

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

Parties to Dispute: ( International Association of Machinists and  
( Aerospace Workers  
( National Railroad Passenger Corporation (Amtrak)

Dispute: Claim of Employees:

1. That the National Railroad Passenger Corporation (hereinafter referred to as the Carrier) improperly suspended Machinist Harry Gouck (hereinafter referred to as the Claimant) from Carrier service on January 15, 1983 and subsequently dismissed Claimant January 28, 1983 as result of formal investigation conducted on January 21, 1983.
2. That the Carrier be ordered to compensate Claimant for all loss (sic) wages incurred from January 15, 1983 to date of restoration to Carrier service with all rights and fringe benefits restored in full.

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 was on an extended medical leave from the Carrier when suspicion that he was working led to an investigation into the matter. As the Organization states in its Submission to this Board, the question to be resolved is whether or not Claimant was engaged in outside employment for compensation.

The Carrier hired a detective firm to check on the activities of Claimant. At the investigation two of the detectives appeared and testified. One stated that he had observed Claimant in a truck with "Bill's Lock and Key" on the side. He further testified that he had been in that establishment and overheard the Claimant making telephone calls and setting up appointments for the day. The other detective testified that he had called the owner of the establishment and had ascertained from him that Claimant was employed and was earning between \$1,000 and \$1,500 per month.

Claimant's testimony was that he was learning locksmithing for occupational therapy and was receiving no compensation for his training. He stated that he repaired locks and did other tasks, but for no compensation. He countered the testimony of the owner by stating that he had told the owner to represent that he made the sums stated because he was interested in refinancing his house and thought this would be easier if the potential lender thought that he was employed and making money.

Several documents were introduced one of which was a statement from the owner written the day before the investigation. It stated:

"This is to certify that Harry Gouck has been in this shop, Bill's Lock and Key, 38410 10th St. East, Palmdale in the capacity of rehabilitation and learning without compensation."

The owner did not appear at the investigation.

Another statement entered was that of a Ph. D., psychiatric social worker, which stated:

"Harry Gouck was recommended to perform occupational therapy in the form of taking a class to become a locksmith. As part of the class a practical experience was needed. Mr. Gouck worked a few hours for a locksmith in Palmdale and claims he was not paid for his services."

It was established that the only way that the writer could have known anything about the alleged lack of compensation was through being told by the Claimant. The document appears to have been made for the purpose of the investigation. It was dated January 6, 1983 and the charges were served January 5, 1983.

The testimony established two essential facts; the Claimant did perform services for Bill's Lock and Key and initially the owner told the investigator that Claimant was being compensated. The record is replete with hearsay and unfortunately the Investigating Officer did not have the opportunity to hear live testimony from the owner.

In a case as this in which the outcome must necessarily rest on the credibility of testimony, an appellate board must defer to the judgment of the Investigating Officer. He had the advantage of hearing the tenor of the witness's voices and had the opportunity to observe their demeanor while they were testifying. These are invaluable aids in assessing credibility and are unfortunately not available to an appellate board. The Board would only overturn his findings if the record had evidence that tends to prove him wrong or establishes that the Investigating Officer was clearly prejudiced against the Claimant. There is no evidence in the record that would support either of these flaws. The testimony of outside investigators concerning the statements of the owner were corroborated by the testimony of Claimant.

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2-NRPC-MA-'85

The Carrier has an absolute prohibition against working while on medical leave. The purpose of the rule is twofold. If a Claimant is well enough to work, he is depriving the Carrier of his services which it has a right to demand. He may be costing the Carrier for unnecessary benefits. Secondly, in many cases injured employees are contemplating or have filed a lawsuit against the Carrier. If that employee is capable of working, he has no right to withhold his services and accumulate more liability against the Carrier. Whatever the purpose the violation is a serious enough breach in the trust necessary for a healthy employment relationship to warrant termination of that relationship if the breach is established.

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 7th day of August 1985.