

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12910
Docket No. 12779
95-2-93-2-162

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers, AFL-CIO System Council No. 2
(
(Union Pacific Railroad Company
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

- "1. That the Missouri Pacific Railroad Company is violative of Rule 32 of the June 1, 1960, controlling agreement and has unjustly dealt with and damaged Electrician J. P. Reed at DeSoto, Missouri, when they denied him a notice that was precise, and subsequently denied him a fair and impartial investigation, resulting in the unjust and improper discipline of Suspension from service for ninety (90) calendar days by notice dated October 11, 1991.
2. That, accordingly, the Missouri Pacific Railroad Company be ordered to make Electrician J. P. Reed whole for all contractual rights concerning seniority, vacation, holidays, health and welfare benefits, and all other benefits that are a condition of employment that may be impaired as a result of the wrongfully assessed discipline, and Electrician Reed be compensated as follows: (1) Eight (8) hours at the straight time rate for October 14 through 18, 1991, October 21 through 25, 1991, October 28 through 31, 1991, November 1, 1991, November 4 through 8, 1991, November 11 through 15, 1991, November 18 through 22, 1991, November 25 through 29, 1991, December 2, through 6, 1991, December 9 through 13, 1991, December 16 through 20, 1991, December 23 through 27, 1991, December 30, 1991, December 31, 1991, January 1 through 3, 1992, and January 6 through 10, 1992, and;

(2) The Missouri Pacific Railroad Company completely clear and remove from Electrician Reed's personal record the investigation, the ninety (90) day suspension and all other matters related, and; (3) In addition to the money amount claimed herein, the Missouri Pacific Railroad Company shall pay Electrician Reed an additional amount of 6% per annum compounded annually on the anniversary date of the claim."

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 is employed as an Electrician in Carrier's car shop facility in DeSoto, Missouri.

On August 9, 1991, Carrier issued Notice of Investigation to Claimant, reading:

"Please report to the DeSoto Car Shop Office Conference Room at 9:00 a.m. on Friday, August 16, 1991, for investigation and hearing on charges that you have failed to protect your assignment due to excessive absenteeism which is in violation of Rule 604 of Form 7908, Safety, Radio and General Rules For All Employees. In addition, a review will be made of your personal record file.

This investigation and hearing will be conducted in conformity with Rule 32 of the Scheduled Agreement.

You are entitled to representation as provided for in the applicable agreement and you may provide any witnesses you may desire at your own expense."

The Investigation was rescheduled several times for various reasons and finally took place on October 2, 1991. Claimant was found guilty of the charges and assessed discipline of 90 calendar days suspension, October 11, 1991, through January 12, 1992.

Appeal of the discipline assessed was taken by the Organization on behalf of Claimant, and handled up to and including Carrier's highest officer designated to handle such matters. Failing to reach satisfactory resolution on the property, the Organization referred the case to this Board for adjudication.

Study of the Investigation transcript convinces us that Claimant was properly found guilty of the charges. We say this because not only did the Carrier adduce substantial evidence of Claimant's failure to protect his assignment and violation of Rule 604 of Form 7908, "Safety, Radio and General Rules for all Employees" reading in pertinent part:

"Employees must report for duty at the designated time and place.... They must not absent themselves from duty...."

but Claimant freely admitted being absent and tardy on nine dates between January 10, 1991, and August 2, 1991, ranging from 2 hours and 24 minutes to 10 minutes. We also note that when given the opportunity to offer a reason for his excessive absence and tardiness, Claimant responded "Running late."

In defending its claim that Carrier unjustly dealt with Claimant in assessing a ninety (90) day calendar suspension, the Organization argued that:

1. The Notice of Investigation was improper as it did not contain a precise charge as required by Rule 32.
2. Investigation was not fair and impartial.
3. Prejudicial error was committed when the Hearing Officer also acted as judge, finding Claimant guilty of the charges and assessing discipline.
4. Carrier has no absenteeism policy.

Study of the Notice of Investigation issued to Claimant along with the transcript of the Investigation persuades this Board that a precise charge "excessive absenteeism...in violation of Rule 604 of Form 7908, Safety, Radio and General Rules For All Employees" was issued to Claimant. This is evident from the fact that Claimant in the Investigation was thoroughly familiar with the date and time of his absenteeism and tardiness. Further, when asked by the Hearing Officer, "Are you ready to answer the charges, Mr. Reed?" Claimant responded "Yes." Neither Claimant nor his Representative raised an objection to the "Notice" at the Investigation. To the contrary, we find at the outset of the Investigation the Hearing Officer asked Claimant's Representative:

"Ms. Thompson, before we proceed with the investigation, is there anything you'd like to say for the record?"

who responded:

"No, not at this time."

The transcript of the Investigation reveals no evidence that Claimant was deprived of his Agreement due process rights.

The Board finds no merit to the Organization's argument that the Investigation was not fair and impartial. The record reveals that Claimant was present and participated; that he was represented by representative of his choice and that both were granted full opportunity to make statements and question all witnesses.

This Board finds no merit to the Organization's contention that prejudicial error was committed when the Hearing Officer, following the Investigation, found Claimant guilty and assessed discipline. Certainly, the Hearing Officer was in the best position to make credibility findings. See Second Division Awards 5360 and 5855.

From the record, it appears that Carrier has no absenteeism policy, although it does have Rule 604, supra, which pertains to absenteeism and applies to all employees. Thus, absence of policy cannot serve to set aside the discipline.

The Board also notes the Organization's allegation that Claimant had permission to be absent or tardy on the dates and time in question. We are not convinced that Claimant had permission, but even if he did, he still has the responsibility to report for duty in a timely manner. Award 5 of PLB No. 5082 addressed the issue as follows:

"... The employee, pursuant to his implied employment contract, has an obligation to protect the requirements of Carrier's service. {It}, as common sense indicates, {is} the basic obligation{s}. The employment relationship, among other things, dictates that the employee needs permission at all times to be absent from his obligation to protect the requirements of his employer's service. The fact that permission is granted in response to such request to be off does not, per se, stop the employer from later questioning whether such employee requests have been excessive or even abusive."

Claimant was properly found guilty of the charge of excessive absenteeism and violation of Rule 604. Second Division Award 12504, reveals that the Claimant was charged with excessive absenteeism and violation of Rule 604 on July 20, 1990, granted an Investigation, found guilty and assessed a thirty (30) day suspension. Upon review by this Board, the discipline was set aside on the grounds that a procedural deficiency existed and cleared his record.

Claimant's record having been cleared of prior discipline, this Board is persuaded that a ninety (90) calendar day suspension is excessive and inconsistent with a program of progressive discipline. Accordingly, the suspension is reduced to thirty (30) calendar days. Claimant shall be made whole for any loss suffered during the remaining sixty (60) calendar days of the original ninety (90) calendar days assessed.

Interest will not be allowed as the Agreement contains no provision for payment of interest. See Second Division Awards 11479, 11767 and 12200.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 16th day of August 1995.