

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(System Council No. 7
(
(National Railroad Passenger Corporation (Amtrak)

Dispute: Claim of Employees:

1. That under the current Agreement the National Railroad Passenger Corporation (Amtrak) has unjustly dismissed Joe W. Oliver from service effective July 17, 1981.

2. That accordingly, the National Railroad Passenger Corporation (Amtrak) be ordered to restore Electrician Joe W. Oliver to service with seniority unimpaired and with all pay due him from the first day he was held out of service, at the applicable Electrician's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and to expunge his record.

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 employes 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 July 3, 1981, electrician Joe Oliver was assigned to work the 3 p.m. to 11 p.m. shift. That afternoon, an altercation took place between the Claimant, Joe Oliver, and the Foreman who was assigned to the preceding shift. Claimant was charged with violation of Carrier's Rules of Conduct I and J.

Carrier's Rule of Conduct I states:

"Employees will not be retained in service who are insubordinate... quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the Company will not be subjected to criticism and loss of goodwill."

Carrier's Rule of Conduct J states:

"Courteous conduct is required of all employees in their dealing with the public, their subordinates, and each other. Violence, fighting, horseplay, threatening, or interfering with other employees while on duty is prohibited."

The Carrier alleges the Claimant had an altercation with his Supervisor, R. Bellinger, and had hit the Supervisor. There is some dispute as to who threw the first punch, but there seems to be no dispute that an altercation did occur.

The Organization argues that the Claimant was not afforded a fair hearing because the Carrier had prejudged the Claimant as to his guilt and further that the Carrier did not call those persons who had information about the case.

The Organization further contends that there is conflicting testimony in the record and that the Carrier has failed to meet its burden of proof in demonstrating that the Claimant is guilty. The Organization states that the Claimant was not under the supervision of Foreman Bellinger and that Foreman Bellinger was out of order when he gave instructions directly to the Claimant instead of to the Claimant's regular Foreman, Jeffrey Hunt. The Organization argues that the Claimant was faced with making a choice as to who he should obey and he obeyed one foreman and this constituted insubordination charges by another.

Finally, the Organization argues that there is no evidence that Claimant attacked Foreman Bellinger and that the evidence shows that Claimant was merely defending himself from an attack against him by his Foreman.

The Carrier argues that the Claimant was accorded a fair and impartial investigation in that the charges were written and specifically set forth the exact rule violations and dates and times of the incident. Moreover, Claimant and his representative were present during the investigation and were allowed to present witnesses and evidence as well as to cross-examine Carrier witnesses.

Furthermore, Carrier states that Carrier met its burden of proof in that two witnesses confirmed that Claimant had cursed the Supervisor. Also, although there is some dispute as to who threw the first punch, it is clear that a fight occurred between the Claimant and Mr. Bellinger and the Carrier argues that that is sufficient for discipline.

Finally, the Carrier argues that the insubordination and fighting are "cardinal sins" in the railroad industry and that dismissal is appropriate, even for a first-time offender. Since there is no dispute that a fight occurred between Claimant and the Supervisor, Carrier argues that it was not a abuse of discretion to terminate the Claimant.

The Organization argues that Claimant acted in self-defense and that the Carrier has never denied this. Finally, the Organization states that there was no insubordination since Claimant had received cross-orders and that Bellinger had only requested Claimant to do something, but had not ordered it.

It is well settled that when an employee admits at the end of an investigating that he has received a fair and impartial investigation, that he cannot later contend that it was not fair. (See Second Division Awards 6188, 6004, 4035, 3874.) In the hearing in the case at hand, Claimant responded affirmatively when he was asked, "Mr. Oliver, do you feel that the investigation has been conducted in a fair and impartial manner?" Hence, this Board finds that he cannot now be heard to complain that the hearing was not fair.

It is also well established that the Board will not resolve conflicts in testimony or evidence. This Board functions as a reviewing authority and it cannot substitute its version of the facts for that reached by the trier of facts who heard the testimony, observed the demeanor of the witnesses, and, by its proximity, was entitled to weight and evaluate the credibility of the witnesses. So long as the conclusions reached are based upon substantial evidence in the record, they should not be overturned. In this case, the record provides the required support for a finding of extremely serious rule violations on the part of the Claimant. The Board will not set aside the finding of fact of the Investigating Officer.

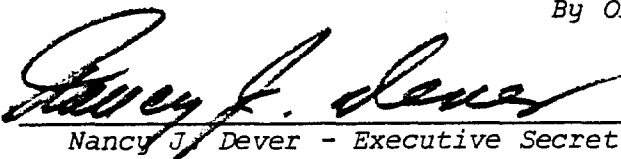
This Board will not set aside the penalty imposed by a Carrier unless it determines that the penalty was imposed in an arbitrary and unreasonable fashion. In this case, there is not evidence that the Carrier was arbitrary or unreasonable when it imposed the serious penalty of discharge to an employee who admittedly had a physical altercation with his Supervisor on the premises during working hours. The penalty, given the facts in evidence was not too severe. This Board will not set aside the judgment of the Carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of April, 1984