

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

Parties to Dispute: { System Federation No. 1, Railway Employees'
Department, A. F. of L. - C. I. O.
(Carmen)
{ Staten Island Rapid Transit Operating Authority

Dispute: Claim of Employees:

1. That under the controlling Agreement, Car Cleaner Stephen Kelly was arbitrarily and unjustly dismissed from service commencing March 31, 1978.
2. That accordingly, the Carrier be ordered to return Car Cleaner S. Kelly to service with pay for all time lost beginning March 31, 1978.
3. Further, that the Carrier be ordered to restore Car Cleaner S. Kelley's seniority, vacation and sickness benefits; and that the Carrier be required to pay any and all bills that have developed for Dental, Hospital, Medical, Surgical and Doctor bills as a result of losing coverage under Health and Welfare Plans when improperly taken out of service. In addition, if this Carrier is granted the right to deduct any earnings in outside employment, they be required to make full payments to the Railroad Retirement Board for this period so that Mr. Kelly will continue his retirement credits and his unemployment and sickness benefits under this Act.

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 grounds that he was responsible for the injury sustained by a fellow employee, Carl Stamer, at about 2:00 P.M. on March 29, 1978. The charge is that Claimant threw a bucket of water at Stamer, causing the latter to fall and injure his knee. Stamer telephoned his supervisor the next day, reporting the incident and naming two fellow employees as witnesses to the incident. No accident report was filed.

On March 31, 1978, in the office of Assistant Superintendent Cummings, Stamer recounted the incident and stated that he did not file an accident report because Claimant threatened him and his mother. Stamer completed the injury report in Cummings' office. The two witnesses named by Stamer were called to Cummings' office and requested to fill out the required injury report.

Claimant was withheld from service pending an investigation, which was held on April 20 and 21. All witnesses at the investigation were sworn. Claimant was dismissed on April 29, 1979.

Claimant testified in his defense that on the day of the incident he was carrying a water bucket out of a train cab when Stamer, seeing him, "... jumped out of his seat and started running. He then slipped and fell on the damp floor we had previously washed." In brief, he denied the charge of throwing the bucket of water and that he had threatened Stamer.

The two employee eye witnesses to the incident corroborated Stamer's account of the occurrence, both with respect to Claimant's "chasing (Stamer) with a bucket of water" and threatening Stamer by saying "he would break his legs and throw his mother out of the hospital window" if Stamer filed an accident report. (Stamer's mother was being treated in a hospital for a terminal illness.)

Stamer refused to appear at the investigation, alleging fear of physical harm by Claimant. Three witnesses (Claimant's supervisor, the Superintendent, and the Trainmaster) testified under oath hearing Stamer repeat Claimant's threat of physical violence to himself and his mother. Stamer was terminated for his refusal to give testimony.

Neither Claimant nor the Organization called employee witnesses or offered exhibits for the record.

There was a conflict in the testimony between the Claimant and the two employee witnesses as to the circumstances surrounding the incident involved. However, many awards have held that the Board will not attempt to resolve conflicts in testimony. The issue of credibility is within the province of the hearing officer and in such cases, the Carrier's findings predicated on credible and substantial evidence must be accepted even though the credited evidence -- eye witness testimony by two employee witnesses and statements of three carrier witnesses submitted under oath -- was denied and subject to contradictory testimony by Claimant. These principles are decisive in this case.

The record, in our judgment, supports the charge. Claimant's actions were not playful but malicious and lack mitigating circumstances. Claimant's conduct reveals a disregard for a fellow employee's personal safety and resulted in bodily harm to Stamer. It is a well settled principle that this Board will not substitute its judgment for that of the Carrier in discipline cases where there is substantial evidence to support the charge.

Accordingly, we find that Carrier's assessment of discipline was warranted and we will deny the claim.

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Award No. 8403
Docket No. 8145
2-SIRTOA-CM-'80

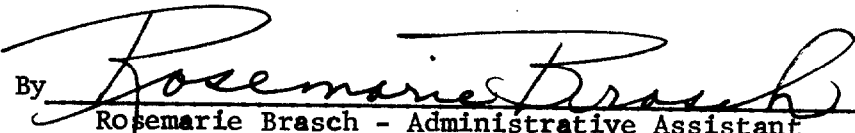
A W A R D

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 23rd day of July, 1980.