

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

Parties to Dispute: (System Federation No. 91, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

1. That Carman W. G. Metzger, Jr., was improperly withheld from service from May 6, 1977 and was subsequently dismissed from service in violation of the current agreement on June 13, 1977, and
2. Accordingly, the Louisville and Nashville Railroad should be ordered to
 - (a) Restore him to service with seniority and all employee rights unimpaired.
 - (b) Compensate him for all time lost as a result of his dismissal with interest at the rate of 6% per annum on all money due him, and
 - (c) Pay premiums for his hospital, surgical, medical, group life insurance and supplemental sickness benefits for the entire time he is 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.

Claimant was dismissed on the basis of the following charges: that he left Carrier's premises on his motorcycle through Gate 5 instead of Gate 6, which he was directed to use by Patrolman Liebert; that he interfered with the patrolman's performance of duty, bodily shoving him aside and opening Gate 5 to depart; and that he assaulted Liebert with his motorcycle when he departed.

Insofar as can be gleaned from a lengthy and confusing record, the incident giving rise to this case arose under the following circumstances:

At the start of his regular shift, starting at 7:00 A.M., Claimant requested permission to report off work at 8:30 A.M. At about 8:30 A.M., he got on his motorcycle ready to leave but found Gate 6 locked. A pedestrian walk-through gate was open between Gate 5 and Gate 6 but Claimant maintains this pedestrian gate was too narrow to pass through on his motorcycle; that the ground was covered with gravel; and that a parked car blocked any exit from that gate. He thereupon proceeded to Gate 5, which was partially open. At that point, Patrolman Liebert, at the Gate 5 guard shack advised him that he would have to exit via Gate 6. When told by Claimant that Gate 6 was locked, Liebert testified he told Claimant that "he could probably ride thru the pedestrian gate north of Gate 6 which stands open at all times..."

As to the events which then occurred, Liebert testified that Claimant told him, "This bike is too wide to go thru", and Claimant started moving closer to Gate 5, whereupon Liebert positioned himself between the motorcycle and Gate 5, backed up, and rolled the gate shut. At this point according to Liebert, Claimant got off his motorcycle and started to walk toward the gate; Liebert stepped in front of him; Claimant pushed him out of the way and opened the gate wide; Claimant remounted his motorcycle; Liebert stepped closer to the motorcycle and positioned one leg in front of the cycle; Claimant stated there was an emergency, and drove off and in so doing his cycle struck Liebert's leg and ran over the instep of his left foot.

Liebert testified that Gate 6 was supposed to be kept closed except at shift change times; and that keys to open Gate 6 for emergency use were available at the main yard office and at the Gate 5 guard shack where he was stationed. (The guard shack is approximately 20 feet from Gate 5 and about 350 feet from Gate 6).

Claimant denied touching or shoving Liebert. He stated that Liebert tried to prevent his departure via Gate 5 by shutting the gate as he inched his way towards it, and then by grabbing the handlebars of his bike, shaking the bike and shoving it back from the gate. (Liebert denied he touched the bike).

Claimant testified he was unaware that Gate 6 was locked at other than shift change times, or that Liebert had a key to Gate 6. (Another Carrier official testified that he did not know where the key to Gate 6 was kept). Claimant added that Liebert did not offer him the key to Gate 6 when he approached Gate 5 on his motorcycle.

As to Claimant's possible exit on his motorcycle via the pedestrian walk thru gate, the record contains the following:

1. A statement by the Hearing Officer to Claimant, as Claimant was testifying: "... I will concede that it is not Company policy for a motorcycle to go thru that pedestrian gate."
2. A statement by the Assistant Manager of the Car Shop that the walkway between Gates 5 and 6 was primarily for pedestrian use and not for vehicular use.
3. Testimony by Patrolman Liebert that the walk-thru gate entrance was for pedestrians.

Although the Car Shop Assistant Manager testified that Gate 5 was not supposed to be opened during working hours for vehicle traffic, Claimant's foreman testified that he had seen other vehicles depart and enter Gate 5. In addition, Patrolman Liebert testified that he had permitted an employee on a motorcycle to enter Carrier property through Gate 5 upon direct orders of a Carrier official, and that he did not bar Carrier officials from driving vehicles in or out of Gate 5. Claimant also testified that several days prior to the date of the incident, in the presence of several guards whom he named, including Liebert's supervisor, he had left on his motorcycle through Gate 5 without any comment from them.

Several employee witnesses testified that they saw Liebert put his hands on Claimant's motorcycle, and that they did not see him limp after Claimant drove away.

We are thus confronted with conflicts in testimony as to whether Claimant assaulted Liebert and whether Liebert held the bike to restrain Claimant from exiting via Gate 5. There is an apparent contradiction between management policy banning the use of vehicles on the pedestrian walkway and Liebert's instruction to Claimant to exit on his bike through the pedestrian gate. By his own testimony Liebert knew that vehicles (including motorcycles) had, in fact, used Gate 5 for entry and/or exit.

In our opinion, both parties involved in this incident -- Claimant and Patrolman Liebert -- showed poor judgment and overreacted. Liebert made no effort to give Claimant the key to Gate 6 nor, for that matter, did he indicate he had one in his possession when Claimant told him that Gate 6 was locked. There is also the fact that there was no pedestrian traffic at Gate 5 at the time these events took place, since the shift had started about one and one-half hours earlier, and Gate 5 was ajar at the time.

Claimant, of course, should have complied with Patrolman Liebert's orders. As an employee with over 13 years' service, Claimant should have been aware of the need to follow orders and instructions from those in responsible authority, although he may have been driven by the fact that he was due in court and he was concerned with being there on time.

The Board, after giving consideration to the entire record, and in view of the questions still present as to the actual events which gave rise to the charges finds that the penalty of dismissal is excessive under the circumstances. The evidence presented was highly contradictory. We have indicated that we fault both Claimant and Patrolman Liebert for their actions and lack of common sense. We are of the opinion that claimant has been sufficiently disciplined for this conduct and that, therefore, his dismissal shall be reduced to a disciplinary layoff, as set forth below.

The period since Claimant's dismissal shall be deemed a disciplinary suspension and constitute a warning to Claimant that a recurrence of unsatisfactory conduct will be viewed with the utmost gravity and severity. He shall be restored to service with all rights unimpaired but without back pay; failure to accept reinstatement under the terms hereinabove set forth shall cause Claimant to forfeit all rights conferred to Claimant by this Award.

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Docket No. 8088
2-L&N-CM-'80

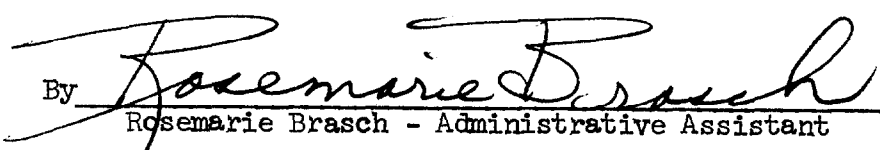
A W A R D

Claim sustained to the extent indicated in 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 23rd day of July, 1980.