

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

Parties to Dispute: ( International Brotherhood of Electrical Workers  
( Port Authority Trans-Hudson Corporation

Dispute: Claim of Employees:

1. That the Port Authority Trans-Hudson Corporation violated the current Agreement when Communication Repairman I Donald Ward was denied a fair and impartial investigation on January 29, 1980.
2. That under the current Agreement the Port Authority Trans-Hudson Corporation has unjustly dismissed Communication Repairman I Donald Ward from service effective February 7, 1980.
3. That accordingly, the Port Authority Trans-Hudson Corporation be ordered to restore Communication Repairman I Donald Ward to service with seniority unimpaired, to restore to the aforesaid employee all pay due him from the first day he was held out of service until the day he is returned to service at the applicable Communication Repairman's rate for each day he has been improperly held from service, and all benefits due him under the group hospital and life insurance policies for the above mentioned period, to restore all railroad retirement benefits due him including unemployment and sickness benefits due him for the above described period, and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period, to restore all other benefits that would normally accrue to him had he been working the in the above described period, in order to make him whole.

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.

Claimant, Mr. Donald Ward, was employed as a Communication Repairman 1 in Carrier's Power, Signals and Communication Division until he was dismissed from service effective February 7, 1980, following investigation on January 29, 1980 into charges contained in a letter dated January 15, 1980. Claimant was charged with having left the property without being authorized so to do on December 28,

1979, and January 2nd and 3rd, 1980; that Claimant ignored the written instructions of his supervisor in that he did not carry both a portable radio and a pager with him on January 3, 1980; that he had been dishonest when confronted by his supervisor concerning his activities on January 3, 1980; and that he had been dishonest in accepting pay for the time he was allegedly off the property without authorization. The Carrier contends that this alleged conduct violated Rules 10 and 7 of the Carrier's (PATH) Book of Rules, as follows:

RULE 10:

"Employees, while performing service, must not absent themselves from duty, exchange duties or substitute others in their place without proper authority. When scheduled to be relieved, they must remain until properly relieved, unless otherwise directed by supervision."

RULE 7:

"To enter or remain in the service, employees must be of good character and must not commit an insubordinate, dishonest, immoral, illegal or vicious act. They must conduct themselves at all times, whether on or off PATH property, in such a manner as not to bring discredit upon PATH."

The record in the instant case discloses that on the three days in question, the Claimant was off the property during his assigned work shift. According to Claimant, his time off the property either constituted lunch breaks, since there was no restaurant on the property during his midnight to 8:00 a.m. tour; or Claimant was sick and had to go home for medication, since there is no aid available on the property during Claimant's work tour. Claimant testified that he reported off sick for the time he left to get medication, had authorization, was not paid and did not request pay for such time. Claimant argues that other employees, including the Claimant's helper, had seen Claimant working on the property, going to or from his assignment, or in the toilet room at various times when he was alleged by the Carrier to have been off the property. Claimant argues that he had given permission to his brother and others to use his car on the dates in question, and that observation of his car on the dates in question therefore proved nothing with reference to the Carrier's charges. Claimant further testified that he left his pager with his helper while at lunch or marked off sick, that the pager had not been functioning properly at the time pertinent to the instant case, and that he did not want to take a chance on losing the pager while off property. Claimant denies any charges of dishonesty and asserts that there was a valid basis for any time that Claimant may have left the property during this incident.

The record indicates that the evidence presented by the Carrier witnesses was essentially offered by private investigators hired to observe the Claimant off the property at times that he should have been working during his normal tour of duty and by his immediate supervisor, the assistant supervisor of communications. The evidence testified to by the two private investigators and

the immediate supervisor was that Claimant was observed off the property on each date in question, either driving his car, going to and from a restaurant, or proceeding to various locations before returning to work.

The Organization, on behalf of Claimant, raised two procedural issues in support of its arguments that Claimant was denied a fair and impartial investigation, to wit: (1) that the carrier officer who preferred the charges also assessed the penalty and functioned as a complaining witness and (2) the hearing officer refused to sequester witnesses at the hearing. Neither of these contentions is in our judgment meritorious in this case. The first because this Board is not in a position to make a ruling concerning whether the contentions as to multiplicity of roles for the hearing officer was raised de novo before our Board but never joined on the property. Even if appropriately before this Board, however, numerous prior awards of this Board have rejected the argument that an unfair and biased hearing automatically results when the same carrier officer signed a notice of charge, conducted a hearing, and assessed the discipline. See Second Division Award No. 7196 (Rose) and Second Division Award Nos. 1795, 4001, 7505, 7992, 8188, and 8412. As to the second point, absent a controlling requirement for sequestration of witnesses under the Agreement, failure to separate witnesses does not constitute denial of a fair hearing. Fourth Division Award No. 3425 and Third Division Award No. 21288 (both by Referee Eischen).

With respect to the procedural objections, we conclude that Claimant was not deprived of the fair and impartial investigation to which he is entitled by Article 10 of the Controlling Agreement under the facts and circumstances of this case and note no persuasive record evidence that the hearing officer acted as a complaining witness in this matter.

With respect to the merits, given the overwhelming evidence of guilt that any fair-minded reading of this record reveals, we do not find persuasive the contentions of the organization that Claimant was not culpable by his actions in leaving the property without justification or permission, contrary to prior instructions. Claimant admitted leaving the property, conceded a prior discipline for a similar offense, and offered woefully inadequate reasons to justify his disobedience of reasonable supervisory orders. Considering the entire record, there is no proper basis for the Board to disturb the discipline imposed.

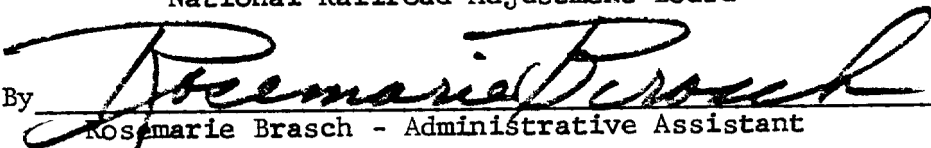
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of February, 1983.