

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

(International Brotherhood of Electrical Workers
Parties to Dispute: (
(Consolidated Rail Corporation (Conrail))

Dispute: Claim of Employees:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) unjustly suspended Electrician Gerald C. McKendree from service twenty (20) days, to be effective as provided in Notice of Discipline, Form G-32 dated February 9, 1982.

2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Electrician Gerald S. McKendree to service with seniority unimpaired and with 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 Electrician's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his 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 employes 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.

Gerald C. McKendree, Claimant, was an Electrician in Carrier's employ on February 9, 1982, when he was suspended for twenty days as the result of an investigation.

On the evening of January 13, 1982, Claimant was mounting brush holders in a traction motor. He was in the process of attempting to mount an oversized brush holder because of a lack of a proper sized holder. During this process he allegedly injured his back. He advised his Foreman that he may have hurt his back. This Foreman in turn called the General Foreman who was also informed

by Claimant that he may have hurt his back. For some inexplicable reason Claimant would not state precisely that he had hurt his back. He was asked numerous times if he had hurt himself and each time he hedged the answer with the qualification that "he may" have injured himself.

It was undisputed that Claimant departed the premises at 1:15 a.m. on January 14, 1982. He did this without obtaining permission from any of his Supervisors. He did inform the police guard at the plant gate that he was leaving and asked the guard to make note of the time. Evidence from the investigation established that both Supervisors were not in the immediate workplace of the Claimant.

In the investigation Claimant made numerous attempts to demonstrate animosity of the General Foreman toward himself. However, the fellow Employees testifying that the General Foreman threatened the Employees with discharge on numerous occasions for varied events all confirmed that he threatened the Employees as a group. No personal animosity toward the Claimant was established.

During the course of the investigation, the Investigating Officer dismissed the third charge "failure to properly report an alleged personal injury". However, the nature of the first two charges rested on the proof of injury. Claimant's defense was based on the fact that he was injured and that the pain became severe enough that he had to depart the premises.

Claimant's explanation for his qualified response to his injury was that he was uncertain as to whether or not he had become injured at the time of the interrogation of the Supervisors. Unrefuted in the record is the fact that he was injured at some time. His statements concerning injury were unrefuted evidence. Moreover, he submitted a letter from his physician which stated:

"To Whom It May Concern:

"This is to verify that Jerry McKendree is a patient of this office. He contacted me on Thursday at my home and I gave him first aid instructions over the phone for his injury. I also gave him an appointment for Friday to be seen in my office.

"I definitely feel this patient was under my care from Thursday.

"If you have any questions regarding this patient please contact me.

"The diagnosis is Lumbar Strain Primary-Thoracic Muscle Spasms."

This communication was dated January 25, 1982. Both the dates and the diagnosis confirm that Claimant had suffered a back sprain.

There can be no doubt that the charges are literally true. Claimant did not protect his assignment and he did leave the property without obtaining proper permission. This is not to say that the literal violation warrants discipline. Most rules are qualified with a rule of reason. The Carrier had the burden to prove with a preponderance of evidence not only that the violations had occurred, but that the violation was intentional and unreasonable.

Undoubtedly the unexpected departure of an Employee who has definite assigned duties puts a burden on the supervision of the shop. Either his function goes unfulfilled or the supervision is forced to rearrange the work force. In either case the normal flow is interrupted and productivity usually suffers.

Claimant testified that he could not locate either of the Supervisors. This contention was buttressed by statements from fellow Employees in the same general area that the Supervisors were not in the area. The Supervisors testified that they made rounds over all of the property during the course of the shift. The General Foreman testified that he departed the area at approximately 12:45 a.m. He returned to the Claimant's work area at approximately 1:15 a.m. It is obvious that he and the Claimant missed each other only by moments.

Some of Claimant's fellow Employees testified that Claimant had told them that he was going home because of the pain. The police guard was said to have stated that Claimant asked that he not note the time that Claimant left the premises. It is evident to this Board that Claimant was not trying to sneak away unnoticed.

If Claimant had waited for the return of the Supervisor to the work area and then had asked permission to go home, it is unlikely that the permission would have been denied. If it had been denied and Claimant had departed anyway, the exception to insubordination, fear of further injury to oneself, would have defeated any charge against him. At that time Claimant would have been justifiably asked to fill out an accident report, which he should have done in any event. However, the charge against Claimant for failure to properly report an injury was dismissed.

Claimant proved that he had suffered an injury to his back. While he did not follow the stated protocol for leaving work, the result would have necessarily been the same if he had been able to locate his Supervisor. His un rebutted statement that the pain was severe enough that he believed that he had to go. Only proper notification would have resulted from his delaying his departure until the Supervisors appeared. He had notified fellow Employees and the guard at the gate that he was departing. Notice was given to the Supervisors at approximately the same time that they would have received it if he had waited.

The Board finds that no element of a deliberate violation of Carrier rules was proved. The circumstances explain why the Claimant took the unauthorized action. The Board does not approve of failure to follow reasonable rules, but we find that under the facts of this case discipline was not warranted.

The Carrier has informed the Board that Claimant's discipline was deferred per Rule 6-A-4 of the Agreement. We direct that all record of discipline in this instance be stricken from his record.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Deaver - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1985.