

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International
(Association
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(Southern Railway Company

Dispute: Claim of Employees:

1. That Sheet Metal Worker Student Mechanic J. H. Benton, Atlanta Diesel Shop, was unjustly suspended from the normal duties between August 21, 1975 and Sept. 19, 1975.
2. That the Carrier be ordered to compensate Sheet Metal Worker Student Mechanic J. H. Benton as follows.
 1. Eight (8) hours pay for each and every day that he was withheld from his normal assigned work shift.
 2. Any hours which claimant would have been entitled to overtime at time and one-half rate of pay.
 3. Holiday pay for Sept. 1, 1975.
 4. Any other contractual benefits which claimant may have been entitled to.

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 were given due notice of hearing thereon.

This dispute consists of two separate parts:

(1) Claimant was given a five-calendar-day disciplinary suspension based on absence of seven days and tardiness of two days in a period of 22 assigned work days.

(2) Following a formal investigation, to which the Claimant was entitled, the disciplinary penalty was changed to a 30-day suspension.

As to the initial five-day penalty, the Board finds no basis for disturbing or interfering with the Carrier's judgment. Claimant had a poor attendance record, resulting in previous disciplinary penalties. The 22-day period in question represented a continuation of the poor attendance pattern, and further discipline logically followed.

The Organization contends that, under Rule 30(a) and (b), the Carrier should not have penalized the Claimant for days which he reported off sick.

Rule 30 reads as follows:

"EMPLOYEES UNAVOIDABLY ABSENT

Rule 30. (a) In case an employee is unavoidably kept from work, he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible.

(b) The provisions of paragraph (a) shall be strictly complied with. Excessive absenteeism (except due to sickness under paragraph (a) above) and/or tardiness will not be tolerated and employees so charged shall be subject to the disciplinary procedures of Rule 34.

(c) An employee in service who fails to protect his assignment due to engaging in other employment shall be subject to dismissal."

The Board finds that Rule 30 (a) and (b) does not prohibit disciplinary action. Some of the Claimant's absences were due to reasons other than sickness and thus clearly fall under the "disciplinary procedure" specified in Rule 30 (b). As to absences in which an employee is "unavoidably kept from work", Rule 30 (a) simply says that employees shall not be "discriminated against" -- that is, not singled out for different treatment; it does not prohibit non-discriminatory treatment of absence generally. The only specific reference to "sickness" is the requirement to "notify the foreman as early as possible".

As to the modified (by increasing) penalty, other considerations obtain. The Carrier's undisputed right to increase -- as well as to affirm, decrease or revoke -- a penalty after hearing is clearly specified in Rule 34 (d), which reads:

"(d) Formal investigation, if requested under Section (c) above, shall be held within five (5) days from the date request therefor is made and it shall be conducted by a carrier officer superior in rank to the officer assessing the discipline to determine the propriety thereof. At such investigation the employee (s) involved shall be entitled to assistance of his duly accredited representative (s). The Carrier officer conducting the formal investigation shall receive all evidence, including testimony or statements of witnesses concerning the act or acts upon which the discipline was based, and he shall render a decision affirming, modifying (by increasing or decreasing) or revoking the prior disciplinary action. Such decision shall be rendered within ten (10) days following the date on which such formal investigation is completed."

In this case, however, the Board finds two flaws in the hearing officer's conduct and consequent action.

First, he misquoted, to the egregious point of actually inverting, Rule 30 (b) when he stated:

"Mr. Barlow:

Under Rule 30, you only read part of it, it says 'the provisions under paragraph A shall be strictly complied with.' Now Mr. Benton is charged with excessive absenteeism, he's not charged with not reporting off. 'Excessive absenteeism, due to sickness, under paragraph A above, and/or tardiness', which he's also charged with, 'will not be tolerated, and an employee so charged shall be subject to disciplinary action under rule 34'. Which he is being tried under rule 34. And he was so warned about this."

This is more than a simple misstatement. There is logic to the Organization's position that he in fact misapplied the Rule in his subsequent findings.

Second, the Board in many previous Awards has sustained the right of a Carrier to have an officer conduct an investigative hearing even if he is otherwise previously or subsequently involved in the matter at hand -- but within limits. In this instance, the Board finds the hearing officer exceeds these limits. Rule 34 (d) provides that the hearing officer "shall receive all evidence, including testimony or statements of witnesses

concerning the act or acts upon which the discipline was based, and he shall render a decision affirming, modifying (by increasing or decreasing) or revoking the prior disciplinary action ..." /Emphasis added/

Among the "evidence" the hearing officer did not hear was his own account of previous discussions with the Claimant as to his record. His statements concerning this were not "evidence" subject to cross-examination. Had he been a witness at the hearing, there might have been a different aspect to his account, but as a hearing officer, he exceeded his role.

While the Board has no basis to question the Carrier's authority under Rule 34(b) to modify a penalty by increasing it, what happened in this instance was that the Carrier's officer indicated what he would have done had he initiated the penalty (which he did not) and failed to confine his judgment to "all evidence ... upon which the discipline was based."

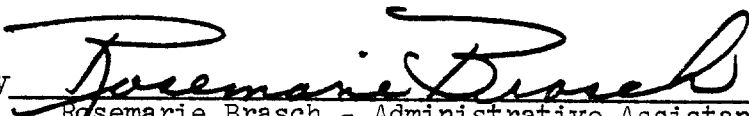
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Claim #1 is denied as to the original disciplinary penalty of five calendar days; it is sustained as to the period beyond these five calendar days.

Claim #2 is sustained as to the period of suspension beyond the original five calendar days; sustained as to holiday pay for September 1, 1975; and denied as to overtime and other contractual benefits.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of November, 1977.