

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers, AFL-CIO
(National Railroad Passenger Corporation (AMTRAK)

Dispute: Claim of Employees:

That the National Railroad Passenger Corporation (AMTRAK) be ordered to restore Machinist M. Moody to service and compensate him for all pay lost up to time of restoration at the prevailing Machinists' rate of pay.

That Machinist M. Moody be compensated for all insurance benefits, vacation benefits, holiday benefits, and any other benefits that may have accrued and were lost in this period and otherwise made whole for all losses in accord with the prevailing Agreement dated September 1, 1977, as subsequently amended.

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 employees involved in this dispute are respectively carrier and employees 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, Michael Moody, entered the service of the Carrier on February 8, 1979. Claimant was charged by Carrier under letter dated July 27, 1982 with failure to comply with Carrier's Rules of Conduct "I" (insubordination), "J" (profane language), "K" (attend to duties), and "L" (absence from duty without proper authority) in that on July 19, 1982 he was missing from his assigned duties from approximately 1:30 a.m. to 2:15 a.m., and was belligerent and insubordinate when told to punch out and leave the property. On August 12, 1982 a formal investigation on the charges of violating the aforementioned rules of conduct was conducted resulting in Claimant's dismissal on August 20, 1982.

The Organization's position is that Claimant was not afforded a fair and impartial investigation, and that Carrier failed to meet its burden of proof. The Organization maintains that the hearing officer demonstrated on the record that he was predisposed against the Claimant, and that all the evidence indicates that Carrier's supervisor not only did not page Claimant as alleged, but that he in fact provoked the altercation with Claimant.

It is the Carrier's position that Claimant received sufficient notice in advance of hearing, was duly represented at the hearing and that the transcript discloses serious conduct on the part of Claimant sufficient to justify dismissal.

The Board finds no merit in the Organization's contention that Claimant failed to receive a fair and impartial investigation. While the record does indicate an expression by the hearing officer that in his opinion Claimant "dragged" the investigation out, the record examined in its entirety reveals that full opportunity was given to the Organization to cross-examine Carrier's witnesses, and to have its own witnesses present on behalf of Claimant. While it would be advisable for a hearing officer to be more temperate in his remarks, the dual capacity of investigator and hearing conductor make such comments understandable, if not excusable.

The evidence before the Board is conflicting. At the hearing, Foreman James Wells who was Claimant's direct and immediate supervisor on the night of the incident stated that at 1:30 a.m. he began paging Claimant as he was not at his work station. He testified further that Claimant did not appear at the office until 2:15 a.m., and when questioned where he had been Claimant stated he was on the ramp working and that Wells was a liar. At this point Foreman Wells stated he punched Claimant out and told him to go home. Another foreman testified on direct examination that Foreman Wells called him looking for Claimant, and that he heard Claimant swear at Foreman Wells after Wells punched Claimant out.

The Organization's witnesses swore that the Foreman punched Claimant out before the latter returned to the office. Two of the Organization's witnesses acknowledge Claimant swore, but not in a derogatory manner and apologized for doing so immediately after the act. These witnesses stated that Foreman Wells only paged Claimant twice, and that Claimant arrived shortly after the second page. Another witness for Claimant testified that he told the foreman where Claimant was located, and that Claimant's time card was punched out before he returned to the office.

Claimant testified to having worked steadily during his shift, but stopped for lunch as the last truck on which he was to make repairs was not in position. Claimant asserted that after the altercation with Foreman Wells, he left the office and proceeded to finish his work.

The Board finds that there was substantial credible evidence adduced at the hearing that Claimant violated Rules of Conduct "J" and "L" by his use of profanity, and by his unauthorized absence. However, there is evidence that Claimant immediately issued an apology for his use of profane language. Although Claimant was absent from his duties without proper authority, there was insufficient evidence that Claimant had refused to perform work available to him, and in fact the record reflects the hearing officer's acknowledgement that at no time was Claimant being charged with his performance or nonperformance of his duties on any locomotive.

The Board therefore finds insufficient, credible evidence to establish a violation of Rule "I" and Rule "K", and modifies the claim accordingly.

The claim is sustained to the extent that Claimant shall be restored to duty with all seniority rights unimpaired but without back pay.

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Award No. 9985
Docket No. 10295
2-NRPC-MA-'84

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 11th day of July, 1984