

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Burlington Northern Inc.

Dispute: Claim of Employees:

1. That Havre Carman G. Gerstenberger was unjustly treated and the provisions of the Controlling Agreement were violated when he was suspended from service for a period from August 7, 1973 to August 16, 1973, inclusive, and a mark of censure was placed on his personal record.
2. That accordingly the Burlington-Northern, Inc. be ordered to compensate Carman G. Gerstenberger for the period from August 7, 1973 through August 16, 1973, inclusive, in the amount he lost in wages at the pro rata rate during that period due to his suspension from service. Further, that the Burlington-Northern be ordered to remove the mark of censure from Carman G. Gerstenberger's personal 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 employees 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.

This claim is presented on behalf of Claimant Carman G. Gerstenberger. The Claimant was notified of Carrier's intent to conduct an investigation to determine his responsibility in connection with conduct unbecoming an employee concerning his arrest on January 25, 1973, and his absence from duty without permission on January 29, 1973. Delays in conducting the investigation were requested by Claimant and granted by Carrier up to July 20, 1973, when Carrier refused further delays pending the outcome of criminal charges against Claimant for alleged possession of certain drugs. The investigation was held on July 20, 1973 and the Carrier, on August 3, 1973, notified the Claimant

that a censure had been placed on his record and that he was suspended for 10 days for absenting himself from duty without permission from proper authority on January 29, 1973. The criminal charges against the Claimant referred to above were ultimately dropped.

The Organization contends that the discipline was improper for the reasons listed below:

The Organization contends that the Carrier did not furnish a copy of the transcript of the investigation to the Claimant or his authorized representative as required by Rule 35(e). There is conflict in the record concerning the furnishing of a copy of the transcript of the investigation to the Local Chairman and the Vice General Chairman. It is clear that four and a half months transpired before the General Chairman received a copy of the transcript. The Organization does not show that the case before this Board has been prejudiced because of the transcript problem. There is no time limits issue in the instant case (the Organization appealed the case within 32 days): had there been a showing that because of not being furnished a transcript, the Organization was unable to prepare and file an appeal within the time limits of Rule 34 we would have rendered an appropriate ruling. In the instant case we do not find prejudice to the Claimant's case on the matter of transcripts: the case is well prepared and presented and all possible arguments that could be made for the Claimant have been made.

The Organization contends that the appeal was to Mr. J. W. Craig, Master Mechanic, the authorized officer for such an appeal, yet the appeal was declined by Mr. J. G. Edwards, Superintendent. The Organization thus contends that the appeal was not properly declined and therefore it should be allowed as presented. We disagree.

Rule 34(a) states in pertinent part:

"(a) All Claims or Grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall...notify whoever filed the claim..."
(Emphasis supplied)

The rule states that the "Carrier" shall notify the person filing the claim. The notification from Mr. J. G. Edwards is sufficient notification from the Carrier to comply with Rule 34(a); and we thus find no violation of the rule. (See Second Division Awards 4464 and 5312.)

The Claimant was found guilty of one charge only, that of failing to protect his assignment on January 29, 1973. Concerning this charge the Claimant testified as follows:

- Q. In connection with your being absent from duty without permission on January 29th, did you obtain permission to be off on that day?
- A. I did not, myself, report that I would not be in on January 29th but I did have somebody else report that I would not be in on that date.
- Q. The other person you had call for you, was this on the 29th, the morning of the 29th?
- A. No, it wasn't, it was the day after.
- Q. On January 30th, then?
- A. Yes.

The Claimant thus admitted that he did not call to protect his assignment on January 29, 1973. Later in the investigation he changed his story to the contention that his wife did call in on January 29, 1973, however Carrier showed that no such call ever was received.

This Board realizes that under certain circumstances an individual may be unable to call or have someone else call the Carrier to obtain permission to be off. The Claimant was asked why he did not call in and he chose not to give a reason as follows:

- Q. Aren't you required to ask for permission to be off duty when you know that you cannot be there?
- A. There are certain times when you cannot ask for permission. There is no way I could have got permission on that date to be off.
- Q. Why was this, Mr. Gersterberger?
- A. No answer.
- Q. In what position were you in that you were not able to call on the telephone to receive permission to be off, Mr. Gerstenberger?
- A. That is a long time back.

The Claimant had authorized absences on the days of January 25, 26 and 27. He worked his assignment on January 28th and January 29th is the date in question. January 30 and 31st were his regular days off. The Claimant had been arrested on January 25, 1973, on the charge of possession of certain drugs (which charges were dropped sometime after the investigation was held). He worked his assignment on January 28th. The record is clear beyond any doubt that the claimant did not protect his assignment on January 29, 1973. The record is barren of any reason why he did not protect it. He had every opportunity to give a reason at the investigation, yet he chose not to. We must point out that this is not the case of a person who was incarcerated by authorities and thus could not call to protect his assignment: the Claimant

worked the day before the date in question. The Claimant gives us no reason for his unauthorized absence, and unless precluded from doing so by other Organization contentions we shall be required to deny the claim.

The Organization contends that the Claimant did not receive a fair and impartial investigation because the Claimant was not allowed the presence of Mr. Barron, a witness under Rule 35(c) who could have given testimony as to the cause of the absence from work. The record shows the contrary. The evidence of record shows that Mr. Morrison of Mr. Barron's law firm wrote the Carrier advising that Mr. Barron planned to appear at the investigation as the designated representative of the Claimant (Carrier's Exhibit No. 10, p 2). The Organization contends further that it was error not to allow Mr. Barron to be in the room during the investigation to protect the Claimant from incriminating himself in his civil case. The Referee is of the opinion that where a criminal action is pending against an individual, then it would be best for the parties to allow the individual access to counsel. He perceives the role of the outside attorney in a counseling as opposed to an advocacy role, allowing the individual to confer with his attorney either inside or outside of the hearing room. It must be made clear, however, that the Agreement of the parties does not require what the Referee suggests. The Claimant is entitled to be represented only as provided by the Agreement; and this does not include an attorney. (See Awards 1821 and 6381.)

The Organization contends further that a fair and impartial investigation was not held because the Claimant was not afforded proper time to present his defense or witnesses at the time the investigating officer closed the hearing. We disagree. The investigating officer gave the Claimant, his representative and his witnesses the opportunity to question all of the witnesses and in fact many questions were asked concerning the testimony of each witness. The representative was given the opportunity to question the Claimant and he did so question him on pages 15, 16, 17, 18, 19, 20, 23 and 24. No reason or excuse for not protecting his assignment on January 29th came forth during the questioning. Having allowed broad questioning by the Claimant, his representative and witnesses, the investigating officer individually asked the representative Mr. Smart, the Claimant's brother David and the local chairman Mr. Danell if they had any further statements, they all answered no. He then closed the hearing. The investigating officer did not ask the usual question, "Was this investigation held in a fair and impartial manner?" It certainly is usual and good form for an investigating officer to ask such a question, but not to ask such a question does not render the investigation any more or less fair or impartial. Such a question is not required by the Agreement of the parties. From the entirety of the record we find that the investigation was fair and impartial.

A W A R D

Claim denied.

Form 1.
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Award No. **6963**
Docket No. 6829
2-BN-CM-'75

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this **14th** day of November, 1975.