

The Second Division consisted of the regular members and in addition Referee Edward M. Hogan when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Fruit Growers Express Company

Dispute: Claim of Employees:

- (a) That under the controlling agreement, the Carrier improperly held Junior Mechanic, J. E. Balderson, out of service from June 2, 1980, through June 13, 1980,
- (b) That accordingly, the Carrier be ordered to compensate Junior Mechanic J. E. Balderson for all lost wages during the aforesaid time, plus any and all other benefits due under the current agreement.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 assessed a ten day suspension subsequent to a formal investigation on the charges of excessive absenteeism. At the time of the investigation, Claimant had been employed in the service of the Carrier for less than one year. Evidence presented by the Carrier at the investigation indicated that from March 6, 1980 through May 8, 1980, Claimant was absent from service for a total of five days. Claimant maintained at the hearing and in this appeal that for at least three of the days in question, he was absent due to sustaining a work related injury on April 8, 1980 (burned fingers), and that this injury prohibited him from working on at least three of the days in question.

At the time of the investigation, the Carrier questioned Claimant's contention that the work related injury interfered with his ability to perform insofar as he had worked a complete shift the day he was injured and the following day as well. However, both the Claimant and Carrier agree that the Claimant was given somewhat heavier duty immediately subsequent to the injury, the type of work that required the use of both hands simultaneously.

Also introduced at the hearing was evidence that showed that the Claimant had been previously suspended for five days for excessive absenteeism just two months prior to the instant investigation. The complaint before us raises the issue that the Claimant's past employment record should not have been introduced into the record, and that because it was, that the suspension and hearing were

improper due to unduly harsh, arbitrary and unwarranted introduction of evidence. We do not agree with this contention. It is well settled that the employee's past employment record cannot be used to determine guilt or innocence of the specific charge or charges that an employee faces in an investigation. However, an employee's past employment record can be used in the determination of the degree of punishment and/or leniency to be given if guilt on the original charges are substantiated.

Secondly, the Claimant raises the issue that because the hearing officer issued an immediate determination at the investigation, without actual review of the prepared transcript, that the Carrier did not follow usual procedures. We, however, decline to rule on this point since this issue was not raised on the property. It is well settled that this Board cannot determine nor consider issues raised for the first time before this Board.

Finally, we come to the issue as to whether or not the ten day suspension as ordered in this case is fair and equitable, free from arbitrary, capricious, or abuse of managerial discretion. It is a well-settled point that this Board will not upset findings of fact made at the original investigation, nor will we in this case. However, we find the ten-day suspension somewhat harsh insofar as Carrier admits that Claimant was given heavier duty immediately following his sustaining a work related injury than he had been performing prior to the injury. Therefore, while upholding the Carrier's finding of fact at the investigation and also upholding the Carrier's imposition of suspension, we are modifying the suspension to reflect seven days rather than ten days. While mindful of the fact that Claimant may not have the most admirable employment record in one year's service with the Carrier, we believe that the Carrier's action in assigning the Claimant heavier duty immediately following a work related injury contributed to three of the five days for which he was cited in the investigation. We trust that this modification will make Claimant mindful of his duty and responsibility to protect his assignment and his work relationship with the Carrier.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of December, 1982.