

The Second Division consisted of the regular members and in addition Referee Bernard Cushman when award was rendered.

Parties to Dispute: { Sheet Metal Workers' International Association  
{  
{ Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

1. That the Louisville and Nashville Railroad Company violated the controlling agreement, particularly Rules 22, 32, 33 and 34 when they unjustly dismissed Sheet Metal Worker J. F. Bowles from service effective December 2, 1976.
2. That accordingly, the Louisville and Nashville Railroad Company, be ordered to reinstate Sheet Metal Worker J. F. Bowles to service with all provisions named herein:
  1. Restore Claimant to service with all seniority rights unimpaired.
  2. Compensate Claimant for all time lost at 6% interest per annum.
  3. Make Claimant whole for all vacation rights.
  4. Pay Hospital Association dues or Insurance for all time held out of service.
  5. Pay the premiums for Group Life Insurance for all time held out of service.
  6. Pay Claimant for all Holidays.
  7. Pay Claimant for all sick pay.
  8. Pay Claimant for all insurance premiums.
  9. Pay Claimant for all jury duty.

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.

The Claimant, J. F. Bowles, was employed by the Carrier as a Sheet Metal Worker at the South Louisville Shops. He was first employed by the Carrier on September 23, 1965.

The Claimant was cited for an investigation on October 28, 1976. The citation, so far as pertinent, read as follows:

"You are charged with failure to protect your regular assignment October 13th through this date, being absent from duty without permission of proper authority.

Investigation of these charges will be held at 9:00 a.m., Thursday, November 11, 1976, in the assembly room, General Superintendent of Shops Office Building, South Louisville, Ky.

Arrange to be present with your representative if you desire one, and any witnesses you may care to have testify in your behalf."

Investigation was held on November 11, 1976. On December 2, 1976, the Carrier informed the Claimant that he had been dismissed from the service effective December 2.

Rule 34 provides:

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his local chairman will be apprised to the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The Union contends that the evidence submitted at the investigation does not support the charges and contends further that the Claimant was denied a fair hearing in that the Hearing Officer allowed the introduction of evidence which was beyond the scope of the charges and overruled objections by the Organization to the consideration of such evidence. The Carrier contends that the charges are fully supported by the evidence and that the Organization did not make timely and proper objections to the receipt of the evidence as to past record concerning which the Organization objects. Evidence

was received as to the past record of the Claimant to the effect that Division Manager Lile, on July 19, 1976, had informed the Claimant that he had an alcohol problem which was affecting his attendance and urged that the Claimant seek help through the Carrier's Employee Assistance Program. Evidence was also received concerning reprimands prior to the absences charged for absenteeism, including warnings in April, 1971 and on November 27, 1972. Further evidence was received concerning a warning dated March 8, 1973, and a discussion by Lile cited above on July 19, 1976. None of these matters were dealt with in the charges nor was the Claimant furnished with any information as to his past record to the effect that he would be charged therewith prior to the hearing, November 11, 1976. A review of the transcript indicates that the Organization representative did make objection to the receipt in consideration of such evidence. In this respect, Rule 34 was violated.

We review the evidence regarding the charge of failure to protect his regular assignment from October 14 through 28, 1976. The Claimant did call in on October 12, 1976, and spoke to Ms. J. B. Jarrard, Steno-Clerk, and stated that he would not come in that day because he had a cold and flu. Jarrard construed the statement by Bowles as relating only to October 12, 1976. The Carrier contends that statement should be so construed and the Organization argues that the statement of October 12 should be considered as having a reasonable connotation that the Claimant would be out as long as he was ill.

On October 22, 1976, the Claimant called to inquire about picking up his pay check. On October 26, the Claimant went to the Shop to pick up his pay check and informed the Section Manager, R. Ballard, that he was sick, that when he returned to work he would have a doctor's statement. Ballard testified that the Claimant did not appear ill.

The Claimant testified that he was still ill on the 26th and simply picked up his pay check and went back home to bed. The Claimant admitted that he told Section Manager Ballard on the 26th that when he returned he would have a doctor's statement. He was not able at the hearing to furnish a doctor's statement and testified that he did not see a doctor during the period of his illness. He testified further that he was physically able to return to his assignment on November 8, 1976, but that since he had already been cited and the investigation was scheduled for the 11th of November, that he wanted to see the outcome and he, therefore, did not report back to work. He felt also that had he reported on November 8th he would not have been allowed to work.

The Carrier contends that unless permission has been granted beyond one day employees are required to report daily under Rule 22 of the Agreement, which reads:

"An employe detained from work on account of sickness or other good cause shall notify his foreman as early as possible."

The Carrier also points to the statement in the transcript in response to a question as to whether the Claimant had reported off to anyone for the period from November 13 to November 28 or to the date of the hearing to which he answered in the negative, as supporting its position that the Rule was violated.

The Claimant's testimony that he was ill during the period of his absence from November 13 to November 28 is uncontradicted. His concession, however, that he failed to report off to anyone for the period in question, must be weighed against the claim that he was unable to "make it to a phone" until November 26, is, however, exculpatory, if true. The Carrier apparently found the statement untrue. We need not, however, determine this issue since we find prejudicial the consideration of the Claimant's past record under the circumstances of this case.


Whatever may be the situation as to the charges that were, in fact, made in the citation of December 2, the record is clear that no charges were contained in the citation with regard to the past record of the Claimant. Accordingly, consideration of the past record was impermissible in the light of the provisions of Rule 34 and due process considerations. Indeed, the submission filed by the Carrier with this Board makes it clear that the past record of the Claimant played a part in the decision to terminate his services. There is thus a record which fails to indicate that the Carrier would have discharged the Claimant absent his past record. Under these circumstances, the removal cannot be sustained, and the Claimant must be reinstated with his seniority rights unimpaired and compensated for any wage loss he may have suffered in said dismissal. To the extent that the claim seeks monetary compensation that goes beyond wage loss, such a claim would be inconsistent with Rule 34 and cannot be granted.

A W A R D

The Claimant shall be reinstated with seniority rights unimpaired and compensated for the wage loss, if any, resulting from his dismissal. The dismissal is found to have been in violation of Rule 34.

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 29th day of August, 1979.

CARRIER MEMBERS' DISSENT TO SECOND DIVISION

AWARD 8057 - DOCKET 7740

( REFEREE B. CUSHMAN )

The majority here erroneously failed to determine the issue on its merits because it determined "the past record of Claimant played a part in the decision to terminate his services" and concluded "The dismissal is found to have been in violation of Rule 34".

Established precedent and practice throughout this industry dictate consideration of the employee's prior record in determining the measure of discipline administered. Second Division Awards No. 6333 and 6985 interpreted this same Rule 34, as follows:

Award 6333 (Referee Robert G. Williams):

"In considering the question of what constitutes disciplinary action in this case, this Board has considered the Claimant's entire employment record. He was employed on February 23, 1967 by the Carrier as a machine operator. A careful review of the Claimant's three and one-half years of employment since he was hired reveals no mitigating circumstances in this case. His attendance was poor and his conduct on the job was unsatisfactory."

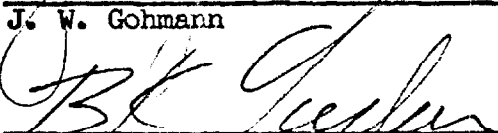
Award 6985 (Referee Walter C. Wallace):

"The Claimant is charged with excessive absenteeism and being absent from his regular assignment on February 13, 1974 without permission. His employment dates back to 1967 and this is not the first time his absenteeism has been the subject of disciplinary action. In 1973 he was subject to an

"an investigation on charges of excessive absenteeism and as a consequence he was returned to his job with the admonition that his attendance record should improve. The record indicates Claimant's absences were reduced for several months in the middle and latter part of 1973".

The Award in this case is contrary to accepted discipline principles. The Claimant's past record here was considered in determining only the question of discipline assessed -- more than substantial evidence established Claimant's guilt for the matter under investigation. That being the case, this decision flies in the face of the discipline principles in this industry, and between these same parties. The decision is palpably erroneous, requires strong dissent, and of no precedential value.

  
J. W. Gohmann

  
B. K. Tucker

  
J. E. Mason

  
P. V. Varga