been discriminated against or treated in an arbitrary or capricious manner."

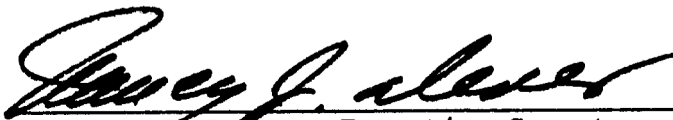
This Board finds that the Claimant is to be reinstated to service with six months' back pay and with seniority rights unimpaired. The balance of the period since the date of his dismissal shall be treated as a lengthy suspension for his role in the altercation. The Board strongly reminds the Claimant that altercations and disputes with other employes cannot be tolerated and will be disciplined.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 9th day of May, 1984