

The Second Division consisted of the regular members and in addition Referee Clarence H. Herrington when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. That the Chicago and North Western Transportation Company violated the current agreement when they assessed Electrician Robert Nicolay fifteen (15) days suspension from service at Oelwein, Iowa beginning December 27, 1979.
2. That the Chicago and North Western Transportation Company violated the current agreement when they failed to compensate Electrician Nicolay for one and one-half hours while attending investigation as directed by the Chicago and North Western Transportation Company on December 12, 1979.
3. That accordingly, the Chicago and North Western Transportation Company compensate Electrician Robert Nicolay for lost wages for fifteen (15) days (eight (8) hours each day), at the pro rata rate account of the improper suspension and one and one-half hours at the overtime rate of pay account of time lost for attending investigation outside of regular shift as directed by Carrier.

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 employed by the Carrier at its Oelwein Diesel Shops, Oelwein, Iowa, on October 23, 1973. On November 20, 1979, Claimant was observed by a supervisor standing near the time clock some five minutes prior to quitting time. Claimant failed to respond to the supervisor's request to return to work. On November 28, 1979, Claimant was directed to appear for formal investigation on the following charge:

"Your failure to properly respond to an order from Foreman T. Reagan on November 20, 1979, at approximately 11:50 P.M. to return to your assignment. Your failure to comply with Shop Bulletin S-105 in that you were observed in your

personal vehicle with the engine running between 11:55 P.M. and 12:00 Midnight on November 20, 1979."

The Organization maintains that Claimant was not afforded a just and impartial hearing, citing as most important the multiplicity of roles assumed by the hearing officer. Specifically, the Organization notes the hearing officer, in addition to holding the hearing, also conducted the preliminary investigation. It further maintains that the Claimant was not properly notified as to the "precise charge" as required by the rule. The pertinent portion of Carrier's notice to Claimant, dated November 28, 1979, read as follows:

"CHARGE: Your failure to properly respond to an order from Foreman T. Reagan on November 20, 1979, at approximately 11:50 P.M. to return to your assignment. Your failure to properly comply with Shop Bulletin S-105 in that you were observed in your personal vehicle with the engine running between 11:55 P.M. and 12:00 Midnight on November 20, 1979."

Upon a thorough review of the record, the Board finds that the objection raised by the Organization regarding the multiplicity of roles assumed by the hearing officer did not, in any way, impair Claimant's right to due process and therefore holds the Claimant did, in fact, receive a fair and impartial hearing. The Board further finds that the charges cited by the Carrier in its notice of November 28, 1979, were precise and fully met the requirements of the rule. Considering the testimony and conduct of the Claimant, as well as his representative at the hearing, it is clear that they were prepared for the investigation, were aware of the precise incident in question, and were sufficiently notified of the Carrier's charge.

The Board, having dismissed the procedural issues, shall now consider the case on its merits.

There was sufficient, competent and credible evidence adduced to support Carrier's conclusions as to Claimant's guilt of insubordination. Foreman Reagan testified:

"Q. Mr. Reagan, did you ask Mr. Nicolay to return to work or did you give him a direct order to return to work? Did you tell him specifically to return to his assignment?

A. The first one I gave him I asked him if he would go back to his place of duty and the second one I asked him if I had to give him a specific order to return to work.

Q. What was his response?

A. He did not respond, he just turned around and walked away.

Q. Did Mr. Nicolay return to his assignment?

A. No, he didn't.

Q. What did he do?

A. He just stood approximately ten feet from the time clock."

This testimony conflicts with the testimony of the Claimant:

"Q. (by Mr. Gallagher) Do you recall Mr. Reagan coming up to you and asking you if you needed a special invitation to return to work?

A. (by Mr. Nicolay) No, I don't recall him saying that at all.

Q. (by Mr. Gallagher) Did you return to your assignment after Mr. Reagan told you to?

A. (by Mr. Nicolay) I made an attempt to but I didn't get very far when the buzzer rang, so I turned around and punched out."

The Board will not resolve the conflict in testimony as that is the function of the trier of facts. Here, the Carrier chose to believe the testimony of the foreman.

This Board has held that insubordination may occur without a stated refusal to do what he is told, as in the instant case, where the employee's actions were diametrically opposed to complying with the lawful instructions of his supervisor.

After a careful review of the facts the Board holds that Carrier did not meet its burden of proof regarding Claimant being in his personal vehicle between 11:55 P.M. and 12:00 Midnight on November 20, 1979. However, the Board finds that there exists substantial proof in the record supporting the findings of Claimant's guilt of insubordination and that the five day suspension imposed was neither arbitrary, capricious, discriminatory or excessive but instead was an altogether appropriate discipline given the offense involved.

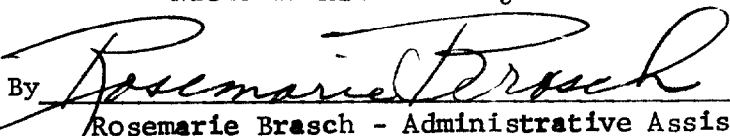
The Board recognizes the distinction between "Discipline" and "Grievance" and holds that the compensation called for in Item 2 of the Organization's claim applies only to conferences concerning Grievances.

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 3rd day of March, 1982.