



**Award No. 5846**

**Docket No. 5730**

**2-PCT(NYNH&H)-CM- '70**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYEES'  
DEPARTMENT, AFL — CIO  
(Carmen)**

**PENN CENTRAL TRANSPORTATION COMPANY  
(NYNH&H)**

**DISPUTE: CLAIM OF EMPLOYEES:**

1. That the New York, New Haven and Hartford Railroad Company violated the controlling agreement, when it unjustly suspended Walter P. Sullivan, from the service on February 11, 1967.
2. That the New York, New Haven and Hartford Railroad Company be ordered to reimburse Walter P. Sullivan for all time lost from February 11, 1967 to March 3, 1967, both dates inclusive, for said violations.

**EMPLOYEES' STATEMENT OF FACTS:** By mutual agreement the time limits for appealing this claim has been extended. Walter P. Sullivan, hereinafter referred to as the claimant, is regularly employed as a car inspector by the New York, New Haven, and Hartford Railroad Company, hereinafter referred to as the carrier, in their inspection yards at Hartford, Conn., he resides at Springfield, Mass.: His regular assigned working hours are, Sunday, Monday, Tuesday, 4 P.M. to 12: Wednesday, Thursday, rest days: Friday and Saturday 4 P.M. to 12.

The claimant has worked for the carrier for a period of twenty-five and a half years, and has a very satisfactory record.

On January 13, 1967, while performing his regular duties as car inspector in the carrier's inspection yards at Hartford, Conn. the claimant received chest injuries diagnosed by Doctor Kuehn as contusions, muscles and left chest.

**Copy of Doctor Kuehn's statement:**

Regarding Walter Sullivan, on 1/14/67, emergency consultations and diagnosis was contusions, muscles and left chest; 1/20/67, office call to recheck area of injury; and on 2/17, call to recheck area of injury.

If the grievance rule had applied and the complaint were that one appeal step had been denied claimant, it would seem to have been waived by the Organization's election to appeal directly from the master mechanic to the Vice President, thus by-passing an appeal step.

Finally, the general foreman's testimony was necessary at the hearing, and objection would certainly have been made if he had also presided.

Objection is made that the claimant was sent home on January 8 (Friday) but not given written notice of suspension until January 11 (Monday); that the written notice on January 13 of hearing on January 15 (Friday) gave insufficient notice and that when the stenographer proved incapable of taking the testimony and the hearing was postponed to January 20 (Wednesday) it was not held promptly; that the hearing was set by the carrier for the general foreman's office and moved to the trainmaster's office over the claimant's and local committeeman's objection; that it was not moved to the scene of the incident; that the hearing officer had obtained written statements from the witnesses before the hearing.

None of these matters constitutes a violation of Rules, indicates prejudice, or is shown to have affected claimant's interests in any respect.

The claimant's loss of time before his return to service was excessive, and did not constitute arbitrary, unreasonable or unjust discipline, under the circumstances shown by the record. On the contrary, claimant's early restoration to service shows extreme leniency, in view of claimant's attitude toward fellow-employees as well as superiors.

#### A W A R D

Claim denied."

Carrier respectfully submits that in the instant case, the evidence is conclusive that claimant improperly absented himself from his duties from approximately 9:30 P.M. to 12:00 midnight on February 10, 1967; that the ten days' suspension was neither arbitrary, capricious nor unjust; and that this discipline should not be disturbed.

**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 employe 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 had been in the employ of Carrier from April 1939 as Car Cleaner, Carman Helper and Carman Inspector. He was working as a Car Inspector at Hartford, Connecticut, hours 4:00 P.M. to midnight, on Feb-

ruary 10, 1967 — the date of the incident here involved — a classification which he had held from October 10, 1941.

On February 11, 1967, Claimant was notified, via telephone, by General Foreman Beaumont to consider himself out of service. Claimant requested and was granted vacation leave from February 12 to 18, 1967, inclusive.

By letter dated February 13, 1967, the General Foreman served the following notice on Claimant:

"Please arrange to be present at a hearing (investigation) to be held in Trainmaster's office, Hartford, Conn., Tuesday, Feb. 21, 1967 at 11:00 A.M. in connection with the following charge:

Deserting your job without permission on the evening of February 10, 1967 at approximately 9:30 P.M."

After hearing held Claimant was restored to service March 4, 1967. Thereafter he received a letter signed by the Master Mechanic, dated April 18, 1967, which in material part reads:

"Notice of Discipline

'Deserting your job without permission on the evening of February 10, 19667 at approximately 9:30 P.M.'

Accordingly you will be disciplined as follows:

Suspended from service for two weeks."

From our study of the transcript of the hearing we are satisfied that Claimant was given a fair hearing. The issues remaining are: (1) is there substantial evidence in the record supporting Carrier's finding of Claimant's guilt as charged; and (2) if there is, in whole or in part, was the discipline assessed reasonable.

It is not disputed that Claimant left his position at approximately 9:30 P.M., February 10, 1967, without first receiving permission. The issue narrows as to whether: (1) Claimant made a reasonable effort to notify Carrier that he was marking-off and the reasons; and (2) were there mitigating circumstances.

On January 13, 1967, in the course of performing his duties Claimant was injured. Medical diagnosis was "contusions, muscles and left chest."

One of the assigned duties of Claimant the evening of February 10 was to inspect the head end of Train SN-1; Car Inspector Kapral was working with him. It was cold and there was about one foot of snow on the ground. Claimant testified that while working the cars he told Kapral that his chest injury was causing him pain and soreness and he did not think he could finish out the remainder of the day. This was corroborated by Kapral. Later, when Claimant, working alone, was finishing testing air brakes on Train NS-4 he testified he became very ill and after performing the tests he could not continue working. He, shortly after 9:00 P.M., he testified, place a telephone call to the engine house, which is the office of the Mechanical Department, with the intention of reporting off because of his physical condition. He testified he received no answer. No foreman of the Mechanical Department was on duty on the shift. In such circumstances Electrician Wrobel, who has his own duties to perform, answers the telephone should he be in the engine

house and hear it ring. Not successful in getting an answer Claimant decided to ride home on Train NS-4—he said with the intention of reporting what occurred to the supervisor coming on duty at midnight. Claimant arrived home at 11:25 P.M. At about 11:45 or 11:50 P.M. General Foreman Beaumont placed telephone call to Claimant's home. Claimant answered and explained the circumstances that caused him to leave his position without first having received permission. The next morning Claimant was taken out of service.

General Foreman Beaumont testified under examination by Mr. D'Elia, a Representative who noted an appearance on behalf of Claimant:

"Mr. D'Elia: Have you any reason to believe that Mr. Sullivan is not a faithful and trustworthy employee of the NHRR?

Mr. Beaumont: Let me answer by saying that I personally have not up until this time found Mr. Sullivan unfaithful.

Mr. D'Elia: Are you completely satisfied with his work?

Mr. Beaumont: I was up until this.

Mr. D'Elia: In view of your answers to previous questions, would you have accepted Mr. Sullivan's explanation as to why he went home.

Mr. Beaumont: I probably would have because of the previous injury."

Electrician Wrobel had Hearing Officer Keenan read into the record a written statement that Wrobel had given to Carrier:

"On Friday night February 10th, 1967 at approximately 8:40 P.M., I called telephone #259 which is located in Car Inspectors room at the North end Yard Office. I was looking for Car Inspector K. Kapral to discuss filling vacancy caused by P. Zigman, car inspector being off sick. Car Inspector W. Sullivan answered the phone as Kapral was not there. After talking to W. Sullivan about job, he W. Sullivan said he was going out where the work was. A train had come in and he did not say anything about being sick.

I was present in the office from 9:15 P.M. until after 10:00 P.M. and I did not receive any telephone calls."

In course of questioning by Hearing Officer Keenan and Representative D'Elia, relative to the statement, Wrobel testified:

"Mr. Keenan: As Chairman I will read it. Here is the statement you gave Mr. Beaumont. Reads statement. Is this a true statement, Mr. Wrobel?

Mr. Wrobel: It is the best I can recollect. It wasn't done in that particular way. At times it might be off a few minutes or so, but it is fairly close. It may not be 100% accurate. After all it was written several days after the thing, but it is fairly close. It is intended to be fairly true.

Mr. D'Elia: As long as he said it isn't exact. It is pretty close you say?

Mr. Wrobel: How can I say it is exactly the minute, correct, but it was approximately about right.

Mr. D'Elia: Pretty close?

Mr. Wrobel: Well, it is fairly close.

Mr. D'Elia: Fairly close?

Mr. Wrobel: Yes.

The character of this evidence is such that it fails to prove by a preponderance of evidence of probative value that Wrobel was in the engine house office at the time Claimant testified he placed his telephone call. The burden of proof was Carrier's. It failed to satisfy it.

Carrier did not adduce any evidence that if Claimant was unable to obtain an answer to the telephone call he placed to the engine house office that he was contratuallly required or had been instructed to report to any other person at another location.

In weighing the evidence of record we can only conclude that Claimant did, as he testified, telephone the engine house office seeking permission to mark-off before leaving his position and there was no answer.

In the light of the testimony of General Foreman Beaumont, *supra*, we find that Claimant, *prima facie*, had good cause for marking-off. Further, we find that Claimant, under the circumstances prevailing, made reasonable effort to obtain permission to mark-off because of physical complications.

We willl sustain paragraph 2 of the Claim only to the extent that the amount of compensation prayed for therein exceeds vacation pay received during the period February 11, 1967 to March 3, 1967, inclusive.

#### A W A R D

Claim sustained to the extent prescribed in FINDINGS, *supra*.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

ATTEST: E. A. Killeen  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1970.