

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employees:

1. Restore claimant to service of Carrier with all seniority rights unimpaired.
2. Compensate claimant for all time lost in addition to an amount of 6% per annum compounded annually on anniversary date of claim.
3. Make claimant whole for all vacation rights.
4. Reimburse claimant and/or his dependents for all medical and dental expenses incurred while employee was improperly held out of service.
5. Pay to the claimant's estate whatever benefits the claimant has accrued with regards to life insurance for all time claimant was improperly held out of service.
6. Pay claimant for all contractual holidays.
7. Pay claimant for all contractual sick pay.
8. Pay claimant for all jury duty and for all other contractual benefits.

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.

On July 30, 1979, the Carrier held an investigation to determine if Claimant had been sleeping and insubordinate during the third shift on July 24, 1979. The Carrier had withheld Claimant, a Pipefitter, from service pending the formal investigation. Determining that Claimant had committed both charged offenses, the Carrier dismissed him from service on October 1, 1979. The Organization filed a claim prior to the assessment of discipline in this case, contesting the Carrier's right to withhold Claimant from service pending the investigation. Evidently, the Organization supplemented the original claim to include an appeal of the ultimate disciplinary penalty.

At the start of the July 24, 1979 shift, the Car Foreman assigned Claimant to assist the Electricians who were changing out a compressor motor on Amtrak Diner 8000. Claimant disconnected the compressor pipes. After the mid-shift meal period, the Electricians had completely changed out the compressor and compressor motor and were ready for Claimant to reconnect the freon pipes. The Assistant General Foreman asked the Car Foreman to find Claimant so that the compressor project could be promptly completed. Beginning at 5:10 a.m., the Car Foreman paged Claimant over the Shop public address system several times but Claimant did not respond. The Foreman searched the area near Amtrak 8000 but was unable to locate Claimant. Receiving no reply to another summons over the public address system, the Foreman continued his search in other areas of the Shop. According to the Car Foreman, he discovered Claimant lying in a seat in the dark in Car No. 4424 of Train No. 92. Claimant jumped up when the Car Foreman shined his flashlight on him. Contrary to the Car Foreman's declarations, Claimant testified that after lunch he helped another worker repair a brake cylinder line on Car No. 2697. Claimant specifically denied that he was ever in Car No. 4424 and further denied that he had been asleep.

When Claimant eventually arrived at Amtrak 8000 with the appropriate fittings to reconnect the compressor pipes at 6:05 a.m., the Assistant General Foreman removed Claimant from service and directed him to leave the property. Ignoring the Assistant General Foreman, Claimant asserted that the Car Foreman instructed him to complete the compressor repair work. When the Assistant General Foreman reiterated his order, Claimant departed the premises.

The Organization accused the Carrier of conducting a defective investigation process which deprived Claimant of his right to a fair and impartial Rule 32 hearing. This Board has examined the Organization's procedural objections and we must overrule them. The notice of charges was sufficiently precise to notify Claimant of the nature of the offense that he had allegedly committed on July 24, 1979. The Hearing Officer conducted a fair hearing where both Claimant and his representative had an opportunity to present all of their evidence as well as a capable, albeit unsuccessful, defense. In addition, the Hearing Officer could prudently exercise his discretion to restrict the scope of questioning during the hearing. The purpose of the hearing is to ascertain all of the facts surrounding the incident in question without becoming entangled and preoccupied with tangential subjects wholly unrelated to the sleeping and insubordination charges.

Next, the Organization alleges that Claimant was improperly withheld from service pending the Rule 32 disciplinary hearing. The Carrier argues that insubordination is a serious offense which warranted Claimant's suspension pending a hearing. Rule 32 provides that an accused employee may only be withheld from service pending a hearing in "proper cases". While insubordination can be grounds for withholding employees from service before a plenary hearing, the record in this case reveals that the Carrier actually withheld Claimant from service prior to alleged insubordinate conduct. In this case, the Carrier pulled Claimant out of service based on an insubordination offense that had not yet occurred. Moreover, when the Assistant General Foreman directed Claimant to leave the property, Claimant was prepared and willing to perform the compressor work on Amtrak 8000. Under the particular facts of this case, Claimant should have remained in service until the conclusion of the disciplinary process. Thus, Claimant is entitled to pay for time lost from July 24, 1979 until October 1, 1979.

Turning to the merits of the case, the first issue presented to this Board is whether or not Claimant was sleeping while on duty. The record contains a patent conflict between the Car Foreman's testimony and Claimant's rendition concerning the events which transpired after the meal period. It is not the province of this Board to resolve conflicts in testimony or to pass on credibility issues. Rather, we are confined to evaluating all of the evidence in the record as a whole to determine if the Carrier presented substantial proof that Claimant committed the charged offense. The Carrier could place more weight on the Foreman's testimony as opposed to Claimant's vague denials. The surrounding circumstances support the Car Foreman's testimony. Claimant failed to respond to numerous public address announcements. If Claimant had been working in another area of the Shop, he would have heard at least one of the pages. Claimant knew that he would be needed to reconnect the compressor pipes but he did not make himself readily available. Instead, the Car Foreman had to waste his valuable time searching the Shop for Claimant. Though Claimant emphatically asserted that he was working elsewhere after lunch, he presented no proof of the work he performed and did not come forward with any corroboration for his assertion. Thus, the evidence substantially demonstrates that Claimant was sleeping while on duty.

The record also contains undisputed evidence that Claimant failed to comply with the direct order issued by the Assistant General Foreman. Though this Board has found that the Assistant General Foreman improperly withheld Claimant from service, Claimant was still obligated to obey the instructions of his Supervisors so long as Claimant remained on the property. If Claimant genuinely believed that the Assistant General Foreman was treating him unjustly, Claimant should have first obeyed the order and then utilized the contract grievance machinery to redress any Carrier violations of the applicable Agreement.

Claimant committed two serious infractions which justified discipline. While he has one prior sleeping charge on his personal record, the Board nonetheless concludes that dismissal was an excessive and unduly harsh penalty. In this case, Claimant has been out of service for more than five years. Claimant should be reinstated to service, with his seniority unimpaired but without compensation for time lost except for the period from July 24, 1979 to October 1, 1979. Claimant's request for interest on the back pay award is denied. Upon his reinstatement to service, we expect Claimant to alertly and competently perform his duties, to obey his Supervisors' directives and to conform to the Carrier's rules. Further offenses will not be tolerated.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of December 1984.