

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: (System Federation No. 76, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Carman David R. Fehlker was unjustly assessed sixty (60) days suspension on October 20, 1976.
2. Carman David R. Fehlker was erroneously charged with failure to protect his assignment on Madison Rip Track on Saturday, September 18, 1976.
3. That the Chicago and North Western Transportation Company be ordered to compensate Carman David R. Fehlker for all time improperly suspended.

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 dispute involves a sixty day disciplinary suspension based on Claimant's failure to protect his assignment on September 18, 1976. The facts revealed in the transcript of the investigation indicate that Claimant had traveled to a town (in fact to a club house outside of the town) about 70 miles from his duty assignment. When he appeared to be stranded at that point he telephoned his foreman at 10:30 P.M., explaining the circumstances and stating that he would not be able to protect his assignment the next morning at 7:00 A. M. The foreman did not give him permission to be off but told him the phone call would be noted. Rule 20 of the Agreement provides:

"Employees wishing to be absent from work must obtain leave of absence from the foreman whenever practicable to do so, and foreman will endeavor to grant leave of absence when requested.

An employe detained from work on account of sickness or from any other cause shall notify his foreman."

Petitioner objected to the conduct of the hearing on two grounds: that Claimant or his representative were not permitted to cross-examine Carrier's sole witness, the foreman; and further that Carrier improperly questioned Claimant with respect to his past record in a manner indicating pre-judgement. Carrier denied that there were any improprieties arguing that Carrier has the right to introduce evidence concerning Claimant's past record into the investigation to assist in the determination of the quantum of penalty to impose. Additionally, Carrier points out that Claimant and his representative were given every opportunity to ask questions in the course of the investigation including questioning Carrier's witness at the conclusion of Claimant's testimony.

The Hearing Officer's conduct in this matter was clearly questionable. He should have specifically offered the Claimant the right to cross-examine the Foreman at the conclusion of that individual's testimony, not later in the proceedings. That flaw alone would be determinative had the issue in this case been one of fact credibility. Since the facts are not substantially in question, we will merely note that the investigating officer was wrong in his actions in this regard, which might in other circumstances be fatal. Concerning the questioning about Claimant's past record, we have additional grave doubts. There is nothing in the record of the investigation which outlines the past record in question; in fact, the entire record of the dispute is devoid of specific facts covering Claimant's alleged prior infractions. Clearly, Claimant's prior discipline record should have been introduced as a matter of fact, rather than questioning Claimant in the manner used in this case. Again, this conduct is close to an indication of lack of fairness and due process.

On the merits there is no question but that Claimant for reasons best known to himself was unable to travel the 70 miles to his assignment in a nine hour period following his call to the Foreman. He was not given permission to be off, as we see the record. The issue on this count is whether the sixty day suspension was appropriate in view of the lack of information on Claimant's past record. In our view, under all the circumstances, the penalty was arbitrary and excessive. Taking into consideration Carrier's right to have employes report for work on a consistent and reliable basis, and Claimant's admission of a prior disciplinary action, we find that the penalty herein should be reduced to a thirty day suspension and Claimant should be made whole for the balance of the original suspension.

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Award No. 7916
Docket No. 7536
2-C&NW-CM-'79

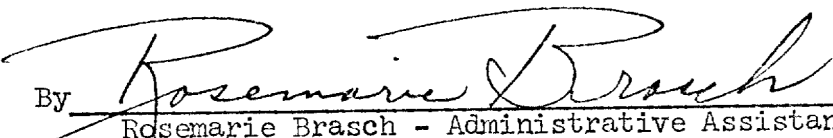
A W A R D

Claim sustained in part as indicated above.

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 16th day of May, 1979.