

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(
(Metro-North Commuter Authority
(Consolidated Rail Corporation)

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation be ordered to restore Machinist M. Gilbert 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 M. Gilbert be restored to service with seniority unimpaired (sic) and compensated for all insurance benefits, vacation benefits, holiday benefits and any other benefits that may have accrued and were lost durring (sic) this period in in (sic) accordance with Rule 7-A-1 (e) of the prevailing 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 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, M. Gilbert, was employed as a machinist at the Harmon Shop in New York. Claimant entered the Carrier's service on July 28, 1978.

On November 18, 1981, Claimant was sent a notice requesting his attendance at a trial in connection with the following charges:

Being absent without permission from your work assignment on November 18, 1981, at approximately 7:30 until the end of your tour of duty.

Failure to mark off properly on November 18, 1981, at the conclusion of your shift at 8 a.m.

Claimant was found guilty as charged and was dismissed from service in all capacities.

The Organization's first contention is that the Carrier failed to introduce evidence of the Claimant's guilt. The Organization argues that the only evidence introduced was the supervisor's testimony that he did not give the Claimant permission to leave. Further, the Organization argues that the Claimant's time card was properly filled out. This, the Organization contends, is not sufficient evidence to support a finding of guilt.

The Organization further submits that in light of the Claimant's alcohol problems, which he was attempting to rectify, the Carrier should not have considered the Claimant's past record to justify dismissing the Claimant.

The Carrier's position is that:

1. There is sufficient evidence to support the Carrier's determination of Claimant's guilt of being absent from his work assignment at approximately 7:30 a.m. and failure to mark off properly on November 18, 1981; and

2. The proven guilt of Claimant in this instance, in conjunction with his past service record, warranted the decision to discharge him.

After a thorough review of the record, this Board finds that there is sufficient evidence to support the finding of guilt. The Claimant admitted that he was away from his assigned work area at approximately 7:30 a.m. on November 18, 1981, and that he signed his time card 7:25 a.m. The Claimant testified that he had permission from his supervisor, Mr. Head, to leave early. However, Mr. Head testified that he did not give Claimant permission to leave early; and, therefore, Claimant was not available at quitting time to mark off properly.

It is well settled that where there is a conflict in the testimony of witnesses at a disciplinary hearing, the Carrier, as the trier of fact, makes the determination as to whose testimony to believe; and this Board may not set aside such findings (see First Division Awards 12072, 15032, and 16848). In this case, the evidence regarding the question of permission is in direct conflict; and this Board will not reverse the Carrier's determination that the supervisor should be believed.

It should be noted that the trial was held open for a day to allow the Claimant to bring in a certain witness or a statement from the witness to support the Claimant's contention that he had permission to be absent. No witness appeared nor was any statement from the witness produced.

This Board further finds that Carrier's action in dismissing Claimant was warranted in view of Claimant's past service record. The Claimant had been disciplined five times in his three years of employment. Three of those disciplines were for offenses similar to the instant offense. The prior disciplines imposed on the Claimant have not resulted in improved behavior. Thus, dismissal is warranted.

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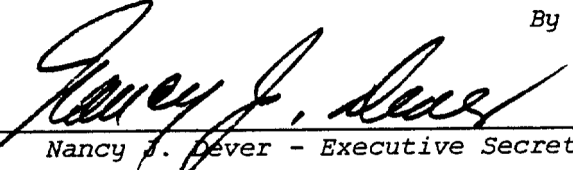
Award No. 10152
Docket No. 10248
2-MNCA-MA-'84

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 7th day of November 1984.