

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 10440
Docket No. 10440
2-MNCR-EW-'85

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Metro-North Commuter Railroad Company
(Consolidated Rail Corporation)

Dispute: Claim of Employees:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician L. Black from service effective September 8, 1982.
2. That accordingly, the Metro-North Commuter Railroad Company be ordered to restore Electrician L. Black 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 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 were given due notice of hearing thereon.

Claimant, L. Black, Jr., was an Electrician in the service of the Carrier. His conduct August 20, 1982, led to an investigation in which he was charged with:

Your failure to comply with "General Rules governing Mechanical Equipment employees" Article 2, 4, 16 and in that on Friday, August 20, 1982 you were missing from your assigned work area from 6 p.m. to 7 p.m. where upon you reported to your Foreman, L. Erwin, that you had taken your motorcycle home and return (sic) to work with your automobile without proper authorization.

Based on the evidence adduced at the investigation the Hearing Officer found that the charges had been proved and dismissed the Claimant from the service of Carrier.

The facts are uncomplicated and, in many respects undisputed. Claimant's Foreman attempted to find him between the hours of 6 p.m. and 7 p.m. on the date in question. The Foreman had noticed that Claimant's motorcycle was not parked in its usual place. When he eventually located Claimant he ascertained, to his satisfaction, that Claimant had departed the premises during the questionable time frame and the Foreman marked him off for the remainder of the trick.

At the investigation Claimant testified that because of imminent rain he had taken a coffee break sometime during the questionable time frame and had called a friend to ask him to bring Claimant's automobile to the facility and to take his motorcycle home. Testimony from the transcript of the investigation reads:

"Q. And what did you speak to Mr. Black about?

A. (the Foreman) I asked Mr. Black where he had been and he told me that he had taken is (sic) motorcycle home and brought his car back and I told him that he should have told me what he was doing and that I had called Mr. Fultz and reported him off the property. Mr. Fultz told me to mark him off. So, I did that, I marked him off at 6 o'clock.

. . . .

Q. (to Claimant) At that time, did you tell Foreman Erwin that you had taken your motorcycle home and returned with your car?

A. I did not say exactly that, no.

Q. What did you say?

A. I said I made arrangements to take my motorcycle home and return with my car."

The Foreman testified that he had looked through all the cars in the yard in an attempt to find Claimant. Claimant testified that he had left his post only for a short time to take a coffee break.

Claimant argues that the decision by the Foreman to mark him off from work demonstrates a predisposition toward guilt on the part of the Carrier. He further claims that this alleged predisposition prevented him from receiving a fair and impartial investigation as guaranteed him by the Collective Bargained Agreement. He further argues that the action of the Foreman was tantamount to having disciplined him, thus the investigation amounts to double jeopardy on the same disciplinary action.

The action by the Foreman is separate and distinct from the actions of the Hearing Officer who conducts the investigation. The presumption must be that the Hearing Officer conducted an investigation for the purpose of developing all relevant evidence and later made his decision based on the evidence adduced from the investigation. This presumption will remain until impeached by the record from the investigation. In this case the relevant evidence consisted of the testimony of two witnesses whose testimony, not surprisingly, is diametrically opposed. Nothing from the record of the procedures on the property indicate any predisposition to find the Claimant in violation of the charges.

The action of the Foreman, however precipitous, in implementing his assumption that Claimant had ceased work for the trick and subsequently marking him off was not discipline. Any grievance toward this action should be addressed in a claim. The broad based claim in this case is sufficient to encompass renumeration if the Foreman erred in his action.

The outcome of this case must rest entirely on the credit, or lack thereof, of the two witnesses. As previously stated, the only witnesses are the Foreman and Claimant. The Hearing Officer chose to credit the testimony of the Foreman, which in some elements was uncontroverted. This Division of the National Railroad Adjustment Board sitting as an appellate body cannot, without reason, upset the findings of this decision maker. Only he was in a position to utilize those tools common to judge and juror; the observation of the demeanor of the witnesses when they testify and the heeding of their voices. Absent any evidence in the record that would tend to impeach his judgment or would lend credence to an argument concerning his prejudice, the Board has no choice other than to defer to his judgment. Careful perusal of the record reveals no evidence of this nature. Therefore, the Board will respect his judgment as to credibility.

This Board would not uphold the severity of the penalty based upon the offense of the instance. The Carrier states that it is the cumulation of the total disciplinary record of Claimant that led to this ultimate penalty. His past record reads:

<u>Date</u>	<u>Offense</u>	<u>Discipline</u>
Aug. 6, 1982	Absenteeism	Fifteen days suspension
Aug. 6, 1982	Absenteeism	Thirty days suspension
Sept. 7, 1982	Absenting yourself from work location	Thirty days suspension
Sept. 8, 1982	Excessive absenteeism	Thirty days suspension

This record certainly displays a problem on the part of Claimant. Normally the progression of discipline would serve as a warning of dire consequences if the pattern continues. However, the Claimant entered the service of the Carrier on June 21, 1979. Until this one month span in 1982 he apparently had been a satisfactory employee.

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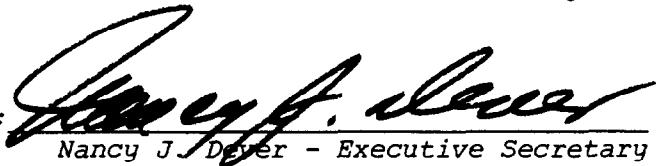
The Board finds, that given the compact time frame of trouble as contrasted with the long employment with Carrier, time out of service is sufficient penalty for the offense as assessed with a view to the total disciplinary record.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dyer - Executive Secretary

Dated at Chicago, Illinois, this 5th day of June 1985.