

The Second Division consisted of the regular members and in addition Referee Barbara W. Doering when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
 { Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement Shop Electrician M. A. Henderson unjustly had an entry of censure placed on his personal record following an investigation held on date of February 26, 1981.
2. The Burlington Northern Inc., further failed in their charged duty to seek out, produce and develop all the facts pertaining to the incident in question and in addition, failed to meet their burden of proof.
3. That accordingly, the Burlington Northern Inc., be ordered to remove all record of investigation and/or mark of censure from Mr. M. A. Henderson's personal record.

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 notified on February 18, 1981 to attend an investigation at 9:00 a.m. on February 26, 1981 in connection with his "... alleged failure to report for duty at the proper time and place on February 12, 1981..."

Petitioner alleges that the hearing conducted on February 26th was not fair and impartial as required by Rule 35 of the controlling Agreement because: 1) the Carrier failed to secure the presence of a requested witness, and in fact wrote to the requested witness in such a manner as to discourage his appearance; and 2) because Carrier scheduled the hearing at 9 a.m. even though regular working hours for all involved except the hearing officer were from 3 p.m. to midnight.

The Board finds that the objection to the morning hour is not timely. Had it been raised prior to the hearing an adjustment might reasonably have been called for. We are not suggesting that hearings be held at night. However, in view of the fact that most participants worked the second shift, it would not have been unreasonable to suggest that the hearing be held after lunch.

As to the question of securing witnesses, the Board agrees with Petitioner that the letter of notification hardly encouraged their presence. Had the witness who failed to come been in possession of relevant information, we would not hesitate to find for claimant on the basis of due process. In any event, however, the hearing officer queried Claimant as to the purpose of the desired testimony and it is clear that the information he had to offer was neither disputed nor particularly relevant to the issue in the charge. Thus the Board concludes that in this instance claimant's procedural rights to a fair and full investigation were not compromised by Carrier's failure to secure the requested witness.

As to the substantive issue, the Board agrees with Petitioner that if indeed claimant told his foreman when asking to leave early the night before the date in question that he was sick, it is at least arguable that he would not need to call in the next day to say he was still sick. We see from the other entries in the "good book" that another employee is shown as having gone home sick with the notation "will ok for work before coming back". Thus there is some evidence to support Petitioner's allegation that in this facility it was not always necessary to call in each day of a continuing illness.

The question here, however, with reference to the claimant is essentially one of credibility -- as to the circumstances in which he reported off early the night before. That is, did claimant report off sick (with the implication that he would be sick until further notice), or did he merely say that he was tired, having worked the previous shift until 7 a.m. and wanted to catch up on some sleep?

Claimant did not deny that he told his foreman he was tired and wanted to go to bed, but claims he also said he was sick. The foreman testified that claimant did not mention anything about being sick and that he (the foreman) makes it a practice to ask employees whether they want to be put in the book for being off sick or for personal reasons. Although there was testimony from a co-worker that claimant informed him he was not feeling well, this is simply not relevant to the question of whether he imparted the same information to his foreman.

It has long been established that this Board will accept the credibility judgments of the trier of fact unless there is something in the record to suggest his determination is clearly capricious. We find nothing of that sort here, and therefore find that the record supports the conclusion that claimant failed to adequately protect his assignment on February 12th. The discipline assessed was not excessive and the claim must be denied.

A W A R D

Claim denied.

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 15th day of June, 1983.