

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

Parties to Dispute: { International Association of Machinists and  
Aerospace Workers  
{ Indiana Harbor Belt Railroad Company

Dispute: Claim of Employees:

1. That the Indiana Harbor Belt Railroad Company be ordered to restore Machinist D. B. Morrissey to service and compensate him for all pay lost up to time of restoration to service at the prevailing machinist rate of pay.
2. That Machinist D. B. Morrissey be compensated for all insurance benefits, vacation benefits, Holiday benefits and any other benefits that may have accrued and were lost during this period in accordance with Rule 36 of the prevailing agreement effective January 1, 1947.

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.

This is a discipline case involving the dismissal of a machinist helper with one year of service, after he was charged with being away from his assigned work area without permission and breaking into locker #107 in the locker room.

Petitioner argues that the Carrier failed to substantiate its charges with any evidence of a probative manner. The foreman admitted it was not common practice for employees to get his permission to go to the locker room. Claimant asserted that he went there in search of tools and that he had a key for locker #107 but that it was bent and didn't fit, so he was attempting to pry it open. Petitioner notes that Claimant was not charged with damaging the locker and indeed the foreman admitted it was not damaged. Since Claimant had a key, Petitioner argues he must have had the owner's permission to open the locker and therefore his attempt to pry it open did not involve any wrong-doing.

The Carrier points out that Claimant's assertions both as to motive and possession of a key were not offered until the investigatory hearing. His claim that he was looking for tools is in direct conflict with his statement to foreman

Kozup when he was apprehended. At that point he told Kozup: "Frazier always has ---- books in his locker." Kozup's testimony on this point was not refuted nor even specifically denied. Moreover, when Kozup asked him if it was his locker, he didn't say anything about having a key, but merely said "No." Nor did he protest that he had a key (or the owner's permission) when Kozup told him he was sending him home pending investigation.

While it is true that Claimant had not completely broken into the locker or damaged it or yet taken anything, the Carrier argues that he was admittedly in the process of breaking into another employee's locker and that activity alone with his absence from his assigned work area for such a reason is a flagrant offense. The Carrier argues that although it was not normally necessary to get permission to go to the locker room to clean up or use the rest room, this practice would not extend to going to the locker room for improper purposes when employees are supposed to be working.

The Board finds that the transcript of the investigation contains substantial evidence to support the conclusion that Claimant was guilty of the charges. Petitioner's argument as to burden of proof is not compelling where Claimant's assertions as to innocent motive and owner's permission were not made at the time of the incident. Had he made these claims when Kozup found him, we would agree with Petitioner that it would have been the Carrier's burden to produce evidence to the contrary. Since these assertions were first made at the investigatory hearing, however, it fell to claimant to substantiate them. That is, even though management bears the burden of proof in disciplinary cases, explanations not offered at the time of the incident and unknown to the Carrier prior to the investigatory hearing reasonably require greater substantiation by claimant than the same explanation offered on the spot.

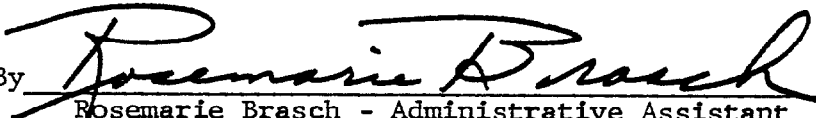
In view of the fact that Claimant's assertion that he went to the locker room in search of tools was inconsistent with his own on-the-spot statement, and that his assertion that he had a key and therefore permission to open locker #107 was unsupported by any corroborating testimony, the Board does not find that the Carrier acted arbitrarily or capriciously in rejecting these excuses. In view of the seriousness of the offense and the evidence establishing Claimant's guilt, we do not find that the penalty of dismissal was excessive or arbitrary.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 11th day of May, 1983.