

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

Parties to Dispute: { International Brotherhood of Electrical Workers
{ Southern Pacific Transportation Company (Pacific Lines)

Dispute: Claim of Employees:

1. That under the current Agreement, Mechanical Department Electrician D. D. Cuslidge was unjustly treated when he was suspended from service for a period of forty-five (45) days on March 29, 1979, following investigation for alleged violation of Rules 801 and 810 of the General Rules and Regulations of the Southern Pacific Transportation Company. Said alleged violation occurring on February 16, 1979.
2. That accordingly, the Carrier be ordered to:
 - (a) Compensate the aforesaid employe for all time lost during the forty-five-day suspension and with payment of six percent interest added thereto.
 - (b) Pay employe's group medical insurance contributions, including group medical disability, dental, dependent's hospital, surgical and medical, and death benefit premiums, and railroad retirement contributions for all time that the aforesaid employe was held out of service.
 - (c) Reinstate all vacation rights to the aforesaid employe.

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 to appearance at hearing thereon

At all times pertinent hereto Claimant D. D. Cuslidge was regularly employed by the Carrier as a Mechanical Department Electrician in the Motive Power and Car Department at Sacramento, California.

By written notice dated March 6, 1979 Claimant was advised to be present at a formal hearing on March 15, 1979 in connection with his allegedly being dishonest on February 16, 1979 and with his alleged failure to report for duty at the prescribed time and place and with absenting himself from his employment without proper authority on February 16, 1979, for which he was charged with responsibility which might involve violation of Rules 801 and 810 of the Carrier's General Rules and Regulations.

Rule 801 reads:

"Employes will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in a manner which would subject the railroad to criticism."

Rule 810 reads:

"Employes must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority..."

After the scheduled formal hearing, Claimant was advised in writing under date of March 29, 1979 that the evidence adduced at the hearing established his responsibility in connection with the charges set forth against him and that his actions constituted violation of the quoted Rules 801 and 810. Consequently, Claimant was suspended from service for 45 days beginning March 29, 1979.

A claim was made for the remedy set forth above on the grounds that the Carrier failed to prove by substantive evidence of probative value that Claimant was guilty of the charges leveled against him and that Claimant was not afforded a fair and impartial hearing.

The dispute was handled with all officers of the Carrier designated to handle such disputes, including Carrier's highest designated officer, all of whom refused to make satisfactory adjustment. After final conference in the matter, the dispute was submitted to this Board.

The Employes reference Rule 39 of the controlling Agreement, captioned "Discipline-Suspension-Dismissal", which reads:

"No employe shall be disciplined or dismissed without a fair hearing by the proper officer of the Company. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe shall in writing be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented as provided for in Rule 38. 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. Stenographic report of hearing will be taken if requested and employe's representative will be furnished with a copy."

It is the position of the Carrier that excerpts of testimony given at the formal hearing establish that Claimant absented himself without authority on February 16, 1979 and that he later claimed a token amount of time (30 minutes) so that he would be eligible for holiday compensation, which requires that an employe work the scheduled day before and after the holiday. Further, the Carrier contends that Claimant's action is but a continuation of a history of absenteeism.

The Carrier emphasizes that on February 16, 1979, forty minutes after start of the afternoon shift, Supervisor Thomas went to the Rotating Shop, where Claimant was assigned to perform his duties, with the express purpose of counselling Claimant on Rule 810 because it had been discovered that Claimant left the property approximately one hour early on February 15, 1979. Thomas could not find Claimant, although Claimant's time card had been stamped on February 16, 1979 with a starting time which indicated that Claimant should be present. Three of Claimant's fellow employes working in the Rotating Shop were questioned by Thomas concerning Claimant and each of these employes evoked identical responses, i.e., none had seen Claimant nor knew of his whereabouts.

The Carrier stresses that the two witnesses called by the Organization to establish Claimant's presence on the property on February 16, 1979 testified only to the effect that they spoke with Claimant prior to the beginning of shift. Both admitted not knowing of Claimant's whereabouts after the start of shift and neither saw Claimant punch his time card.

Carrier believes it quite significant that Claimant did not claim that he worked thirty minutes on February 16, 1979 until his return to work on February 20, 1979, the Tuesday following the holiday. Before that time there was no indication on the time card showing when Claimant left the property on February 16, 1979. Carrier is reasonably certain that Claimant, had he been on the property on February 16, 1979 and stamped his time card, would surely have claimed the time before leaving the property on February 16, 1979 so as to ensure eligibility for holiday compensation. Further, it is reasonable to conclude that when confronted by Thomas on February 20, 1979 about being AWOL on February 16, 1979, Claimant would have at that time proved his presence on the property by making known the two witnesses who allegedly saw him on the property that day, but who were not made known by Claimant to the Carrier until over a month later at the formal hearing.

The Carrier contends that Claimant's testimony that he was given permission by Supervisor Thomas on February 15, 1979 to be absent for part of the tour of duty on February 16, 1979 is unbelievable. First, Carrier notes that the Organization did not call employe Molnar as a witness to verify that Claimant's absence for any part of February 16, 1979 was approved by Thomas, although Claimant testified that Molnar was present talking to Thomas when the approval was given. Second, there is no explanation why Claimant would search for Supervisor Thomas on February 16, 1979 if he believed that he already had permission to not complete the shift.

The Carrier concludes that an action of showing only a token time at work on February 16, 1979 by Claimant for the purpose of collecting holiday pay is dishonest. While it is one thing for an employe with proper permission to leave his work during any shift because of a valid excuse such as sickness or an emergency, it is quite another thing for one not to finish a particular shift the day before a holiday when there is no excuse for such conduct. Claimant's action, in effect, was to swindle money by merely being on the property (which wasn't proved) for a short time, and by absenting himself without permission and without cause, for the sole purpose of showing himself eligible for holiday compensation.

While the instant case is Claimant's first brush with Rule 801 pertaining to dishonesty, Claimant has a history of absenteeism and had been spoken with on three occasions prior to the fourth occasion for his absence on February 15, 1979. Carrier's steps to modify Claimant's undesirable behavior has been for naught. Because the discipline assessed here was appropriate for Claimant's infraction of the Rules, the Carrier requests that the claim be denied in its entirety.

The Organization emphasizes that, as admitted by management at the formal hearing, it is common practice for an employe to work only part of his shift before a holiday in order to qualify for the holiday pay. Thomas testified that prior to a holiday it is common for employes to come in and perform a length of service for between fifteen minutes and one hour in order to get paid for the holiday. Consequently, Claimant did not intend to be dishonest or defraud the Carrier when he appeared for work on February 16, 1979, marked his time card for thirty minutes only, spent the time taking out the tools to be used in the Rotating Shop, and performed other activities which were a part of his everyday work duties before leaving the property as Supervisor Thomas had approved.

Further, the Organization stresses that not only was Claimant not guilty as charged, but the hearing was conducted by Administrative Manager B. M. Fitzpatrick in an unfair and partial manner violative of Rule 39 of the controlling Agreement. The Hearing Officer expressed bias and prejudged Claimant prior to the close of the investigation; he gave testimony and inserted bias and leading questions throughout the hearing over the objection of Claimant's representatives; he led the witnesses in order to extract the answers he wanted. Such arbitrary and prejudicial action by a Hearing Officer cannot be tolerated by the Board inasmuch as it makes a mockery of the system of justice afforded by the Agreement. See Second Division Award 2923; Fourth Division Awards 2158, 1175, 1951, 1588, and 1713; and First Division Award 20335.

It is the opinion of this Board that the submission of the Carrier in this case is a careful analysis of the record which might reasonably lead to denial of the claim on its merits except for procedural errors which, in their totality, dictate that the claim must be sustained.

The essence of a formal hearing is to obtain all relevant facts surrounding the incident(s) in question, to ascertain the truth which falls both in favor of and against a claimant, in a manner manifesting a reasonably objective inquiry without preconceived notions of guilt or predisposition against the charged employe. In the instant case, the Carrier's Hearing Officer is not found to have conducted the hearing in a manner satisfying these standards of fairness and impartiality implicit in Rule 39 of the controlling Agreement.

As the Organization has asserted, the Hearing Officer repeatedly framed questions that were leading in nature and improperly assumed facts not established in the record of the case. For example:

TESTIMONY OF SUPERVISOR J. THOMAS
INTERROGATED BY HEARING OFFICER D. M. FITZPATRICK, PAGE 6 OF TRANSCRIPT

"And what did he say?

He just said he was there and then I offered him an AWOL for the day and he didn't act like he wanted it. And when I tried to read him Rule 810 he didn't want to listen.

Did he give you any reason why he didn't want to listen?

He just said he had heard it before.

In other words, he led you to believe he had heard it on several occasions?

Mr. Bryant: Objection, Mr. Fitzpatrick. You are leading the witness a little bit there. There is no evidence that Mr. Cuslidge ever heard on several occasions Rule 810.

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TESTIMONY OF SUPERVISOR J. THOMAS
INTERROGATED BY HEARING OFFICER D. M. FITZPATRICK, PAGE 7 OF TRANSCRIPT

And Mr. Cuslidge stated to you that he was familiar with Rule 810?

Yes.

And led you to believe -- then he stated he was familiar with Rule 810 -- he would be on his normal duty assignment in order to perform his compensative time in order to get paid for the holiday and that portion of Rule 810 which says he should check out with the proper authority, which would have been you, his supervisor, is that correct?

Correct.

Mr. Bryant: Mr. Fitzpatrick, objection. I don't believe I see that in Rule 810. You just stated you have to check out with your supervisor. Could you show me that, please.

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TESTIMONY OF SUPERVISOR J. THOMAS
INTERROGATED BY HEARING OFFICER D. M. FITZPATRICK, PAGE 8 OF TRANSCRIPT

Mr. Fitzpatrick: They must not absent themselves from their employment without proper authority.

Mr. Bryant: The word 'check out' is not a portion of Rule 810. Will you stipulate that Rule 810 does not say 'check out with your supervisor'?

Mr. Fitzpatrick: I will stipulate that Rule 810 states you must not absent yourself from your employment without proper authority and Mr. Cuslidge's proper authority would have been his supervisor, Mr. Thomas. Do you agree to that Mr. Bryant?

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TESTIMONY OF SUPERVISOR J. THOMAS
INTERROGATED BY HEARING OFFICER D. M. FITZPATRICK, PAGES 11 AND 12 OF TRANSCRIPT

Mr. Thomas, did you see Mr. Cuslidge any time on February 16th?

No.

And you stated that you did not approve the 30 minutes for the 16th or the eight hours paid for but not worked on the 19th I believe--

That's true.

-- because Mr. Cuslidge did not render service, is that right?

Right.

But yet he claimed it there, is that correct?

That's correct.

In other words, he conspired to cheat the company?

Mr. Bryant: Objection. There is no evidence that Mr. Cuslidge conspired.

It was on these times in question, they were on Mr. Cuslidge's time card?

Correct.

Did Mr. Cuslidge put those times there?

Yes.

In other words, he must have conspired to cheat the company if he put them there?

Mr. Bryant: Objection. There is no evidence to that.

Is that correct?

Correct.

Mr. Fitzpatrick: Your objection is noted.

And what you are stating then is that in order for somebody to be dishonest they don't necessarily need to collect the reward of their dishonesty if they conspire to do it, is that correct?

Correct.

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On page 13 of the transcript Supervisor Thomas testified as follows when cross-examined by J. M. Bryant:

TESTIMONY OF SUPERVISOR J. THOMAS
INTERROGATED BY LOCAL CHAIRMAN J. M. BRYANT

"OK. Mr. Thomas, Mr. Fitzpatrick addressed to you that Mr. Cuslidge conspired with somebody to cheat the company. Who did he conspire with?

I don't know who with.

Who was it he conspired with? You were agreeing with the Administrative Officer.

He wanted to know who he was conspiring with. I am saying I don't allege that he conspired with anyone.

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TESTIMONY OF GENERAL FOREMAN A. D. MC ADAM
INTERROGATED BY HEARING OFFICER J. D. FITZPATRICK, PAGE 15 OF TRANSCRIPT

"And not only did he not see him on February 16th, he did not receive any word either by telephone or any other means as to why Mr. Cuslidge absented himself on the 16th or why, if he in fact was here, he checked out on the 16th, is that correct?

That's correct."

A review of the testimony given by Mr. McAdams does not include any mention of "word either by telephone or any other means...."

Significantly, the Hearing Officer not only introduced the concept of conspiracy into the hearing, he insisted on pursuing a line of questions obviously intended to obtain corroborating testimony for his conclusion that there must have been conspiracy to cheat the Company over the objection of the Organization and before any evidence was taken from Claimant or his witnesses.

Additionally, the Hearing Officer accepted the hearsay testimony of Supervisor Thomas that employes Bob Lewis, Alex Molnar and John Jenkins had each said he had not seen Claimant in the Rotating Shop on February 16, 1979 to establish that Claimant could not have been at work on that date. The Hearing Officer was not bound to strict rules of evidence, but undue weight cannot reasonably be attached to hearsay evidence. In this case, where Claimant testified that he was at work on February 16, 1979 and laid out the tools for the other employes (but had not seen those employes), the hearsay evidence was not entitled to the weight that the Hearing Officer obviously attached to it just as did the Carrier in its submission to this Board. It would have been a simple matter for the Hearing Officer to have called one or more of the employes working with Claimant in the Rotating Shop to obtain direct testimony to prove or disprove Claimant's contention that he had laid out the tools which all of the employes would use on the day in question. Failure to call such witnesses constituted a serious omission in the search for probative evidence going to a significant factual issue in the case.

In light of the foregoing, it is the determination of this Board that there was no fair, full and impartial hearing in the instant matter and, consequently, the claim shall be sustained to the extent set forth below.

Under Rule 39 of the controlling Agreement, no employe can be disciplined without a fair hearing and where it is found that an employe has been unjustly suspended such employe shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension. Here, it is found that there was no fair hearing prior to Claimant's forty-five-day disciplinary suspension. Consequently, the Carrier is ordered to remedy the unjust suspension by paying to Claimant an amount equalling wages lost during that disciplinary suspension, with seniority rights unimpaired. The compensation for wage loss may be reduced by interim earnings, if any, realized by Claimant to the extent that such interim earnings would not have been realized except for the suspension.

A W A R D

Claim sustained in accordance with the Findings.

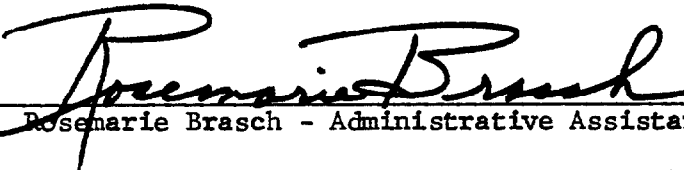
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Award No. 9435
Docket No. 8999
2-SPT-EW-'83

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By



Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of April, 1983.