

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

Parties to Dispute: ( International Brotherhood of Electrical Workers  
( Metro-North Commuter Authority  
( Consolidated Rail Corporation)

Dispute: Claim of Employees:

1. That under the current Agreement the Consolidated Rail Corporation has unjustly assessed a 10 day suspension against Electrician W. C. Terry, Harmon, New York, in Notice of Discipline dated August 11, 1981.
2. That accordingly, the Metro-North Commuter Rail Division be ordered to restore Electrician W. C. Terry to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electricians' rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his record.

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.

The Claimant was employed by the Carrier as an Electrician at its facility in Harmon, New York. After a trial that was held on July 17, 1981, the Claimant was assessed ten (10) days suspension for the following offenses: a) "Observed lounging in dark car 8225, on track #3 at approximately 4:55 a.m. on 2/17/81, without completing [his] assigned duties;" and b) Failure to report car 8246 with depleted air bags as reported on HH-217 card".

On appeal, and as the Carrier indicated, "on the basis of leniency", the discipline was reduced to five (5) days suspension. As a result of discussions between the Carrier and Organization, the second charge involving "the failure to report car 8246", was withdrawn by the Carrier, leaving the issue on whether the Claimant was "lounging" in a dark car "without completing his assigned duties".

The record fails to disclose that at the time of the event giving rise to the charge in question, the Claimant failed to complete his assigned duties. Nor does the record show that the Carrier's Supervisors assigned him any other duties. Proof that the Claimant was observed "lounging" or sitting in a darkened car, without more, is insufficient to prove that the Claimant had not completed his assigned duties. In First Division Award No. 20471, it was stated that:

"It is firmly settled in the law of labor relations that in discipline cases the burden of proof squarely rests upon the employer to convincingly demonstrate that an employee is guilty of the offense upon which his disciplinary penalty is based."

The Carrier has failed to meet its burden of proving that the Claimant had been "lounging" in a darkened car without completing his assigned duties on February 17, 1981.

Accordingly, the claim is sustained. While the record is not clear as to whether the discipline assessed against the Claimant has been deferred, or has been served, the Carrier is to comply with Rule 7-A-1(e) of the Agreement where applicable, which states as follows:

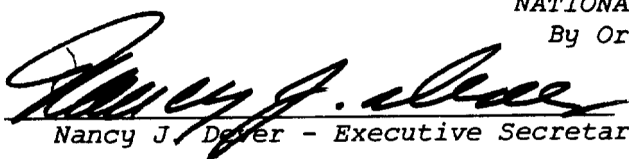
"(e) When an employee is held out of service on a charge and is later exonerated, the charge shall be stricken from his record and he shall be compensated for the difference between the amount he earned while out of service or while otherwise employed and the amount he would have earned on the basis of his assigned working hours actually lost during the period. Insurance, vacation, and other benefits to which the exonerated employee may be entitled will be restored without impairment."

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 17th day of July 1985.