

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

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Boston and Maine Corporation, Debtor

Dispute: Claim of Employees:

1. That under the terms of the current Agreement, upgraded Carman-Helper C. A. George, Jr. (hereinafter referred to as the Claimant) was unjustly held out of service of the Boston and Maine Corp. (hereinafter referred to as the Carrier) from May 26, 1978 through June 21, 1978, both dates inclusive.
2. That accordingly, the Carrier be ordered to compensate the Claimant for all lost wages and fringe benefits, if any, during time held out of service by the Carrier.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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, a carman helper stationed at Lowell, Mass., was charged with the unauthorized removal of wood lining from a freight car and with unauthorized action on May 20, 1978. Five days later, the carrier held the claimant out of service pending a hearing originally scheduled for June 6, 1978. The notice of hearing is dated June 1, 1978. At the request of the organization, the parties agreed to postpone the hearing and it was duly held on June 20, 1978. The carrier found the claimant committed both offenses and assessed discipline consisting of twenty-four demerits and the prior suspension from service from May 25, 1978 until the hearing. On June 20, 1978, claimant was restored to service.

On May 20, 1978, the claimant, accompanied by a friend, removed two pieces of lumber from a freight car and placed them in a truck. A carrier police officer observed the lumber in the truck and instructed the claimant to replace the wood. The claimant complied. There was a substantial dispute regarding whether the claimant had properly procured permission to remove the lumber. Claimant removed the lumber during his regular shift, but he was not neglecting any particular work assignment and on May 20, 1978, the claimant competently performed all his

duties. The carrier urges this Board to sustain the discipline contending the record contains substantial evidence to support both charges. The organization, on the other hand, argues that the evidence offered by the carrier was speculative and insufficient for a finding of a violation. Alternatively, the organization claims the discipline constituted an abuse of management discretion when compared with claimant's outstanding work record.

Where the record raises credibility issues, we are unable to resolve conflicts in testimony where the carrier has reached a reasonable factual conclusion from the record. The record demonstrates that the claimant did not have proper written permission to remove the wood from the freight car and, by his admission, he did place two pieces of wood in his friend's truck. Thus, we affirm the carrier's finding that the claimant committed the first charged infraction. After carefully reviewing the record, we can uncover no evidence supporting the second charge. The claimant's immediate foreman repeatedly praised the claimant's general work performance. In addition, the foreman testified that the claimant ably completed all his assigned duties on May 20, 1978.

There are, however, several mitigating circumstances which justify a reduction in the penalty. First, claimant sincerely thought (though incorrectly) that he had permission to take scrap lumber off the property. Second, the carrier improperly applied Rule 31(a) since this was not the type of case which mandated a suspension prior to the investigation. The claimant was not threatening either the safety of other employees or the efficient operation of the railroad. The infraction was relatively insignificant and the carrier waited five days before imposing the prehearing suspension. Third, when directed to return the material, claimant immediately did so and thus he received no personal benefit as a result of his conduct. Lastly, the carrier failed to prove the second charge. Due to the extraordinary circumstances surrounding this case, the discipline imposed was excessive. Twenty-four demerits alone is a penalty that is reasonably commensurate with the proven offense.

Ordinarily, the claimant would be entitled to wages lost for the period from May 25, 1978 to June 20, 1978. But, in this case, the organization asked for a hearing postponement and the carrier should not be prejudiced for acceding to the organization's request. Even though the organization rightly requested a hearing delay so the claimant could prepare a defense, the carrier is not responsible for the wages lost from June 7, 1978 to June 20, 1978.

The claimant shall be paid wages lost for the period from May 25, 1978 through June 6, 1978 at the rate of pay in effect at that time under the applicable agreement. The discipline of twenty-four demerits is affirmed. In accord with Rule 31(a), the claimant's petition for over time pay is denied.

A W A R D

Claim is sustained to the extent consistent with our findings.

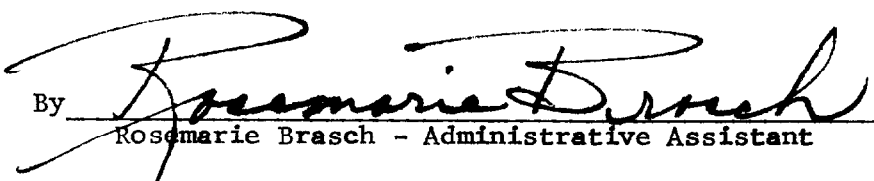
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Award No. 8664
Docket No. 8592
2-B&M-CM-'81

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 4th day of March, 1981.