

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: { System Federation #6, Railway Employees' Department
 { A. F. of L. - C. I. O. - Carmen
 {
 { Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employees:

1. As a result of an investigation Carman R. D. Treadway was suspended from service for a period of seven (7) working days plus a three (3) day suspension for a total suspension of ten (10) working days. This action by Elgin, Joliet and Eastern Railway Company was unjust, unfair, arbitrary, and capricious.
2. That accordingly the Elgin, Joliet and Eastern Railway Company be ordered to pay Carman R. D. Treadway eight (8) hours pay at the pro rata rate for each of the ten (10) working days that he was suspended, a total of eighty (80) hours pay at the pro rata rate as provided by Rule 35. Also that R. D. Treadway's record be cleared of the charges which resulted in the suspension.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 dispute involves the following facts and circumstances. On December 31, 1973 (New Year's Eve), Claimant was assigned to work as a Car Inspector in Carrier's yard at East Joliet, Illinois, between the hours of 11:00 p.m. and 7:00 a.m. the following morning. At approximately 12:00 Midnight, Claimant called Assistant General Yardmaster McLean, "marked off sick", and then left the property.

Carrier asserts that Claimant left his assignment without first securing permission from the on-duty Trainmaster or from one of Carrier's Car Foremen; that Claimant was not "sick"; and that his reason for marking off was to attend a New Year's Eve party. Petitioner asserts to the contrary and maintains that Claimant obtained "permission" to mark off sick from Mr. McLean.

In any event, formal Investigation was held on January 15, 1974, Claimant being charged with "... leaving your regularly assigned ... tour of duty ... without permission". Claimant was found guilty as charged and was assessed discipline of seven days suspension. Shortly thereafter, a review of Claimant's personal file disclosed a prior similar offense, upon which a three day deferred disciplinary suspension having become actuated pursuant to its specific conditions, it was then added to the current seven day suspension, making in all a ten day suspension.

Initially, we stress that there is no question as to the fairness and impartiality of the Investigation or that Claimant's rights of due process were in any sense violated.

Claimant testified that he marked off "because I was sick enough I didn't think I could perform my duties safely in the train yard". However, Trainmaster Elens testified that shortly after 11:00 p.m. on that same night (one hour before he "marked off sick") Claimant approached him and "merely asked me if I would approve his leaving at 3:00 a.m., after all the work was cleared up. I told him no, I would not approve that". Claimant did not at that time say anything about being sick, but mentioned "that his wife wanted him to attend" a New Year's Eve party.

Mr. Amiot, Track Foreman, testified that about 11:15 p.m. on December 31, 1973, he had a telephone conversation with Claimant and offered several times to give him his telephone number where he could be reached but that Claimant said he did not need it because "everything was alright in the yard". Claimant did not "indicate he was sick or ask permission to leave" at that time.

Mr. Pugh, General Car Foreman, testified as follows:

- "Q. Did you attempt to find out from Mr. Treadway, why he left the property?
- Q. Yes, on January 2 I asked Mr. Treadway, he came into my office, and I asked him why he had left on January First.
- Q. What was the reason Mr. Treadway gave?
- Q. He said he had a party, that he wanted to leave early for, that they wouldn't let him off, so he went off sick."

Petitioner contends that the latter testimony is inadmissible as hearsay. Although prior Awards support the admission of hearsay testimony "where fairly received and evaluated" (See for example 1st Div. Awards 17158 and 22294 among others), we find that the testimony of Mr. Pugh is not hearsay. Had he testified to what he heard someone else say about Claimant, that would constitute hearsay. But his testimony is a direct conversation he had with Claimant personally. Such testimony does not constitute hearsay and is clearly admissible as evidence.

Moreover, as to Claimant's assertion that he was "sick", the burden of proof rests squarely upon him, as to which he offered no probative evidence whatsoever.

See Awards 3874 (Anrod), 5185 (Harwood), 6457 (Bergman), and 6849 (O'Brien), as well as many others in all Divisions of this Board.

We point out further that Claimant did not, as he contends, "obtain permission" to leave from Mr. McLean. He merely "told Yardmaster McLean" that he was marking off sick.

Petitioner contends nevertheless that Claimant did in fact "have permission to leave his job early on December 31, 1973" and refers us to "a signed statement from one of Carrier's own supervisors to substantiate this." This reference obviously is to Mr. McLean's handwritten statement of 1/13/74, which states in pertinent part:

"On the 1st of January, 1974 at or before 12:05 a.m. I was notified by car inspector Robert Treadway that he had marked off sick at 12:00 Midnight 12-31-73."

We cannot conclude from the foregoing that Claimant "obtained permission" to leave. It is quite evident that in fact permission, as such, was neither sought nor obtained. We are more inclined to the conclusion, based on the entire record, that Claimant sought permission to leave from Mr. Elens at about 11:00 p.m. but that such permission was not granted; that at no time prior to his "marking off sick" did Claimant indicate to anyone in authority that he was "sick"; and that his reason for desiring to leave when he did was not because he was "sick" but because he wished to attend a New Year's Eve party. We are not persuaded to the contrary by Claimant's testimony.

In any event, the principle has been enunciated and confirmed in many prior Awards of this Board that where the investigation was fairly and impartially conducted (as is clearly the case here), and substantial probative evidence is present in the record supporting the charge against Claimant, and the discipline imposed is neither arbitrary nor unreasonable, we will not substitute our judgment for that of Carrier in evaluating the evidence, in determining Claimant's culpability, or in assessing discipline. We so hold here in relation to this Claimant.

See Awards 2200, 3676, 4407, 5020, 6615, and 6408, as well as 1st Div. Awards 13345 and 20654, and 3rd Div. Awards 15574, 17914, 19487 and 20245, among a host of others.

In short, that Carrier did not violate Rule 35 of the Agreement and that it was warranted in finding "that Claimant left his regularly assigned tour of duty without permission."

Accordingly, based on the record evidence and established precedent, we will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch /es
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of May, 1976.