

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: ( International Brotherhood of Electrical Workers  
( National Railroad Passenger Corporation

Dispute: Claim of Employes:

- (1) That the Carrier erred and violated the contractual rights of Ms. Wruth McIntosh when they removed her from service on March 31, 1979 as a result of an investigation held on March 16, 1979.
- (2) That the investigation was neither fair nor impartial.
- (3) That, therefore, she be returned to service with seniority and all other rights, benefits and privileges restored, and,
- (4) That she be compensated for all lost time including overtime and holiday pay, and,
- (5) That she be made whole for health and welfare benefits, and,
- (6) That she be made whole for all vacation rights, and,
- (7) That she be made whole for pension benefits, unemployment and sickness insurance, and,
- (8) That she be made whole for any and all other benefits, not specifically mentioned here, that she would have received or would have earned had she not been withheld from service.

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.

This case involves dismissal from service stemming from an incident between Claimant and a fellow employe wherein Claimant was charged, as follows:

- "1. You struck Coach Cleaner, Theresa Lang, with your fist.

2. You stated to Coach Cleaner, Theresa Lang, you would hit her each morning.
3. You spit at Coach Cleaner, Theresa Lang."

The only direct testimony upon which to base the charges was given by the subject of the alleged assault, Theresa Lang. Another employee present at the time the alleged actions took place could neither directly affirm nor dispute Theresa Lang's statements involving Claimant. The charges of Lang were investigated by Carrier Police Officer, Ian Kaplan, who, on the day of the incident, January 24, 1979, prepared an investigation report and secured five written statements from employees, including Claimant.

The Organization raises several objections to the conduct of the investigation and the imposition of discipline. Initially, we are asked to address a threshold question of procedure. The Organization points to an agreement entered into between Carrier and the Equal Employment Opportunity Commission in August of 1979. Essentially, that document is an exchange of promises related to a Title VII charge initiated by Claimant against Carrier. The Organization contends Carrier's agreement to expunge the records of Claimant as to the fighting incident, which led to Claimant's Title VII charge, estops Carrier from further proceedings in this case.

On December 27, 1979, the General Chairman wrote to the Carrier's Corporate Director of Labor Relations and, among other subjects raised, addressed the EEOC settlement, as follows:

"You advised of the EEOC settlement agreement made with the Claimant and furnished copy of same. You stated that this settlement nullified the claim under discussion. I did not agree. While the settlement stated that Amtrak was not committed to rehire the Claimant our claim was for reinstatement, loss wages etc.

I stated that I was not a party to the EEOC settlement and that I have (sic) authorization or instructions from the Claimant to withdraw the case.

It is my position that the EEOC settlement has no bearing on the case at hand, one involves racial matters and the other is a Labor Relations matter."

Thereafter, the EEOC settlement was not raised again until this case was submitted to this Board. In the Organization's submission, the General Chairman reiterated his position on that settlement and stated:

"As we pointed out to the Carrier, in our letter of December 27, 1979, Exhibit J, the Employees' do not agree that the Settlement Agreement, in any way, nullifies or affects the instant dispute. That settlement did not involve a Labor Relations matter and we were not a party to it.

Although the settlement provides that Amtrak is not committed to rehiring the Claimant, the Employees are not seeking 'rehiring' but reinstatement along with all rights, privileges and benefits, lost wages, etc.

The 'Settlement Agreement' has no bearing whatsoever on the dispute at hand nor does it prevent this Honorable Board from allowing the Claim of Employees in its entirety, which should be their judgement."

In consideration of these expressions and in order for this Board to now endorse the Organization's assertions that the Carrier is prevented from affirmatively pursuing its defenses to the claims raised herein ignores the clearly stated position of the Employees and is without precedent.

The Organization also believes the introduction of statements and testimony relating to an earlier argument involving Claimant and Theresa Lang was incorrectly allowed into the record by reason of lack of relevancy. The Board affirms that such evidence does not prove the correctness of the charge asserted, but was properly admitted for the establishment of motive.

Organization next argues against the admission of a polygraph report, which outlines the results of a test administered to Theresa Lang on February 20, 1979. Basically, that report outlines four questions asked of Lang by the laboratory. The opinion rendered indicated subject was telling the truth when she said Claimant struck her and would strike her every morning.

In prior awards, this Board has accorded some weight to the admission of such tests, recognizing the current doubts cast upon the objectivity, accuracy, and reliability of the polygraph test. In this case, the examiner did not testify nor were the laboratory tests entered into the record. A single page summation and opinion from Chicago Professional Polygraph Center, Inc., was admitted. The signing representative is not identified. Essentially, this method of submission creates a situation whereby all aspects of the test's administration and analysis are immune from challenge of cross examination. Under these specific circumstances, we find the recorded testimony of witness, Theresa Lang, controlling.

We note the Organization lastly argues the Carrier's charges and dismissal of Claimant were against the manifest weight of the evidence. This case turns on credibility. The Carrier clearly established an altercation took place between Claimant and Lang two days before the incident giving rise to the charges. This Board does not have the capacity to evaluate the credibility of witnesses and does not normally overturn such findings. We cannot substitute our judgment for that of the Hearing Officer. If he has reasonably concluded Theresa Lang truthfully related she was struck by Claimant, we will not interfere with that judgment. However, we stress that the penalty must be commensurate with the proven offense. In the establishment of motive, we cannot overlook the active participation of Theresa Lang in the disparaging, if not denigrating, remarks exchanged on Monday. Such an exchange does not justify the physical hitting or touching of a person. But, for our purposes, it provides insight and balance to the incident. The offense has been proven. However, we find the penalty excessively harsh under the circumstances.

The Claimant has been separated from service for over three years. This period serves as an appropriate penalty. Claimant is to be reinstated with seniority unimpaired, but without back pay and without any other benefits requested.

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: Acting Executive Secretary  
National Railroad Adjustment Board

By

  
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Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of July, 1982.