

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Southern Pacific Transportation Company (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, Mechanical Department Electrician M. H. James was unjustly treated when he was suspended from service for a period of thirty (30) days on November 8, 1978, following investigation for alleged violation of Rule 810 of the General Rules and Regulations of the Southern Pacific Transportation Company. Said alleged violation occurring on October 11, 1978.
2. That accordingly, the Carrier be ordered to:
 - (a) Compensate the aforesaid employe for all time lost during the thirty-day suspension and with payment of six percent interest added thereto.
 - (b) Pay employe's group medical insurance contributions, including group medical disability, dental, dependent's hospital, surgical and medical, and death benefit premiums, and railroad retirement contributions for all time that the aforesaid employe was held out of service.
 - (c) Reinstate all vacation rights to the aforesaid employe.

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, M. H. James, an electrician at the Carrier's Sacramento, California, Heavy Locomotive Maintenance Plant, was assigned to a battery crew on 10-11-78 under the immediate supervision of W. J. Costa, Supervisor of the Erecting Shop. During his tour of duty on that date, Claimant was absent from his employment for a period of approximately fifty (50) minutes.

As a consequence of said absence, Claimant was cited for formal hearing into the occurrence, described in the Carrier's October 12, 1978 letter of notification as "alleged failure to remain at your post of duty and devote yourself exclusively to your duties during your tour of duty and your absenting yourself from your employment without proper authority on October 11, 1978, ... which may involve violation of Rule 810 of the General Rules and Regulations."

Rule 810 reads: "Employee must report for duty at the prescribed time and place, they must not absent themselves from their employment without proper authority."

On November 8, 1978 the Carrier notified Claimant that evidence adduced at the formal hearing held on October 24, 1978 had established his responsibility in connection with the charge against him, and that for Claimant's conduct on October 11, 1978 he was suspended for thirty calendar days (22 working days) from the Carrier's service.

According to the Carrier's submission, Claimant resigned from the Carrier's service on December 20, 1978, twelve days after returning from the disciplinary suspension. This Board attaches no significance to that fact in determining the merits of the claim presented here.

The instant claim was filed on behalf of Claimant pursuant to Rules 38 and 39 of the controlling Motive Power and Car Departments Agreement.

Rule 38, Paragraph (a), of that Agreement reads:

"An employee who considers himself unjustly treated, or that this agreement as applicable to his craft is not being properly applied, shall have the right to submit the facts informally to his foreman for adjustment and/or to the nearest duly authorized local committee of his craft. The duly authorized local committee (of not to exceed three (3) members of the craft), if they consider it justified, may submit the case informally to the foreman, general foreman and/or the master mechanic (or from foreman to general foreman and/or to shop superintendent in General Shops)."

Rule 39 of the Agreement reads:

"No employee shall be disciplined or dismissed without a fair hearing by the proper officer of the Company. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall in writing, be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented as provided for in Rule 38. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal. Stenographic report of hearing will be taken if requested and employee's representative will be furnished with a copy."

The Organization thereafter exhausted the appeal procedures up to and including the highest officer designated to receive such appeals, the latter denying the claim submitted on the property for the remedy as requested above or for any remedy. The matter was then submitted to this Board.

The Carrier believes that there is substantial evidence in the record as a whole to show that Claimant left his post of duty for an alleged reason unrelated to his work without permission to do so in violation of Rule 810. Further, Carrier asserts that Claimant's responsibility for violating Rule 810, in light of Claimant's past record with Carrier, warranted the assessment of a 30-day suspension.

The Carrier emphasizes that General Foreman T. M. Deuerling observed Claimant at approximately 9:05 a.m. on October 11, 1978 in the Boiler Shop of the Locomotive Maintenance Plant. Deuerling learned from the Foreman there that Claimant had no business in the Boiler Shop. Before proceeding to question Claimant about his presence there, the General Foreman, who is responsible for the work performed in the Erecting Shop where Claimant was assigned, observed Claimant depart in a van vehicle. The van returned with Claimant, who reentered the Erecting Shop at 9:55 a.m.

The Carrier relies also on the testimony of General Foreman Deuerling to show that it is policy for employees to have permission of the assigned supervisor before leaving their assignment and that only in the event of an emergency can another supervisor or officer be contacted to grant permission to leave work. The instant situation did not involve an emergency.

Claimant's supervisor, Foreman T. J. Costa, did not grant Claimant's permission to absent himself from his post of duty on the date in question. Similarly, the Carrier contends that Foreman J. R. Marin did not give Claimant permission to leave to pick up his pay check.

The Carrier emphasizes that the pay location is approximately one-eighth of a mile from Claimant's subject work location and asserts that Claimant needed a maximum period of fifteen minutes away from his assignment to obtain his check when he had permission to do so. Because Claimant took fifty minutes, the Carrier submits that Claimant's story as to how he used the time is simply not credible. There must have been other reasons for Claimant leaving his work assignment.

Carrier believes it lost approximately forty to forty-five minutes of productive time from Claimant (important time when considering the need for efficient operation of the plant and the lines drawn around the various crafts in the railroad industry limiting specific work to specific crafts) and points to absenteeism as a severe problem in the Plant where Claimant is employed. The Carrier notes that Claimant had received educational talks twice before regarding the necessity to comply with Rule 810, and he was dismissed for violation of Carrier's Rule "G", use of intoxicants while on duty in 1975. Under all of the circumstances, the Carrier submits that the claim should be denied.

The Organization believes that Claimant left his post of duty for good and sufficient reason and with proper authority. Claimant had been absent on October 10, 1978, which was pay day, and needed to pick up his check on October 11, 1978. Historically at the Sacramento General Shops, employees have been allowed to leave their post of duty during a tour of duty to obtain their pay checks after returning to work. This practice was attested to by both Foreman Costa and Foreman Marin, and even General Foreman Deuerling did not doubt that it was a common practice.

The Organization emphasizes that Claimant did not arbitrarily leave his post of duty in the middle of an unfinished job which would have caused a delay in the maintenance schedule. Claimant had finished a segment of his assignment on the unit and could not continue until another employee completed certain functions on that same unit. Rather than wait until Supervisor Marin had located someone to perform the next maintenance procedure, Claimant utilized the dead time to obtain his check.

The Organization stresses that the longstanding practice permitted the employee to inform another supervisor when he was leaving his post of duty if he could not locate his immediate supervisor. This practice was recognized as common by Foreman Costa and Marin, who gave such instructions to their employees. Here, the record reveals that Marin knew Claimant had been unable to locate his immediate supervisor and that Claimant desired to use a buggy to obtain his paycheck; and Marin did not tell Claimant he could not leave the area to get that check. In essence, Marin gave his approval or permission for Claimant to leave his work area to obtain his paycheck.

In summary, the Organization argues that as a consequence of following the past-practice procedure for absenting himself from his employment with proper authority, Claimant was in compliance with the generally accepted Interpretation of Rule 810 and there was no rule violation. Because Carrier has not proved the alleged violation by substantive evidence of probative value, the requested remedy should be ordered by the Board.

It is the opinion of a majority of this Board that the Carrier has not proved a violation of that portion of Rule 810 reading "Employees ... must not absent themselves from their employment without proper authority", as that rule has been interpreted and applied through longstanding practice which must govern the decision here.

Heavy emphasis was placed on the fact that Claimant did not obtain "permission" from his immediate supervisor, Mr. Costa, or from Foreman J. R. Marin. However, there has been no showing that "proper authority" under Rule 810 required employees to "obtain permission" to absent themselves from their employment. Indeed, what is required by the Company policy as repeatedly manifested in the record evidence is that an employee desiring to leave his assignment must "notify" his assigned supervisor or some other supervisor in the absence of the immediate supervisor. A clear distinction exists between giving notification and obtaining permission, and it is plain that Claimant did give notification to Foreman Marin after he was unsuccessful in locating Foreman Costa.

In the formal hearing, Hearing Officer Fitzpatrick asked Foreman Marin "In any way did (Claimant) get permission to go pick up (his) check?" and Marin answered, "No, (he) didn't." This response by Marin evidences his understanding that Claimant has not been given permission to leave his posts by Supervisor Costa and his belief that obtaining permission requires a particular request for permission that is granted. At the same time, Marin admitted that Claimant had indicated that he wanted to use a buggy to pick up his check and because Marin could not furnish a buggy to Claimant for that purpose he suggested that Claimant ask Boiler Shop Foreman McKenzie if he had one available, obviously to use for the purpose of picking up Claimant's check. Under the circumstances, wherein Marin knew that Claimant had been unable to locate his immediate supervisor, Mr. Costa, or secure permission from Costa to go for his pay check, Marin should have reasonably known that he was giving permission to Claimant "in a way" by suggesting how Claimant might go from his post to obtain his pay check.

The Carrier has argued that Claimant admitted that he did not obtain supervisory permission to get his check, but such admission does not appear in the record. When Hearing Officer Fitzpatrick asked Claimant, "Who did you notify?" the answer was "John Marin". After other questions by Mr. Fitzpatrick pertaining to what was said to Mr. Marin, Fitzpatrick asked, "In other words you didn't obtain your supervisor's permission to go get your check, is this correct?" Claimant's answer was, "No". Because Claimant had already indicated that he never notified or asked permission of his supervisor, Costa, that question in context must reasonably refer to Marin rather than Costa; and the negative answer clearly indicated that it was not correct that he had not obtained Marin's permission. Claimant reasonably believed that he had proper authority to go for his check and Marin's statements to him under all of the circumstances indicated nothing less.

Although the Carrier has suggested that Rule 810 allows an employee to leave his employment only with the permission of his immediate supervisor except in an emergency, the record evidence will not permit such an interpretation of Rule 810 with regard to being absent to obtain one's pay check. It is clear on the record that both Costa and Marin have regularly allowed employees to leave their tour of duty to obtain their pay check when they have been absent on pay day for any reason.

Parenthetically, although the matter was not raised during the hearing or in the parties' submissions, Rule 28 of the Agreement, all of which is before this Board, provides that "(a) Employees will be paid off during their regular working hours, ..." Given that contractual provision, and the practice found under Rule 810, there would seem to be nothing improper in the incident that precipitated the disciplinary action.

The Carrier has shown that Claimant might have gone for his pay check and returned in less time than was taken, but there has been no showing that the amount of time taken was excessive relative to what other employees have been allowed to take, and there was no showing that the Company was in any way harmed by Claimant's action. Indeed, Claimant left his job location at a time when he was unable to proceed in his work until other work had been completed by Mr. Marin (or under Mr. Marin's supervision) and there was no showing that the interim work was performed prior to the return of Claimant to his job.

Given the situation as established by the record in this case, the Board finds no reasonable basis for imposing a 30-day suspension on Claimant. The fact that Claimant had earlier been counseled concerning Rule 810, and had been dismissed for having the odor of an alcoholic beverage on his breath in February, 1975 is of no consequence when there exists no instant infraction upon which discipline can reasonably rest.

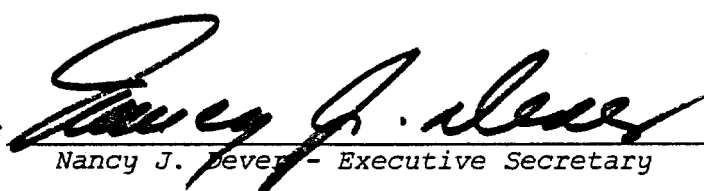
In light of the foregoing, the Claim shall be sustained to the extent that the Company shall be ordered to pay Claimant for all wages lost, less interim earnings realized by Claimant during the 30-day suspension which Claimant would not have received except for the wrongful suspension.

A W A R D

The claim is sustained to the extent set forth in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1983.