

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Michigan-Wisconsin Transportation Company

STATEMENT OF CLAIM:

1. That the Michigan-Wisconsin Transportation Company unjustly, and in violation of Agreement Rule 34, arbitrarily and capriciously assessed Electrician C. J. Hagerman sixty (60) days actual suspension and ninety (90) day record suspension as a result of hearing conducted on April 19, 1989; and

2. That Electrician Hagerman be compensated for all time lost as a result of the unjust suspension; and

3. That Electrician Hagerman be allowed all vacation and retirement credits to which he would have been entitled had he not been suspended; and

4. That Electrician Hagerman's record be expunged of all mention of the arbitrary, capricious and unjust discipline.

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.

As the result of an Investigation held on April 19, 1989, the Claimant was assessed a suspension of sixty calendar days and a ninety day record suspension for refusing to obey an order on Wednesday, March 29, 1989. The Claimant was originally charged with violation of Rules 1 and 115 of the Agreement effective May 1, 1954. This original charge was contained in the Notice of Investigation dated April 5, 1989. At the Investigation held on April 19, 1989, the Claimant was provided with a revised Hearing Notice by the Carrier. The revised Notice changed the date of the alleged misconduct from Wednesday, March 29, 1989, to Thursday, March 30, 1989. The Carrier's discipline letter dated May 12, 1989, found the Claimant guilty of insubordination for conduct that occurred on March 29, 1989.

The essence of this Claim is twofold: 1) That the Claimant was denied a fair and impartial Hearing in that he was charged with misconduct on one date and found guilty of misconduct on another date; and 2) The Carrier failed to meet its burden in proving that the Claimant was guilty of the charges. A review of the latter contention establishes to this Board's satisfaction that the Hearing Officer did not apply adequate weight to the testimony of the Carrier witnesses. The Foreman of the Marine Shop testified that when the Claimant was advised on March 29, 1989, to work on the ship while it sailed on March 30, 1989, the Claimant responded that he did not think that it was necessary for him to ride the ship; that he was of the opinion that he could do the work while the ship was in at the dock in the morning. The Marine Superintendent testified that the Claimant reported to work at 7:30 A.M. on Thursday, March 30, 1989, however, he was refused an opportunity to perform service on that date. This testimony was offered by the Marine Shop Foreman who stated that the Claimant was not ordered on March 30, 1989, to perform maintenance work on the Steamer Badger; that he was instructed by the Carrier's owner at approximately 7:15 A.M. to tell the men of the shop that there was no work for them; that they were out of service without pay pending an Investigation. The record further disclosed that ten of the shop employees were sent home; that there are twelve shop employees in total and one was on sick leave. The Marine Shop Foreman also agreed that the Superintendent did not advise the Claimant that his suggestion about performing the work before the ship sailed was unacceptable, and that he further did not advise the Claimant that he would have to ride the steamer and perform the work while riding the ship. The Carrier Foreman testified that these conversations took place on March 29, 1989, in his presence, the Claimant's presence and the Superintendent's presence.

On the basis of the foregoing facts, the Board is compelled to agree with the Organization that the Carrier did not meet its burden of proof in establishing that the Claimant was insubordinate. The Claimant was not given a direct order on March 29, 1989, that he refused. The record is clear. The Claimant expressed his opinion as to how and when he could perform the work and was not advised otherwise. Additionally, the Claimant reported to work on March 30, 1989, and was refused an opportunity to perform the work and, more importantly, an opportunity to refuse to perform the work. Nothing in the testimony of the Carrier's witnesses would lead a reasonable person to conclude that the Claimant was insubordinate on March 29, 1989. Further, nothing in the record indicates that the Claimant was insubordinate on March 30, 1989. This Board's findings regarding the substantive issues of the charges against the Claimant render the procedural issues raised by the Organization moot. Accordingly, the Claim will be sustained. The Claimant shall be made whole for all lost wages and other entitlements and the discipline shall be expunged from his record.

A W A R D

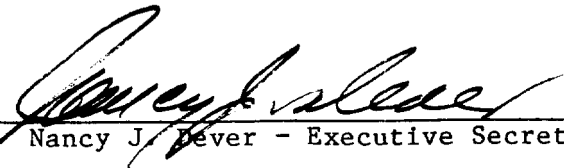
Claim sustained.

Form 1
Page 3

Award No. 12170
Docket No. 11964
91-2-90-2-71

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of October 1991.