

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That under the current agreement, electrician J. Berlin, a Dynamoman, was unjustly dismissed from service of the Consolidated Rail Corporation (ConRail) on January 4, 1979.
2. That accordingly, the Consolidated Rail Corporation (ConRail) be ordered to reinstate electrician J. Berlin to service with seniority unimpaired, compensated for all wages lost, and all other rights and benefits because of improper dismissal on January 4, 1979.

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.

On January 4, 1979, claimant was dismissed from the carrier's service for excessive tardiness and absence. Specifically, claimant had been charged with three unexcused absences on October 2, 8 and 29, 1978 and five unexcused instances of reporting to work late on November 4, 5, 6, 12 and 18, 1978. After a hearing held on December 11, 1978, pursuant to proper notice, the carrier determined claimant had committed the charged offenses.

The organization initially objects to the conduct of the hearing officer during the investigation. According to the employes, the hearing officer asked witnesses questions that were so leading in substance to be tantamount to the presiding officer acting as a witness. We are precluded, however, from adjudicating the employe's objection since the objection was not raised during the December 11, 1978 hearing. At the conclusion of the hearing, both the claimant and his representative waived all objections to the hearing when they expressly responded that they had no criticism of the conduct of the hearing. This Board cannot resolve an issue that was not first raised on the property.

Carrier's attendance records conclusively demonstrate claimant was absent and tardy on the days in question. The underlying dispute concerns whether the

claimant had proper cause to be absent and tardy. Claimant offered the following explanations for his failure to timely report for work.

- 1.) On October 2 and 8, his religious beliefs mandated that he refrain from work to observe the Jewish High Holy Days;
- 2.) On October 29, he had to vacate his apartment during normal work hours; and,
- 3.) On November 4, 5, 6, 12 and 18, he was late because it became difficult for him to rise at 4:00 a.m. so that he could punctually report for duty at the commencement of his shift.

There is no language in the applicable agreement which permits employes to be absent for moving or merely because it is inconvenient for them to awake at an early hour. Claimant conceded that he realized each instance of tardiness caused the carrier to expend resources to find a suitable replacement and to incur overtime expenses. Thus, there is overwhelming evidence that claimant was impermissibly absent on October 29 and tardy on the five days in November.

As to October 2 and 8, the organization contends the carrier discriminated against the claimant because of his religious beliefs. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it an unlawful practice for an employer to discriminate against an employe on the basis of his or her religion. In 1972, Congress enacted the following amendment to Title VII which defines religion and set a broad standard for determining the existence of discrimination:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."
42 U.S.C. §2000 e (j).

The broad statutory standard was narrowly interpreted by the U. S. Supreme Court in Trans World Airlines v. Hardison, 432 U.S. 63 (1977). The Court ruled that to require the employer to bear more than a de minimis cost constitutes an undue hardship. In Hardison, the Court expressly ruled that if an employee's observance of religious holy days would force the employer to pay overtime to a replacement, the premium pay is more than a de minimis cost and, thus, outside the proscription of Title VII. Also, while the statute clearly places the burden on the employer to demonstrate that he attempted to reasonably accommodate the employee's religious needs, the threshold burden is on the employee to inform the employer that his work schedule conflicts with a religious observance. This Board has strictly followed the Hardison ruling in cases involving alleged religious discrimination. Second Division Award No. 8226 (Larney). Applying Hardison to the claimant's case, we find that the carrier was never forewarned of a possible conflict with claimant's religious holiday and even if it had been

forewarned, the cost to the carrier to allow claimant's absence would have been more than de minimis. From the sparse record before us, we find no evidence that the claimant approached the carrier in the weeks prior to October 2 and 8 to discuss a possible conflict between his religious observances and his work schedule. Since the claimant decided to take the days off without giving the carrier an opportunity to reasonably accommodate his religious beliefs, he must face the consequences of his unilateral action. Thus, we conclude that the claimant was absent without proper authority on October 2 and 8.

The carrier may properly review the claimant's prior attendance record to determine the appropriate measure of discipline. In the last two years, claimant has been disciplined four times for unauthorized and excessive absence and tardiness. The prior discipline failed to impress upon the claimant that he had to improve his attendance. Instead, he continued a course of conduct which leads us to believe he was an unreliable employee. Therefore, we cannot upset the carrier's judgment that dismissal is the proper penalty.

A W A R D

Claim denied.

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 4th day of March, 1981.