

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

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

Dispute: Claim of Employees:

1. That under the current Agreement the National Railroad Passenger Corporation (Amtrak) has unjustly dismissed Electrician Donald A. Wells from service effective October 8, 1981.

2. That accordingly, the National Railroad Passenger Corporation (Amtrak) be ordered to restore Electrician Donald A. Wells to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to 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.

Claimant, Donald A. Wells, was employed with Carrier for approximately two years. He was dismissed from service effective October 8, 1981, after being charged with violation of Rules of Conduct I and J. Rule of Conduct I states:

"Employees will not be retained in the service who are insubordinate, dishonest, immoral, 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."

Rule of Conduct J states:

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

The Carrier charged Claimant with being insubordinate to his Foreman, Anthony Joseph, and threatening to do physical harm to the Foreman. On September 17, 1981, a general meeting of the shift crew was held to discuss work performance and improvement. The discussion was led by the foreman and comments were solicited from the employees. When Claimant expressed his opinion about an aspect of the work assignments, his Foreman, Mr. Joseph, took issue with him and instructed him as to the present policy. Claimant then, according to the Foreman, stated, "I wasn't even talking to you. I am going to kick your ass." Then others in the group of employees allegedly had to restrain the Claimant from attacking the Supervisor. The Claimant then allegedly called the Foreman some other vulgar names.

Other witnesses confirmed that there had been a verbal disagreement between the Claimant and his Foreman during the meeting that day. However, there is some dispute in the testimony as to how serious the alleged threats of violence were and whether the Claimant actually attempted to attack the Foreman.

The Organization contends that the Claimant did not receive a fair and impartial investigation into his misconduct because the Carrier failed to call certain witnesses, and it is the Carrier's duty to present all material evidence at the hearing. Moreover, the Organization states that the hearing was unfair because the carrier used the Claimant's prior discipline record against him but failed to provide facts with respect to the earlier discipline at the hearing and did not provide any record of the merits earned by the Claimant.

The Organization also argues that the Carrier failed to meet its burden of proof in demonstrating that the Claimant was guilty in that there were conflicts in the testimony and its interpretations of evidence. For example, the Organization argues that the Claimant did not threaten to do physical harm to his Foreman when he stated, "...this is how people get their ass kicked..." but rather, he was merely expressing an opinion and was misinterpreted.

The Board has reviewed the record and finds the Claimant was afforded a fair and impartial hearing. The charges were written and specifically set forth the exact rule violations and dates and times of the incident. Claimant and his representative were present throughout the hearing and had a right to cross-examine the Carrier witnesses and present their own witnesses. There is nothing in the record to suggest that the hearing accorded the Claimant was anything but fair. Hence, the Board rejects the Organization's argument that the claim should be granted on procedural grounds.

The Board also finds that the Claimant's guilt was clearly established by the evidence. Although there were some inconsistencies in the testimony, it is well settled that this Board will not substitute its judgment for that of the Investigating Officer as to the credibility of witnesses unless it appears that the Investigating Officer was unreasonable and arbitrary in his determination or that the hearing was not fair. There is nothing in this record to suggest that the Investigating Officer did not fairly evaluate the evidence and, thus, the Board finds the Claimant was guilty of violations of the Rules of Conduct. Numerous awards of this Board have rules that it is not the Board's function to review a Carrier's determination of the credibility of witnesses or to resolve conflicts in evidence unless it can be demonstrated that the evidence is insufficient or that the Carrier acted in a capricious manner. The transcript in this case contains substantial evidence in support of the charges against the Claimant. No arbitrary action on the part of the Carrier is here shown. There is ample testimony in the record that the Claimant was boisterous, profane, and threatening in his language and conduct toward his Foreman on the day in question.

Finally, this Board must review the penalty assessed the Claimant. It is well settled that the Board will not set aside the discipline meted out by the Carrier unless it can be demonstrated that it was arbitrary, capricious, in bad faith, or did not fit the circumstances, and was unreasonable or excessive. In this case, Claimant received the most severe penalty available to the Carrier. Although the offense is extremely serious in nature, it appears from the evidence in the record that imposing the most severe penalty available under this set of facts is somewhat unreasonable. It is true that the foremen were discussing the performance of the employees and had solicited comments from the individuals. Although the Claimant's comments were somewhat boisterous and vulgar and not acceptable behavior, discharge is too severe a penalty for the offense in this case. Certainly, the Claimant deserves an opportunity to recognize that he must show greater respect toward his supervisors and should not make vulgar and threatening comments toward them. This offense is serious enough to support an extremely long suspension to put the Claimant on notice that his behavior was unacceptable.

However, based upon Claimant's seniority and the facts of this case, discharge is just too excessive a penalty and, therefore, an unreasonable result. The Board grants the claim in part insofar as it requests the reinstatement of the Claimant to his former job with seniority and all rights unimpaired. The period since October 8, 1981, shall be treated by the Carrier as a long suspension without benefits and should serve as a strong warning to the Claimant that continued violations of a similar nature may lead to discharge.

#### A W A R D

Claim allowed in part. The Claimant is ordered reinstated with full seniority and other benefits, but the period since October 8, 1981, shall be treated as a lengthy suspension without pay for time lost.

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Award No. 9847  
Docket No. 10053  
2-EW-NRPC-'84

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