

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it unjustly disciplined and withheld Carman R. D. Hladik from service for a period of ten (10) days, per letter dated January 12, 1977, as a result of investigation held December 9, 1976, at South Lorain, Ohio.
2. That the Norfolk and Western Railway Company be ordered to make Carman R. D. Hladik whole for all lost wages, seniority and vacation rights, on account of ten (10) day actual suspension, and remove such discipline from his service 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 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, Robert D. Hladik, a Carman employed at Carrier's repair track facility at Lorain, Ohio, was given a ten (10) day deferred suspension following a formal investigation held on December 9, 1976 for attempting to defraud the Company.

Claimant reported for work on the morning of November 24, 1976 and prior to the commencement of his tour of duty Claimant informed his supervisor that he had to leave work early. At this same time, Claimant asked his supervisor how long he had to remain at work to qualify for Thanksgiving holiday pay which was the following day. The supervisor told Claimant he was not sure but advised Claimant he should remain at work for at least a couple of hours. In the course of assigning duties to the carmen at the beginning of the shift, Claimant's supervisor directed Claimant first to put air in the company truck tire. At approximately 7:45 AM Claimant's supervisor noticed the tire had been inflated and proceeded to look for Claimant in order to assign him further duties. At about 7:50 AM, supervisor located Claimant in the lunchroom apparently preparing to change into his street clothes.

The supervisor instructed Claimant to begin changing an air brake valve on a freight car but Claimant stated he had to leave for home, explaining that he and his mother were due in Cleveland that morning at 9:30 AM because his father was undergoing exploratory surgery for possible cancer. In response to his supervisor's query as to why he had bothered to report for work at all if he had to leave so soon, the supervisor testified Claimant answered, to protect his holiday pay, while the Claimant stated at the investigation he had reported for work to protect his job because of his past record of absenteeism. Claimant's supervisor acquiesced and told Claimant to do what he had to do. Claimant then marked off after having been at work for only twenty (20) minutes.

Carrier asserts that Claimant did not report for work on November 24, 1976 with the intention of protecting his assignment or performing any work, but rather he reported for work with the expressed intention of remaining only long enough to receive a full day's pay for the Thanksgiving Day holiday. Carrier argues Claimant's sole motivation in reporting for work constitutes an attempt to defraud the Company.

The Organization vigorously protests the charge against Claimant as not having any validity in the first instance and very strongly argues Claimant did not receive a fair and impartial investigation based mainly on the multiplicity of roles played by Claimant's supervisor and the General Foreman at South Lorain, Ohio. Specifically, the Organization notes that Claimant's supervisor was involved in the incident in question, preferred the charges against the Claimant, appeared as a witness for the Carrier, and acted as an appeals officer. The General Foreman was utilized by Carrier as the hearing officer, reviewer of his own hearing record, assessor of discipline, and appeals officer.

Furthermore, the Organization takes exception to the discipline imposed of a ten (10) day deferred suspension as this discipline triggered a previous ten (10) day deferred suspension given Claimant for another offense thereby causing Claimant to serve a ten (10) day actual suspension.

We first turn our attention to the procedural point as to whether or not Claimant was afforded a fair and impartial investigation. In addressing such procedural objections as those raised in the instant case, we have in numerous cases over the years reached our decisions on a case by case basis by applying the following general formula:

"That where there exists an objection regarding the mix of roles performed by a Carrier officer in connection with the charge against Claimant, the resulting investigation, the imposition of discipline, and the appeal process, such mix of roles must be balanced against the tenets consistent with fair play and due process. These tenets include: that claimant be properly and timely notified of the charge against him and the date, time and place of the investigation; that claimant be well represented; that claimant be allowed any witnesses of his own choosing; that claimant be given every opportunity to present any and all testimony believed to be relevant to the situation; that both the claimant and his representative be allowed to cross-examine all witnesses; and that at the conclusion of the investigation

"the claimant and his representative be afforded the opportunity to express any exceptions they might have to the manner in which the hearing had been conducted."

Upon a thorough review of the record and a careful weighing of the alleged procedural defects against Claimant's having been afforded due process at the investigation, we conclude Claimant did in fact receive a fair and impartial hearing.

As to the merits, we have before us a classic case involving the Claimant's word against those of his supervisor. Claimant states he reported for work on the morning in question to protect his job while Claimant's supervisor testifies Claimant told him he reported to work to qualify for holiday pay. We are therefore faced with having to resolve a credibility question as to who is telling the truth, the Claimant or his supervisor. This, the Board cannot do since we lack the opportunity to judge for ourselves both the demeanor of the witnesses and the veracity of their testimony. It is well established that our Board has a limited scope in reviewing discipline cases and that we, at this appellate level, do not resolve pure conflicts of testimony or credibility. In view of the fact that we have determined Claimant received a fair and impartial hearing and ruling out that the discipline imposed was neither arbitrary, capricious, discriminatory or excessive, we shall not disturb the findings of the hearing officer by substituting our judgment for that of the Carrier.

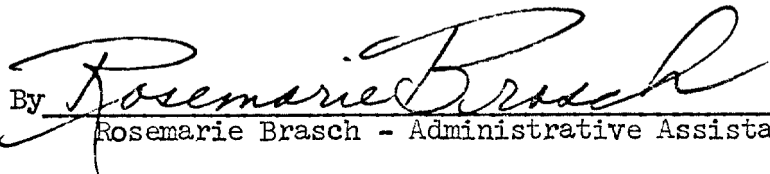
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of January 1980.