Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7153
SECOND DIVISION Docket No. 6960
2-PCT-MA-'76

The Second Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Penn Central Transportation Company

Dispute: Claim of Employes:

1. That there were no facts to sustain the action of the Penn Central Transportation Company in assessing the five (5) day actual suspension and twenty five day (25) record suspension following the investigation held on Machinist J. Davis held on October 11, 1973.

2. That the hearing was held in violation of Rule 36 & 26 of our controlling agreement.

3. That the Penn Central Transportation Company reimburse Machinist Davis for the wages lost and any fringe benefits, vacation time, Insurance etc., that he lost during the five day actual suspension.

4. That this be removed from Mr. Davis's record, five day actual and twenty five day record suspension and he be made whole.

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 was notified to report for a hearing on a charge of being involved in an illegal and unauthorized work stoppage and leaving the property without proper authority.

Subsequent to investigation, he was assessed a 60 day actual suspension.

During the handling of the matter on the property, the discipline was modified to a five (5) days actual suspension and twenty five (25) days record suspension.

The Organization has raised certain procedural matters in addition to submitting a defense on the merits.

It is urged that the Carrier did not provide a fair hearing, in violation of Rule 36, because Carrier "refused to allow the charging officer to be questioned at the hearing by not having him present." At page 6 of the Transcript of Hearing the General Chairman stated that he would like to question Mr. Antel, the General Foreman, who was not present. Thereafter, the parties considered the request, and debated the question of whether or not he was the "charging officer". We have considered the Organization's cited authority, and have noted a Carrier's duty to present all "material" evidence of which it has knowledge bearing upon the question under investigation (First Division Award 5248) which includes evidence that tends to "... explain, justify or deny the charges." (First Division Award 8260). Nonetheless, we feel it is incumbent upon the Employee to specify, in some reasonable manner, the type of material evidence which is assertedly being withheld from the investigation. We do not feel that the claimant made such a showing. Further, from our review of the record and understanding of the facts which surrounded the asserted misconduct, we fail to understand what factual information could have been provided.

The Claimant alleges a violation of Article 35 because the shop manager refused to enter into a joint statement of facts. Article 35(b) directs that a joint statement shall be prepared should the case remain unsettled after conference with the highest local official, at the point at which the grievance originated.

The notification of intention to file ex parte submission in this case asserted a violation of Rule 36 and 26. It did not claim a violation of Rule 35, and accordingly that assertion is not properly before us.

The assertion that Rule 26 was violated was not substantiated. Rule 26 states that investigations will be held <u>if possible</u> during the time the employees are on duty. Thus, there is no absolute requirement. In addition, we find no indication of record that the Employees raised the alleged procedural deficiency until some time after the investigation was conducted, even though there was ample opportunity to lodge an objection in a timely manner.

Concerning the merits of the dispute, the record demonstrates that another employee, Rudolphy, had been directed to work in an area different than his usual location (drop pit). The Claimant (Local Chairman), Rudolphy and 17 other Machinists were located in the lunch room rather than at their assigned work sites. When asked why the 19 employees were in the lunch room, Carrier witnesses testified that Claimant stated that he would return to

work "... when Mr. Rudolphy goes back to the drop pit."

The employees were then instructed to return to work, but no one left the lunch room. When they were warned about insubordination charges, Claimant advised that all of the employees were sick. At no time material to this dispute did any of the employees advise supervisory employees that they were ill.

The Shop Manager - who had been summoned from home - was asked for time cards at about 1:05 a.m. However, the Manager denied the request and advised that the men who "quit work" at 11:30 would be paid one-half hour's time. Shortly thereafter, Claimant and others left the property, "without permission."

The claimant insisted, at the investigation, that he was in the lunch room because he was sick. However, he refused to elaborate and when asked the nature of the illness, medical attention sought, etc., he stated it was "personal".

Claimant asserts that he can not be held responsible for leaving the property without authority, inasmuch as the Shop Manager advised that he was not being compensated after 11:30 P.M. Although the Manager stated that there was no permission granted to leave the property, the record is rather unclear as to the basis for his "payment for one-half hour" statement. As we read the cold record, it would appear that the employees had no reason to remain at the property, and that they could have reasonably presumed that they were free to leave inasmuch as they were no longer in a pay status. It is interesting to note that the Carrier official who modified the quantum of discipline found that the record "... adequately substantiates that ... were involved in an illegal and unauthorized work stoppage." However, he makes no mention of the charge that claimant left the property without proper authority.

Based upon our consideration of the entire record, we fail to find that Carrier presented substantive evidence to show that Claimant was guilty of departing the property without proper authority.

However, we find that substantive evidence was presented to support the finding that Claimant was involved in an illegal and unauthorized work stoppage. We feel that the evidence referred to above is directly demonstrative of such a conclusion. The fact that one Machinist and one helper may have remained at their work stations, and that other craft employees remained at work, does not alter that conclusion. Claimant's testimony at the hearing was not persuasive to Carrier, and does not operate to rebut the rather obvious inferences of the claimants' intentions.

Under all of the circumstances we are unable to find that the discipline imposed was excessive.

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A W A R D

Claim denied as stated in the Findings, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of October, 1976.