

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13272

Docket No. 13189

98-2-96-2-96

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (

(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

"Dispute - Claim of Employee:

That the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the 'Carrier') violated Rule 40 of the Controlling Agreement, Form 2641-Std., as amended, between the Atchison, Topeka and Santa Fe Railway Company and its Employees represented by the International Association of Machinists and Aerospace Workers (hereinafter referred to as the 'Organization') when it wrongfully and unjustly suspended Argentine, Kansas Machinist David E. Cruse (hereinafter referred to as the 'Claimant') for thirty calendar days, September 9, 1995 through October 8, 1995.

Accordingly, we request that the Claimant be paid for his lost work days at his pro rata rate of pay and that all reference to this matter be removed from his personal 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 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 were given due notice of hearing thereon.

Claimant was charged with his alleged failure "to follow instructions and was quarrelsome with the KAW welding instructor on June 29, 1995." He was also charged with being "indifferent to duty and absent without proper authority when "... (he) failed to attend the welding class on June 30, 1995, and pass the required exam ... dishonesty and theft. ..."

Following the Investigation, Claimant was assessed an actual 30 day suspension from service only for "failure to comply with instructions and absence from duty without authority June 29 (30), 1995. ...". He was exonerated from the charges of theft and dishonesty.

After reviewing the transcript, it is evident that Carrier's evidence is mostly derived from statements by individuals at the training school rather than from direct testimony. Claimant's representative did object to the introduction of statements rather than having the authors of those statements available for cross-examination, but the Board in Second Division Award 7347 put the statements in their proper prospective when they said:

"Petitioner alleges that Carrier committed a fatal error in permitting into the record, the written statement of Chuck Anchales, a non-employee, who allegedly witnessed the entire incident.

Such written statement is not a 'fatal' defect, but is subject to the same limitations as other forms of hearsay evidence, namely, while it may be admitted, it should be carefully weighed, once admitted, for its probative value."

It is a well-established precedent of this Board that the credibility of witnesses who testify at an Investigation will not be second guessed by the Board as the Interrogating Officer not only observes the demeanor of the witness, but he also listens to the tenor of the testimony.

Regarding the charge of "failure to comply with instructions," Carrier has relied upon a written statement from a KAW instructor directly involved with the training of Claimant. Claimant's representative, in objecting to the introduction of any statement without the presence of the author, stated that KAW personnel have been available and have testified on previous occasions. The representative's statement was not denied by the Carrier, and when the representative asked further if Carrier had requested that the KAW personnel be present, Carrier replied in the negative. Even though KAW personnel are not Carrier employees and the Carrier lacks the means to demand the presence of any non-employee, in this instance the Carrier should have at least made an effort. The charge of "failure to comply with instructions," when the usual criteria of substantial evidence is applied, has not been established.

Direct testimony at the Investigation by the Carrier witness who conducted the introduction to the training at the outset, reflects that part of the instruction concerned itself with lay-offs by stating that "if they needed to for some reason to lay off, that they were instructed to contact their facility, however, that manner is done there. . . ."

Claimant is no novice to the industry. As of the Investigation, he had accumulated about 30 years of railroad experience, the last 20 or so years with the current Carrier. Surely, when he could not make it to work he knew who to call and when to call to seek authority for his absence. In this instance, he did not call anyone. He simply did not report to the training class on June 30.

Claimant's defense was that he was told by the Instructor on Thursday, June 29, in the afternoon that he might as well head home as he was not going to pass the tests to be given Friday to achieve certification of successfully completing the welding class. The Instructor's statement, on the other hand, is silent as to any such exchange, but regardless, Claimant should have at least called through normal channels to advise that he could not be in class on Friday, June 30, and why. Claimant further attempted to justify his failure to call by stating that Friday, June 30, 1995, was his rest day and he didn't believe it was necessary to call in even though he knew he was being paid to attend training and besides, since the Instructor was perceived to be his immediate Supervisor at the time, he was of the opinion everyone knew he would be off on June 30, 1995.

The Carrier has furnished sufficient evidence to support its findings of Claimant's culpability for the charge of being off without authority. The Carrier expected Claimant

to be in class, and if he could not or would not attend, he was obligated to notify his Supervisor through normal channels as though he had been scheduled to work. The Instructor may have been Claimant's immediate Supervisor as of June 30, but there exists no evidence that Carrier had conveyed to him the authority to grant permission for absences.

In further review of the file, there is no evidence that shows Claimant's work record to be anything other than outstanding, thus the infraction of being off without authority, although it is a serious charge, does not, in the opinion of the Board, warrant an assessment of 30 days out of service. Claimant's absence on June 30, 1995, was not disruptive to Carrier's service. He simply played hooky from school. The discipline is reduced to ten working days with Claimant being paid for all time lost in excess thereof in accordance with the practice in effect on the property.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 18th day of May 1998.