

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

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

Dispute: Claim of Employees:

1. That in violation of the current agreement Firemen and Oiler Phillip I. Booze, was unjustly dismissed from the service of the Carrier on March 27, 1979, following a hearing held on March 14, 1979.
2. That accordingly, the Carrier be ordered to make the aforementioned Phillip I. Booze, 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.

On March 27, 1979, claimant was dismissed from service for allegedly failing to properly service locomotive (No. WP 709) and for tardiness on February 20, 26 and March 1, 1979. Pursuant to notice, an investigation was held on March 14, 1979 in Sacramento, California.

The employes contend there was insufficient evidence to convict the claimant on the first offense because the incomplete service on locomotive No. WP 709 resulted from a minor misunderstanding between the claimant and his foreman. As to the second charge, the claimant acknowledges he was late on the specified days but argues that the penalty of discharge was an abuse of managerial discretion. The carrier, on the other hand, argues that the record is replete with substantial evidence demonstrating that the claimant was solely responsible for improperly

servicing the locomotive on February 27, 1979. The carrier justifies the discharge by pointing to claimant's poor prior attendance record.

While there are a few conflicts in testimony, the basic facts are undisputed. On February 27, 1979, the operating crew refused to accept engine WP 709 because there was oil on the steps and walkways posing a safety hazard and the engine was missing a seat box. Part of the claimant's assignment for the day was to completely service the locomotive. The Diesel Shop Foreman had instructed the claimant to procure a seat box from the blacksmith's shop. However, there were no seat boxes in that shop and claimant, unable to find his foreman, went home knowing the engine lacked a seat box. A seat box was available in the service shed, but there is no indication the claimant knew it was there. Because the locomotive was not ready for service, operations were delayed approximately fifteen minutes. The primary factual dispute concerns the time at which the foreman told the claimant to collect the seat box from the blacksmith's shop. The foreman testified the order came in the morning giving claimant ample opportunity to ascertain if a seat box was available, and if not, to inform his foreman. Claimant stated he did not receive the seat box instruction until near the end of his shift. Also, claimant testified that there was no oil on the engine at the time he delivered the locomotive to the tie-up track. Therefore, according to the organization, the oil must have been tracked by another employe. As to the second charge, the claimant himself honestly completed his time cards showing he was tardy on the three work days.

We do not have the power to evaluate the credibility of witnesses or to resolve factual disputes. The hearing officer, who observes the demeanor of witnesses can best decide how much weight to attach to particular testimony. Thus, if the hearing officer could reasonably conclude that the diesel foreman truthfully related the events on February 27, 1979, we will not upset his determination. Here, the foreman's testimony concerning the improper service performed on locomotive WP 709 is reasonable. Because the foreman told the claimant early in his shift to pick up the seat box at the Blacksmith's shop, any confusion over the location of the seat box could have been cleared up before claimant went off duty. The claimant's contention that someone tracked oil on the engine walkways is too speculative. The hearing officer could reasonably resolve the factual issues against the claimant. Thus, there is substantial evidence to prove that the claimant failed to properly service the engine.

There is no doubt that the claimant was tardy on February 20, 26 and March 1, 1979. Each employe has an obligation to zealously protect his assignment regardless of whether or not the tardiness seriously hampers railroad operations. Second Division Award No. 8149 (Dennis). In assessing discipline, the carrier may review the employe's prior attendance record. Second Division Award No. 7769 (Weiss). However, the penalty still must be commensurate with the proven offense. Even though the carrier has proven both of the charges here, the penalty of discharge is excessive due to mitigating circumstances. Because the claimant tried to inform his foreman about the missing seat box and because he honestly completed his time card, he should be reinstated with seniority unimpaired but without back pay and without any of the other benefits requested by the claimant.

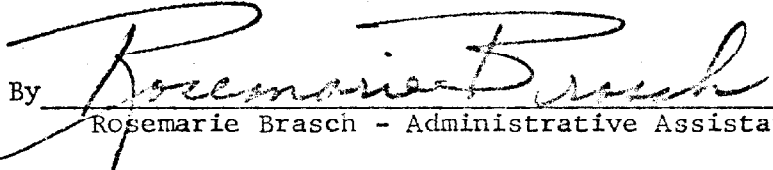
A W A R D

Claim is sustained but only to the extent consistent with our 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 7th day of January, 1981.