

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12800
Docket No. 12849
94-2-93-2-218

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(
(CSX Transportation, Inc. (former Chesapeake
(and Ohio Railway Company)

STATEMENT OF CLAIM:

"1. That, in violation of the current agreement, CSXT (former Chesapeake & Ohio Railway Company), a Carrier that owns and operates a locomotive equipment repair facility in Huntington, West Virginia, arbitrarily disciplined Machinist D. E. Miller by unjustly dismissing him. The dismissal was effective on October 16, 1992.

2. That accordingly, CSXT be ordered to reinstate Machinist Miller to his former position; compensate him for all time lost at the pro-rata rate of pay as of September 8, 1992 and until restored to service with seniority unimpaired; made whole for all vacation rights, payment for Health and Welfare, benefits under Travelers Insurance Policy GA-23000, Railroad Employees' National Dental Plan GP-12000 and Provident R-5000, and any other benefits to which he would have been otherwise entitled had he not been improperly withheld from the services of the Carrier and clear 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 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 were given due notice of hearing thereon.

On September 11, 1992, Claimant was notified of an Investigation, to be held on September 16, concerning Claimant's being away from his assigned work area without permission at 8:50 P.M. on September 8, 1992. Claimant was held out of service, pending the Investigation. The Investigation was held as scheduled, and on October 16, 1992, Claimant was notified that he had been found guilty of the charges and dismissed.

The Organization contends that Claimant was denied a fair Hearing. The Organization argues that Carrier prejudged Claimant's guilt, that the Hearing Officer was prejudiced against him, that the Hearing was not run in an impartial manner, and that Carrier refused to allow Claimant to make his own tape recording of the Hearing. The Organization further argues that Claimant was improperly removed from service pending Investigation and that Carrier did not proffer charges against Claimant or remove him from service until three days after the incident.

Furthermore, the Organization contends that the evidence did not prove that Claimant was out of his assigned work area without permission. Rather, according to the Organization, after working under very hot conditions, Claimant was cooling off in accordance with Carrier's instructions to avoid overheating. Finally, the Organization protests that Claimant was discharged, but that a second employee who was with Claimant at the time of the alleged incident was exonerated of all charges.

Carrier contends that the Hearing Officer conducted the Hearing in a fair and impartial manner. Carrier argues that it acted in accordance with the applicable Agreement in denying Claimant's request to tape record the Hearing and in providing Claimant with a copy of the transcript. Carrier maintains that the Hearing transcript shows that Claimant conducted himself in an uncooperative and provocative manner during the Hearing and that, despite this, the Hearing Officer afforded Claimant wide latitude in calling and questioning witnesses.

Carrier argues that the evidence disproved Claimant's contention that he was seeking heat relief. In light of Claimant's prior record, Carrier urges that dismissal was proper.

The Board has reviewed the transcript of the Hearing. We find no evidence that the Hearing was conducted in such a way as to deny Claimant a fair Hearing or that the Hearing Officer had prejudged the case. Actions of the Hearing Officer that the Organization relies on to show bias amount to nothing more than proper conduct in controlling the Hearing. At numerous points during questioning of witnesses, the Claimant sought to make statements and/or give testimony. The Hearing Officer properly confined him to asking questions and advised him that he would have an opportunity later in the Hearing to make statements and give testimony. Later in the Hearing that opportunity was provided and the Claimant exercised it. Furthermore, when the Organization expressed a desire to call an additional witness, the Hearing Officer obtained the witness.

The Board also finds no evidence that Carrier prejudged Claimant's guilt. Carrier had discretion, based on the nature of the offense and Claimant's prior record, to withhold Claimant from service pending the Investigation.

The Organization has pointed to no Rule giving Claimant a right to tape record the Hearing. We find no violation of the Agreement resulting from Carrier's denial of Claimant's request to record the Hearing. Claimant was furnished a copy of the transcript and there is no indication that the transcript was not accurate.

Similarly, we find no violation of the applicable Agreement resulting from the passage of three days between the incident and the notice of charges and withholding from service. Carrier certainly is entitled to gather the facts to determine whether an Investigation is warranted. Rule 37 does not set specific time limits for the notice of charges or the decision to withhold an employee from service. It requires a "fair hearing" and allows "Suspension in proper cases pending a hearing, which shall be prompt" The Hearing in the instant case occurred eight days following the incident and five days following the notice of charges. Carrier clearly acted in a prompt manner as required by the Agreement.

We have reviewed the record and, based on that review, find that substantial evidence supports the conclusion that Carrier proved the charges against Claimant. It is undisputed that Claimant was outside his work area at 8:50 P.M. on September 8, 1992. Claimant maintained that he had gone outside the shop to cool off in accordance with prior instructions to avoid heat stress. Evidence indicated that the high temperature on the day in question was 86 degrees. Although the incident occurred after sundown, Claimant maintained that the inside of the shop remained hot until much later that night. This condition, according to Claimant's testimony, was aggravated by Claimant's work activities which included using a torch to burn off bushings, which necessitated wearing heavy leather protective clothing, and swinging a ten-pound sledge hammer.

Claimant's explanation was not credited on the property. We do not review this finding de novo. Our review of the record finds that the evidence supporting the rejection of Claimant's explanation is more than substantial.

Claimant's lunch break was from 8:00 until 8:20 P.M. Claimant testified that upon returning from lunch, he continued to feel hot and that he felt too nauseous to walk up the stairs to his supervisor's office to report his illness. Instead he walked outside to cool off. But, when confronted by supervision and told to return to his job, Claimant did not mention feeling ill and did not protest that he was too ill to return to work. Furthermore, although Claimant was performing his job with two co-workers, he did not advise them of his illness or his need to cool off. There is no evidence of any mention of the need to cool off until Claimant raised it at the Investigation.

Additional evidence supports Carrier's rejection of Claimant's explanation. Although the General Foreman testified that employees were instructed to stay close to their gangs when going outside to cool off, Claimant was found away from his gang. There were several doors closer to Claimant's assigned work area that he could have used to get some fresh air to cool off without going to the area where he was found. Furthermore, Claimant was not constantly operating the torch during the period prior to the incident in question; rather he engaged in incidental burning to remove bushings. According to Claimant's supervisor, two other employees performed welding that night and neither complained of heat stress.

Moreover, earlier that evening, shortly after Claimant should have returned from a paid break, he was found away from his work area in roughly the same location. When it is considered in light of the entire record, Claimant's contention that immediately after a twenty minute lunch break, he had to cool off for another thirty minutes in an area significantly removed from his assigned work area lacks credibility.

At the time of the incident, Claimant was found together with a Fireman and Oiler. Both employees were charged with being away from their work areas but, whereas Claimant was found guilty, the Fireman and Oiler was exonerated in a separate Investigation. The Organization contends that the difference in results invalidates Claimant's dismissal.

The record of the Fireman and Oiler's Investigation is not before us. All we can tell from the record in this case is that the Fireman and Oiler, according to Claimant, was operating a steam filled vat, and that his work area was three bays west of Claimant's work area and considerably closer to the location where both were found. There is nothing in the record before us indicating how long the Fireman and Oiler was in the area, how he got there, why he was there, what mitigating factors, if any, he may have offered during his Investigation, or what his prior record may have been. To find disparate treatment, we must find that the Claimant and the Fireman and Oiler were similarly situated employees. Such a finding on the record before us would be based on speculation rather than evidence. What we do know from the record before us is that substantial evidence proved that Claimant was away from his work area without authorization, that his explanation that he was seeking relief from heat stress was not credible and that he had a prior record which included a thirty day suspension for a similar offense that we upheld in Second Division Award 12709. We must base our decision on the record before us, and based on that record we are unable to say that Claimant's dismissal was arbitrary, capricious, or otherwise excessive. See e.g., Public Law Board No. 1569, Award 3; Public Law Board No. 2906, Award 2.

AWARD

Claim denied.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1994.