

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
(Consolidated Rail Corporation (Conrail)

Dispute: Claim of Employes:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician D. E. Hosie, from service effective March 5, 1982.
2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Electrician D. E. Hosie 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 Electrician's 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 has been employed by the Carrier as an Electrician at its Locomotive facility located in Harrisburg, Pennsylvania. He has been in the service of the Carrier for approximately 3 1/2 years. Following a trial that was held on February 26, 1982 the Claimant was dismissed from service for committing the following offenses: 1) Deliberately spilling oil on the platform between No. 2 and No. 3 track, at the Harrisburg facility to create an oil slick about 4:15 p.m. on October 24, 1981 for the purpose of injuring himself and, 2) Purposely injuring himself by deliberately slipping on the oil slick on October 24, 1981.

The Company's case placed primary reliance upon the testimony of Assistant Shop Manager R. Harville and Electrician J. C. Gerdy, the Claimant's co-worker. Assistant Shop Manager Harville acknowledged that he did not have personal knowledge of the events surrounding the Claimant's injury; nor did he observe the Claimant slip on the oil slick on October 24, 1981. He concluded that the Claimant deliberately spilled oil to injure himself based upon statements obtained from various employees which were submitted to the Carrier before the trial that was held in the instant case. Assistant Shop Manager Harville's testimony at the trial was based upon what he derived from these statements. As he indicated:

"What I am reading here is what had happened from what I got out of the statements. I'm not reading. It's in the statements I'm reading in my own words the contents of the statements."

Assistant Shop Manager Harville's testimony cannot be considered probative or reliable evidence since it is based upon the statements of employees.

The Carrier also placed great weight on the statements and testimony of Electrician Gerdy. The Carrier indicates that he "watched him [the Grievant] deliberately step into the oil spill and fall in the direction of the pit." Electrician Gerdy also said that he can "safely say without doubt that the employee deliberately stepped into the oil." According to the Company, such testimony, in effect, provides ample support in proving its case.

The function of this Board is to review the whole record and not only the case presented by one party since other evidence may weaken or even indisputably destroy that case. In this connection, Electrician Gerdy submitted three (3) statements to the Carrier. In this first statement which was given on October 24, 1981 at 7:00 p.m. Electrician Gerdy indicated that he did not have any "real knowledge" of how the oil spill occurred and that he did not see the Claimant "slip, trip or fall" but he "saw what was probably the bare hand ***" of the Claimant. At 8:19 p.m. on the same day, Electrician Gerdy gave a second statement to the Carrier in which he indicated that the earlier statement "was partially in error." He referred to the Claimant being "despondent and dismayed" and that he told him on "a couple of occasions *** he felt like just walking or jumping in front of an engine and ending it all." Electrician Gerdy then stated he "can safely say without any doubt that the Claimant deliberately stepped into the oil." He went on to say that before the Claimant slipped on the oil spill, he and the Claimant "went into the cab" and the Claimant "said something like 'Oh, what the hell anyway' and left to go in the direction of the oil spill. Asked whether the Claimant

slipped "deliberately or could it be due to *** his being depressed that he forgot the oil was there", Electrician Gerdy responded, "I don't really know. Just the way he said it leaves me to believe he knowingly did it, but I don't really know. [Emphasis added]. Thus, after indicating that he "can safely say without doubt" that the Claimant deliberately stepped into the oil", Electrician Gerdy indicated that he "did not really know" whether the Claimant deliberately stepped into the oil or that due to his depression he forgot about the oil spill. There is yet another statement that was given by Gerdy to the Carrier on October 26, 1981. At variance with his first statement when he said he "probably" saw the Claimant's "bare hand" as he fell, he indicated that he "could see a foot--it went out from under him ***" in his third statement.

In addition to the contradictory and untrustworthy statements given by Electrician Gerdy to the Carrier there is his testimony at trial which must be considered. Describing what he observed on October 24, Electrician Gerdy testified that from the cab he was "in a position to see from his midsection on up. But it was apparent I could see the results of what happened; his body going toward the corner of the pit. ***" Thus, at trial, he did not see the Claimant's "foot" which "went out from under him" as he related in his third statement, since he "was in a position to see from his midsection on up." Moreover, he was only able to see "the results of what happened", rather than how the fall occurred. The Claimant also called his second statement given on October 24 as "Conscious and confused". Finally, when asked to explain the discrepancy between his second statement in which he said that he "watched him deliberately step in the oil" and his third statement when he denied that he "actually" saw him step in the oil, Electrician Gerdy replied as follows:

"Early that statement at 8:19 PM was one of emotion I guess and disbelief. The question of whether he actually stepped since he fell in that direction and I didn't actually see him at the time, the reason I used the word deliberately is because I was convinced at that time that through these prior discussions of Doug [the Claimant] and mine, I felt not only in his depressed state of mind it actually happened."

Apart from the confusing nature of his testimony, Electrician Gerdy's statements were based on "emotion", "disbelief", what he was convinced of, based upon "prior discussions" with the Claimant, and the Claimant's "depressed state of mind".

After carefully examining the entire record, the Board concludes that the Carrier failed to carry its burden of proving that the Claimant deliberately spilled oil to injure himself. The evidence which the Carrier relied upon to prove its case cannot be considered probative or reliable. Accordingly, the claim is sustained.

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Award No. 10491
Docket No. 10165
2-CR-EW-'85

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1985.