

The Second Division consisted of the regular members and in addition Referee Ralph W. Yarborough when award was rendered.

Parties to Dispute: ( System Federation No. 22, Railway Employees'  
( Department, A. F. of L. - C. I.O.  
( (Firemen and Oilers)  
( St. Louis-San Francisco Railway Company

Dispute: Claim of Employee:

1. That under the current applicable Agreement Laborer Larry E. Ewing, was unjustly discharged from the service on August 17, 1976, and unjustly discharged from the service on September 15, 1976.
2. That accordingly, the St. Louis-San Francisco Railway Company compensate Laborer Larry E. Ewing, at the pro rata rate of pay for each work day beginning September 15, 1976, until he is reinstated to service and in addition to receive all benefits accruing to any other employee in active service, including vacation rights and seniority unimpaired. Claim is also made for Laborer Larry E. Ewing, for his actual loss of payment of insurance on his dependents and hospital benefits for himself, and that he be made whole for pension benefits including Railroad Retirement and Unemployment Insurance, and in addition to the money claimed herein, the Carrier shall pay Mr. Ewing an additional sum of 6% per annum compounded annually on the anniversary date of said claim.

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.

Claimant was discharged from service on August 17, 1976 and discharge was reaffirmed on September 15, 1976. The charge on which Employee Larry E. Ewing was discharged from service of the Carrier reads as follows:

"You are being charged with alleged violation of following rules of the Rules, Regulations, Safety Rules and Instructions Governing Mechanical Department Employees, Form MP-1 Standard, effective March 1, 1957:

Rule B: That part reading, Employees who are... vicious...will not be retained in the service.

Rule I: That part reading, Employees must exercise care and economy in the use of railway property."

The specific charge against Employee Ewing as testified to by Mr. R. V. Strain, Supervisor for Frisco Railway with nine years service, was that while Mr. Ewing was working the 4:00 p.m. to 12:00 midnight shift on August 17, 1976 with Mr. Strain, the Supervisor, Mr. Strain, swore that he saw Mr. Ewing pour something into the gas tank of an old yellow supply truck from a red and white container, that supervisor Strain went to the truck after Employee Ewing left, looked in the gas tank and there was a white substance in it. Strain went back to the wash room, found Employee Ewing washing his face, went into the wash room, looked for the red and white container that he had seen Employee Ewing with and could not find it; all this was about 5:50 p.m. At about 9:00 that night Mr. Strain found a red and white container in one of the lockers in the locker room, which he took to be the box out of which Employee poured something into the gas tank of the yellow truck. A sample was taken of the contents of the truck tank and salt was found in the tank.

Mr. Strain swore unequivocally that he saw Employee put something in the tank of the yellow truck; Employee Ewing swore unequivocally that he did not put anything in the truck, that it was not true. Employee's representative then made this statement in their brief:

"As you Honorable Board Members know, the case we have here is the issue who is telling the truth or telling a lie - Supervisor R. V. Strain or Laborer L. E. Ewing. On page 9 of the hearing transcript, Interrogating Officer, Mr. L. M. Allison asked the following questions to Claimant Ewing:

'Q. You actually deny the alleged actions you are charged with in the hearing by Mr. Strain?

A. 100 percent.

Q. This means Mr. Strain is not telling the Truth?

A. This is right.

'Q. If I have Mr. Strain take a lie detector test, will you be willing to submit to a lie detector test at the same time?

A. I will submit to any test.'"

Thus, there was a direct conflict in evidence between the Employee and the Supervisor. They diametrically opposed each other on oral examination, on what they saw with their eyes, no written document either way, except that after agreeing to take the polygraph examination, Employee Ewing took the examination, failed it. Employee complains of Strain's failure to take the test. But Strain took the test on September 15, 1978; with indifferent results.

O. H. Summers, Chief Mechanical Officer, St. Louis-San Francisco Railway Company claims that Employee Ewing, since investigation, admitted to Superintendent L. M. Allison that he was guilty and falsified his testimony during the investigation; O. H. Summers further stated that on October 19, 1976 while he was in Tulsa, Employee Ewing contacted him (Summers) by telephone and stated that at the time of the offense he had, "smoked pot, been drinking and all that kind of stuff", and indicated that he was not responsible for his actions.

With a direct conflict of the evidence, with two witnesses swearing diametrically opposite to each other, we must give weight to the findings of the hearing officer who could see the witnesses, hear them testify, observe their demeanor, and have the first opportunity of determining their veracity. The hearing officer has decided on the question of veracity in favor of Mr. Strain. But we are not left with merely one witness vs. one witness; in this case we are not left to such imponderables. The record, quoted above, contains testimony that Mr. Ewing had admitted he had falsified, that he had smoked pot and been drinking, etc. At the hearing, witness C. L. Smittle, Special Officer, corroborated Supervisor Strain.

These additional statements strongly support the hearing officer's conclusion that Supervisor Strain was the truthful person in this instance.

The burden of proof is on the Carrier in cases of such severe punishment as discharge, and in this instance the burden was amply met.

We find that the record sustains the disciplinary action taken by the Carrier in this case.

Form 1  
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Award No. 7639  
Docket No. 7522  
2-SLSF-FO-'78

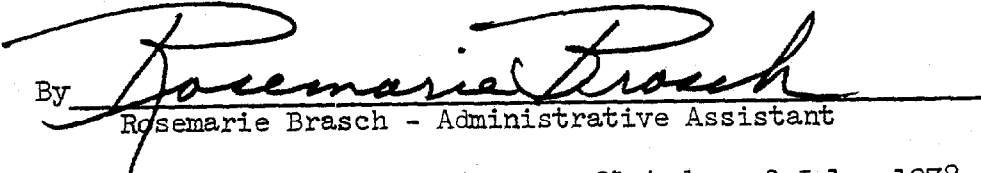
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of July, 1978.