

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

Parties to Dispute: (Sheet Metal Workers' International Association
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(Southern Pacific Transportation Company

Dispute: Claim of Employee:

1. That Sheet Metal Worker Apprentice D. B. Carr was wrongfully and unjustly dismissed from service of the Southern Pacific Transportation Company (Pacific Lines) on May 19, 1977.
2. That accordingly, the Carrier be ordered to:
 1. Restore Claimant to service with all seniority rights unimpaired.
 2. Compensate Claimant for all time lost as a result of dismissal in addition to an amount of 6% per annum compounded annually on the anniversary date of claim.
 3. Make Claimant whole for all vacation rights.
 4. Reimburse Claimant and or his dependents for all medical expenses incurred while employe was improperly held out of service.
 5. Pay to Claimant's estate whatever benefits Claimant accrued with regard to life insurance for all time Claimant was improperly held out of service.
 6. Pay Claimant for all contractual holidays.
 7. Pay Claimant for all contractual sick pay.
 8. Pay Claimant for all jury duty and all other contractual benefits.

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, the claimant was employed as a sheet metal worker with a seniority date of November 16, 1973.

The claimant was notified to appear for a formal hearing by letter dated January 18, 1977. The letter read as follows:

"You are hereby notified to be present at the office of Assistant Plant Manager J. B. Matthias, Car Shop #3, Sacramento Heavy Maintenance Plant, at 10:00 a.m., February 4, 1977, for a formal hearing in connection with your alleged breaking into candy vending machine January 7, 1977, for which occurrence you are hereby charged with the responsibility which may involve violation of Rule 801 of the General Rules and Regulations reading:

Rule 801: Employees will not be retained in the service who are careless of the safety of themselves or others, indifferent to duty, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in a manner which would subject the railroad to criticism (sic).

You are entitled to representation in accordance with the M.P.&C. Department Agreement and to bring to the hearing such witnesses as you desire."

On February 3, 1977, Mr. J. D. Walker, Local Chairman, requested a postponement of the hearing because the claimant was hospitalized as a result of an on-the-job injury. On February 10, Mr. Barker, writing for the carrier, granted the postponement and indicated to Mr. Walker that the hearing would be rescheduled upon Mr. Carr's release from the hospital. On April 12, 1977, Mr. Barker addressed a letter to Mr. Walker rescheduling the hearing for April 21. A copy of the April 12 letter was sent certified mail to the claimant. On April 18, Mr. Walker responded to the April 12 letter indicating that to his knowledge Mr. Carr had not returned to service and in view thereof requested a further postponement. On April 20, Mr. Barker addressed another letter to Mr. Walker with a copy to the claimant. Attached to this letter was a copy of claimant's doctor's release. The letter rescheduled the hearing for April 27 at 10:00 a.m. The claimant's copy of the letter was again sent certified mail. The hearing was held April 27. However, the claimant was not in attendance.

The organization argued in their Ex Parte submission that the "claimant was not afforded a hearing much less a fair hearing" as guaranteed by Rule 39 of the agreement. They elaborate as follows:

"The transcript of hearing fails to reveal any factual evidence that Carrier's letter of April 12, 1977, copy of which was allegedly sent to Claimant was, in fact, dispatched. Moreover, on TR page 4, witness Rubens

"admitted that no acknowledgement of receipt of that letter had been received. Claimant was thus deprived of representation of his choice, the right to present a defense, present witnesses on his behalf and to examine witnesses appearing against him in addition to testifying on his own behalf.

However, under close scrutiny, the organization's contention is without foundation. First of all, it is irrelevant whether the April 12 letter rescheduling the hearing for April 21 was received or not. The critical notice was Mr. Barker's April 20 letter further postponing the hearing until April 27. Secondly, when the Board reviews the transcript there is no evidence in the record that Rubens testified that the company had not received acknowledgement of the April 12 letter. Quite to the contrary, Mr. Rubens gave the following testimony on page 4 of the transcript:

"(Q) The letter of April 12, 1977, addressed to myself, the Local Chairman, from Mr. Barker's office, I see its noted that a carbon copy was sent to Mr. Carr, was this letter, in fact, sent to Mr. Carr?

(A) Yes, it was Certified Mail No. 498219, and it was receipted Dan Carr on April 20, 1977.

(Q) It was received by Mr. Carr and this will be made part of the record?

(A) Yes."

The testimony regarding the April 12 letter stands unchallenged in the record. The Board observed that no argument was made in the organization's submission to the Board that carrier's procedure was defective in regards to the April 20 letter. In view thereof, on the basis of the organization's submission and the arguments before the Board, it is our opinion that no fatal procedural defect has been shown.

In considering the merits of the case, the Board finds substantial evidence that the claimant did, in fact, break and damage the candy machine. However, we do not find any evidence of a probative nature that the claimant was responsible for theft of the candy in the front of the machine as implied by the charge and the testimony of Sargeant Shorter, a carrier witness. The carrier produced an eye witness, an electrician, who testified he was between six to ten feet away when he saw the claimant take a pipe or small wrench and swing at the machine. This witness indicated that he had to turn his head away to avoid being hit with flying glass. This witness also testified the claimant walked away muttering something to the effect that he was tired of the machine "ripping him off". Another witness said he also saw the claimant hit the machine. Their testimony effectively was identical to the information they had given Sargeant Shorter during his investigation of the incident. Shorter also testified that a third witness was interviewed during his investigation. This witness told Shorter he was around the machine and heard a crash. The witness then was said to have

looked up and saw the claimant standing directly in front of the machine with something in his hand. The witness told Shorter that the claimant then said something about having been "ripped off" by the machine. Shorter also introduced a report that indicated the total cost to repair the machine was \$18.97.

This evidence is quite conclusive that the claimant broke the machine but not that he broke "into" the candy. As previously mentioned, the charge was related to "breaking into" a vending machine. This implies theft. However, none of the carrier's witnesses testified that they saw claimant take the candy. Nonetheless, breaking and in effect vandalizing a machine on the carrier's property is a serious offense.

Regarding the quantum of discipline, the Board is not presented with any evidence of a past record that would convince us that the claimant is not deserving of the benefit of progressive discipline and another chance to prove himself a worthy employee. Permanent dismissal is excessive and the claimant shall be reinstated with no pay for time lost.

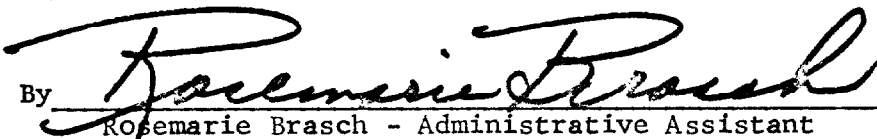
A W A R D

Discipline 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 10th day of December, 1980.