

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7985  
SECOND DIVISION Docket No. 7842  
2-AT&SF-EW-'79

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

Parties to Dispute: { System Federation No. 97, Railway Employees'  
{ Department, A. F. of L. - C. I. O.  
{ (Electrical Workers)  
{  
{ The Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employees:

1. That the Carrier erred and violated the contractual rights of Mr. Jeffery A. Howell when they removed him from service on January 11, 1977, as a result of an investigation held on December 29, 1976.
2. That the investigation was neither fair nor impartial.
3. That, therefore, he be returned to service with seniority and all other rights, benefits and privileges restored, and
4. That he be compensated for all lost time including overtime and holiday pay, and,
5. That he be made whole for health and welfare benefits, and
6. That he be made whole for all vacation rights, and
7. That he be made whole for pension benefits, unemployment and sickness insurance, and,
8. That he be made whole for any and all other benefits, not specifically mentioned herein, that he would have received or would have earned had he not been withheld from service.

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 employe 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 in this case is Electrician Jeffery A. Howell who was dismissed by the Carrier by letter dated January 11, 1977.

The incident which led to the investigation and to the ultimate dismissal of the claimant from service involved an alleged physical altercation in which the claimant was found by the Carrier to be the aggressor. The altercation took place on December 9, 1976. The claimant was notified of the investigation by letter dated December 23, 1976, and the investigation was held on December 29, 1976. The Organization contends that because there was a period of 20 days between the date of the alleged altercation and the date upon which the investigation was held that Rule 40(a) of the Agreement between the Carrier and the Organization was violated in that the claimant did not receive a prompt hearing. Rule 40(a) provides, so far as pertinent:

"(a) No employe shall be disciplined without first being given a fair and impartial investigation which shall be promptly held, unless such employe shall accept dismissal or other discipline in writing and waive formal investigation...."

Claimant continued working after the incident until his removal from service. Promptness is a matter of reasonableness under all the circumstances. No monetary loss was suffered as a result of waiting for the hearing. A twenty day period under the circumstances of this case did not violate the Rule 40(a).

There is much more substance to the Organization's contention that the claimant was denied a fair and impartial hearing and Rule 40(a) was violated in this respect. Claimant called Electrician W. D. Hudson as a witness. There was conflicting testimony at the hearing as to the facts of the altercation itself with the versions of the claimant on the one hand and the version of the other party to the altercation, Carman-Painter, Gregory J. Carlos and Carman L. L. Harrison, on the other differing sharply. Credibility resolutions were, therefore, critical matters. While Harrison was not a witness to the altercation, he was precluded by the Investigating Officer from testifying to events that led up to the incident. According to the Organization, Hudson would have testified that Carlos had previously been careless and inconsiderate with regard to the impact of his painting on other employees (presumably Hudson) and that the grievant was not the only employee who had problems with Carlos or who had protests about Carlos' spraying paint on him and protested such conduct and complained concerning Carlos' attitude toward such a protest. The incident in this case involved a charge by the claimant that Carlos sprayed him with paint when he protested Carlos' painting relatively near him with resulting fumes reaching him. Such testimony did not directly bear upon the events involved in the altercation. It would have been better practice to have received the evidence but its exclusion cannot be said, under all the circumstances, to have been so prejudicial as to warrant a finding of a denial of a fair hearing. Nor was the refusal to hear Hudson's testimony discriminatory. Witness Egan and

witness Webb were called solely to establish the prevailing instructions as to which of the two crafts should defer to the other when painters and electricians work in close proximity. That evidence was relevant even though the witnesses had not seen the altercation.

Finally, the Organization claims that the loss by the Carrier of certain diagrams used at the hearing in the examination of witness Harrison and not submitted with the appeal to this Board renders the transcript so incomplete as to prejudicially affect the claimant's right of appeal. A study of the transcript has enabled the Board to determine the function of the diagrams and their content sufficiently to lead the Board to the conclusion that the essential facts relating to the claimant's conduct were sufficiently reported to the Board. The absence of the diagrams does not interfere with the Board's reaching a reasonable conclusion.

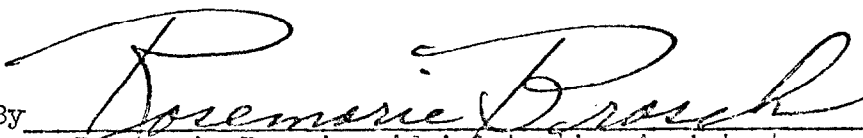
Fundamentally, this case presents questions of credibility. The Carrier's finding that the claimant was the aggressor was on the basis of the credibility resolutions made after hearing supported by the evidence. This Board does not ordinarily overturn credibility findings. And this Board has repeatedly held that aggression in engaging in a physical altercation constitutes ground for dismissal. See Second Division Awards 4098 and 7080. The Board is satisfied that the record supports the Carrier's determination and that the discipline assessed was proper.

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 20th day of June, 1979.