

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

Parties to Dispute: ( System Federation No. 92, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Firemen & Oilers)  
(  
( Grand Trunk Western Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Laborer James W. Anderson was unjustly dismissed from the Carrier effective January 30, 1979.
2. That accordingly the Carrier be ordered to reinstate this employee with seniority rights unimpaired, made whole for all wages, vacation rights, Railroad Retirement benefits including Unemployment Insurance and 10% (percent) interest on all lost monies due him under the present agreement.

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.

An investigation was held on February 10, 1978 at Pontiac Roundhouse to determine whether Claimant, a laborer with assigned hours of 7:00 A.M. to 3:00 P.M., Saturday through Wednesday, purchased without authorization, two cases of oil from the Wide Track Auto and Industrial Supply Company on January 7, 1978 and the correlative determination as to whether he failed to bring the two cases back to Carrier's property.

Claimant had been suspended on January 31, 1978 pending the outcome of the investigative hearing and said suspension was subsequently changed to a permanent dismissal on February 27, 1978 following Carrier's evaluation of the investigative transcripts. This disposition was appealed on the property pursuant to Agreement procedure and is presently before this Division for appellate consideration.

In reviewing this case, the pivotal question that is germane to this dispute is the propriety and conduct of the investigative hearing. In essence, was Claimant afforded an investigation that comported with the essential requirements of administrative due process? We well nigh recognize the differences between

the evidentiary standards required in criminal law proceedings and the evidentiary standards acceptable to employer administered discovery hearings, but discharge is an extreme industrial penalty, that warrants at an irreducible minimum that the charges be clearly and convincingly established by the record.

In the instant case, the evidence relied upon by Carrier to support the dismissal was the positive identification made by the Manager of the auto supply store that Claimant purchased the two cases of oil on January 7, 1978, the Manager's written notarized statement of February 6, 1978 affirming that Claimant executed the aforesaid transaction, the reasonable probability that Claimant made this purchase, since he was familiar with the requisition procedures relative to off property purchases and the graphoanalysis correlating Claimant's signature and printing on other documents with the contrasted receipt marked #35753, dated January 7, 1978.

While hearsay evidence is not impermissible in administrative proceedings, its probative value can only be determined from the circumstances from which it arose. The Board concurs with Claimant that the graphoanalysis is without judicial significance, since the methodologies and principles underlying its application are not known. The January 30, 1978 identification standing alone is challengeable and perhaps suspect in the absence of other data. But where as here, the January 30th, positive identification was followed up with a written notarized statement and the investigative hearing officer or Claimant for that matter cannot compel the outside witnesses to attend the investigation, this Board has not ruled persuasive documentary affirmations inadmissible, when other circumstantial evidence confirms the specification.

The auto supply store Manager had nothing to gain from fabricating this story and certainly payment for the oil was not worth the presumptive risks of submitting an executed accusatory statement. When the total facts and circumstances, such as the Claimant's physical description, his assigned work status on January 7, 1978, his knowledge of the purchase requisition techniques and the explicit positive identification are clinically considered, we must conclude that the evidence is more than just suspicion. The administrative hearing, notwithstanding its basic structural and procedural limitations was properly administered under the unique conditions of this case and the conclusions reached adequately supported by the record. Claimant committed a serious offense that is plainly intolerable in this industry and we are disinclined to modify the penalty imposed.

However, because we believe that his dismissal to date was sufficient punishment for this transgression and his overall work record since 1971 shows that he was never disciplined before, we will reinstate him to work on a leniency basis, but without back pay. Claimant is admonished that we will not look kindly upon any recidivist deportment and we expect him to observe fully the rules and norms governing his employment obligations.

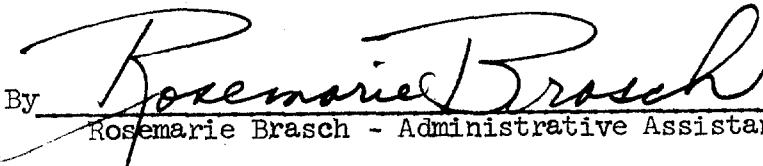
A W A R D

Claim sustained to the extent expressed in these findings.

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 25th day of June, 1980.