

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Western Pacific Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current agreement Firemen and Oiler Gilbert M. Madrid, was unjustly dismissed from the service of the Carrier on April 6, 1979, following a hearing held on April 2, 1979.
2. That accordingly, the Carrier be ordered to make the aforementioned Gilbert M. Madrid, whole by restoring him to Carrier's service with seniority rights unimpaired, plus restoration of all holiday, vacation, health and welfare benefits, pass privileges and all other rights, benefits and/or privileges that he is entitled to under rules, agreements, custom or law and compensated for all lost wages. In addition to money claimed herein, the Carrier shall pay the Claimant an additional amount of 6% per annum compounded annually on the anniversary date of this 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 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.

At the time of dismissal, claimant was employed as a Laborer and had a seniority date of March 12, 1977.

On March 27, 1979, Mr. Madrid received a notice of formal investigation to be held April 2, 1979, to determine facts and place responsibility if any for claimant's alleged unauthorized absence from duty on March 26, 1979. Based on the evidence adduced at the hearing, carrier discharged the claimant.

The claimant contends he called in and reported off sick prior to his 7:00 a.m. starting time. However, the claimant could not identify the person to whom he allegedly spoke. Nor could the claimant remember the exact time he called, recalling only that it was "when the sun was coming up ... right when it starts turning a little dark and light at the same time". On the other hand, Car Foreman Walden testified he was on duty from 11:00 p.m. March 23

to 7:00 a.m. March 26 and that he did not receive any phone calls from claimant nor did any of the other employees on that shift. Two other foremen on the 7:00 a.m. to 3:00 p.m. shift on the 26th testified to the same effect. One of them, Mr. McCaul, stated that it was customary to make a record of employees reporting off and that there was no such record of Mr. Madrid calling in.

The testimony of the claimant and the foremen conflict significantly. It is not the Board's function to assess credibility or resolve conflicts. We also recognize that carrier witnesses are not to be given more credibility per se. The question to be answered in regard to the assessment of credibility and resolution of evidentiary conflicts is whether the hearing officer's judgments are supported by substantial evidence. In carefully considering the record in its entirety the Board concludes there is substantial evidence to support the hearing officer's findings.

Regarding the quantum of discipline, the Board observed that in the carrier's submission, they listed ten disciplinary notations on the claimant's past record. The carrier argues that when taking this record into consideration permanent dismissal is justified. However, in their Rebuttal Brief, the organization points out that only two of those notations were a matter of record in the handling of this case on the property. They pointed out further that the two notations that were handled on the property (a 5-day suspension and a 15-day suspension) were based on very different and unrelated offenses. These two notations they point out were not handled until the final conference. The rest of the record, which included three letters of admonishment for absenteeism in the eleven months previous to the discharge, they argue, cannot be considered by the Board.

The Board, in its review of the handling of this case on the property, cannot find any evidence of a specific delineation or discussion of the claimant's past record other than the two above mentioned suspensions. Occasionally, in the handling on the property, there were general references to the existence of a past record but there is no concrete evidence that the other notations (involving admonishments and informal notes) on his past record as presented here were discussed on the property; nor does the transcript contain any discussion of the claimant's past record. It is so well established so as not to require citation that all evidence presented to the Board must be positively shown to have been handled on the property. If the carrier hopes to convince the Board that a claimant's past record justifies permanent dismissal, then that past record should clearly be made part of the record on the property. It is a simple task and not an excessive burden.

Based on the past record that is properly before the Board and based on the seriousness of the charge we find that permanent dismissal is excessive. A progressive penalty such as a lengthy suspension would have been more appropriate. As such, the Board directs the claimant to be reinstated with no back pay and his time out to serve as a final, and hopefully effective, warning that company rules, particularly attendance rules, are to be complied with if continued employment is desired.

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Award No. 8517
Docket No. 8454
2-WP-FO-'80

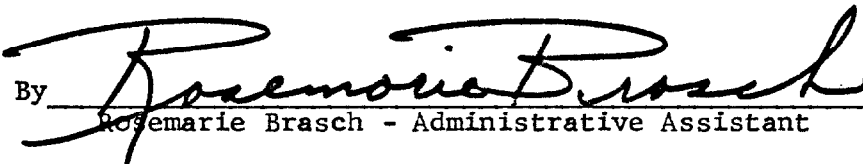
A W A R D

The discipline is modified to the extent indicated in the 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 3rd day of December, 1980.