

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 9860
Docket No. 9955
2-FW&D-MA-'84

The Second Division consisted of the regular members and in addition Referee Hyman Cohen, when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Fort Worth and Denver Railway Company

Dispute: Claim of Employees:

1. That under the Fort Worth and Denver Railway Company schedule of rules, the Carrier unjustly dismissed Machinist G. F. McClure, effective January 15, 1982.

2. That accordingly the Fort Worth and Denver Railway Company reinstate Machinist McClure and compensate him for all wages lost as a result of said dismissal and restore to him unimpaired all other rights and privileges of employment.

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.

Machinist G. F. McClure, the Claimant has been employed by the Carrier since March, 1978. Following an investigation which was held on December 28, 1981, the Claimant received written notification from the Carrier on January 15, 1982, that he was dismissed from service for the following reasons:

****violation of Rule(s) General 1 and Rules 114, 574 and 585 of the Burlington Northern Safety Rules at about 1:30 a.m. on December 17, 1981, in connection with failure to remove the fueling hose from Unit BN 6377 while servicing Train No. 152's consist, which resulted in damage to the Amarillo Fueling Facility, and further, his failure to report the incident to the proper authority while working as Machinist at the Downtown Fueling Facility at Amarillo, as evidenced by a formal investigation afforded him on Monday, December 28, 1981 at Amarillo, Texas."

On December 17, 1981, the Claimant was employed at the Carrier's Downtown Fueling Facility at Amarillo, Texas. His shift began at midnight and ended at 8:00 a.m.

After carefully examining the evidentiary record, the Board has concluded that the Claimant was afforded a fair and impartial investigation. The painstaking care with which the Carrier conducted its investigation is consistent with its burden to justify the dismissal of the Claimant on the basis of substantial evidence. To do less could very well lead to the conclusion that the Carrier acted in a discriminatory, unjust, unreasonable or arbitrary manner. Moreover, the Claimant acknowledged that the investigation was conducted in a fair and impartial manner "except" that his "local chairman was not able to attend" because he was on vacation. However, the Claimant was extended the opportunity to secure representation. He did so and was adequately represented at the hearing. The Board also finds that the Claimant was given sufficient time to request a postponement of the hearing inasmuch as he received the Carrier's investigation notice on December 22, 1981. The Carrier's denial of the Claimant's request for a postponement of the hearing approximately one (1) hour before the hearing on December 28, 1981 was not unreasonable.

The Claimant admitted that he did not remove all fueling connections while servicing Train No. 152's consist, but left a fueling hose on the Engine BN 6377. Accordingly, he violated BN Rule 114 which states:

"Where locomotives are being serviced, they must not be moved until all connections are removed and it is known that employees are in a position of safety."

Whether the Claimant violated BN Rule 574 raises a significant factual issue. BN Rule 574 provides that employees who withhold information or fail to give factual reports on any irregularity, accident or violation of the rule will not be retained in the service. The Claimant reported the failure to remove the fueling hose from BN Unit 6377 to Foreman Statham in Childress before Train 152 reached the Childress facility. The Claimant's Supervisor, Foreman Wilson, learned of the incident by telephone from Childress during the morning of December 17. When queried about the incident by Foreman Wilson the following morning (December 18) the Claimant said that he slipped a note under his office door. He also produced a copy of the note and gave it to Foreman Wilson, who told him that he had not received or seen any note in his office.

The parties are aware that the Board which serves an appellate function is ill equipped to resolve factual issues which turn on the credibility of witnesses at the hearing. This function can be best carried out by the Hearing Officer at the investigation, who observed the witnesses and has heard their testimony. Thus, the Board is in no position to disturb the finding of the Hearing Officer that the Claimant failed to report the incident to the proper authority on December 17, 1981. In addition, it should be pointed out that the Claimant, who was the only Machinist on duty at the time, did not report the incident to anyone before his shift ended at 8:00 a.m. December 17, 1981. Thus, on the basis of the evidentiary record, the Board has concluded that the Claimant violated Rule 574. Furthermore, the Grievant violated Rule 585 since he did not report the incident to his "immediate supervisor as soon as possible by first available means of communication".

In addition, based on the evidentiary record the Board cannot conclude that the Claimant violated General Rule 1. It cannot be said that he "persisted" in an unsafe practice to the jeopardy of himself "and others****", on December 17, 1981.

Turning to another consideration, the Claimant stated that he had "been told that someone was going to harass me until they get me fired****". Such testimony constitutes hearsay evidence of the most unreliable kind inasmuch as the Claimant provided no details as to who said what, and when it was said. Moreover, Machinist Erdman's testimony that "down through the years" a fuel valve was pulled off a hose and no investigation was pursued or F-27 report filled out, is likewise unreliable evidence, as it lacks the relevant details involved in the alleged incident.

Finally, since March 1978 when he joined the Carrier, the Claimant has had an unsatisfactory employment record. He was dismissed from service on November 17, 1978 for sleeping on duty and his failure to be alert and attentive while on duty. He was reinstated on a leniency basis because of his prior service record. On August, 1981, the Claimant was dismissed again, for permitting two switch engines to run out of the Depot track down the main line and through the Santa Fe Interlocking on July 17, 1981. In an effort to rehabilitate the Claimant, the Carrier restored him to service on December 9, 1981. In the instant case the Claimant was dismissed from service the third time, on January 15, 1982, a little more than a month after he was restored to service on December 9, 1981.


The Carrier may properly weigh the Claimant's employment record to determine whether the discipline imposed is excessive, arbitrary, or an abuse of discretion. See, for example, Second Division Award No. 8527. Based upon the record in this case, the Board cannot find that the Carrier acted in either a capricious or arbitrary manner when it dismissed the Grievant. The Board concludes that in light of the substantial evidence presented at the hearing, and the Claimant's unsatisfactory employment record, the Carrier's dismissal of the Claimant is upheld.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of April, 1984