

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

(Brotherhood Railway Carmen of the
(United States and Canada
Parties to Dispute: (
(Norfolk & Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk & Western Railway Company violated the controlling Agreement of September 1, 1949, as subsequently amended, when on October 20, 1981, Car Repairer T. M. Williams was given a formal investigation resulting in an unjust assessment of five (5) day deferred suspension against his service record, and further, for failing to maintain a clear record while on probation, T. M. Williams was required to serve a five (5) days actual suspension beginning at 7:00 A.M. November 5, 1981 and extend through and including November 9, 1981, also placed on his service record.

2. That the investigation was improperly arrived at and represents unjust treatment within the meaning and intent of Rule 37 of the controlling Agreement.

3. That because of such violation and unjust action the Norfolk & Western Railway Company be ordered to rescind the assessed discipline and that T. M. Williams be compensated for all time lost plus 6% interest.

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.

This is a dispute initiated by the Organization on behalf of Car Repairer T. M. Williams, the Claimant in the case at bar. The Organization's claim is that the Carrier violated Rule 37 of the Agreement in not providing Claimant with a fair and impartial investigation. As a result of the investigation the Claimant received a five (5) day deferred suspension which later became a five (5) day actual suspension. The Organization objects that the investigation was not timely, that it was tape recorded without Agreement support and that, among other factors, the Carrier failed to meet the burden of proof.

The instant dispute originated on September 2, 1981, when Claimant sustained an on-the-job injury when he lost his balance and fell, after the pigtail bar he was using slipped out of a handhold he was attempting to straighten. The Organization argues that the investigation, held on October 20, 1981 was not timely. A complete review of the record as developed on property and the Agreement does not substantiate this charge. After the injury the Claimant was out of work approximately two weeks and notified within a reasonable time upon his return to prepare a defense of the charges placed against him. In fact, the Claimant was notified on September 25, 1981, and he requested a postponement of at least five (5) days which was granted by the Carrier. There being no specific time frame in the Agreement and no evidence that the delay denied the Claimant his rights, we find no merit to that element of the Claim.

As for the use of tape recordings which occurred without the Organization's consent, there also appears to be no violation of the Agreement. This Board can find no grounds upon which to consider the tape recording of the investigation a violation of the Claimant's rights to a fair hearing within the contract. This is consistent with past Awards pertaining to this same issue on the property (Second Division Awards 9378 and 9379).

As to the record in the case at bar, this Board has reviewed carefully the investigation in light of the charges brought against the Claimant. The record discloses clearly that an injury occurred when the tool used by the Claimant slipped out of the handhold he was attempting to straighten and caused him to lose his balance and fall backwards into a metal stand. It is also clear from the record that the only evidence of Claimant's responsibility for said injury is the injury itself. There were no witnesses to the incident. Claimant maintains he used the tool correctly, carefully and in a manner to avoid injury. The record before this Board does not provide sufficient probative evidence to substantiate the charge and an injury does not in and of itself substantiate guilt (see Second Division Awards 6306, 10334). In this and other discipline cases the Board in its appellate function must determine if the Carrier has provided substantial evidence for a finding of guilt. In the case at bar the evidence of record is insufficient to uphold Carrier's position and sustain the necessary burden of proof (see Second Division Awards 6528, 8082, 7606, 7634).

Consequently, we find that the Company should rescind the discipline compensating the Claimant for five (5) days in which he was improperly suspended. That portion of the claim requesting interest is denied as this Board lacks such authority (see Second Division Awards 6261 and 5672).

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Award No. 10608
Docket No. 10372
2-N&W-CM-'85

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1985