

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: { International Association of Machinists and
Aerospace Workers
{
{ Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That, under the current Agreement, the Baltimore & Ohio Railroad Company unjustly dismissed from service Machinist Gary A. Twigg, from the date of February 26, 1980.
2. That, accordingly, the Baltimore & Ohio Railroad Company be ordered to reinstate Machinist Gary A. Twigg to his former position, compensate him for all time lost, from February 26, 1980 until restored to service, with seniority unimpaired, made whole for all vacation rights, and payment for Health and Welfare and Death Benefits, under Travelers Insurance Policy GA-23000 and Railroad Employees' National Dental Plan GP-12000.

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 December 26, 1979, the Claimant was scheduled to work the 11:00 p.m. to 7:00 a.m. shift at the Carrier's Cumberland Diesel Shop. He arrived for work at the beginning of his shift and received his daily service card and job assignment instructions. At approximately 12:45 a.m. on December 27, the Claimant left his work assignment and did not return. In addition, the Claimant's daily service card had already been completed. It indicated that he had worked eight hours (from 11:00 p.m. to 7:00 a.m.) and was signed by Claimant.

In a December 31, 1979, letter to the Claimant, the Carrier instructed him to attend a January 4, 1980, investigation of the above incident. The letter included the following statement of charges:

"You are charged with being absent without permission from your assigned position (Job #10, Spot 7 on Track 3, 11P-7A shift, working day of December 27, 1979) from 12:45 AM on December 27 until 7:00 AM on December 27, 1979; and

with falsifying your daily service card in that you claim eight hours worked on working day of December 26, 1979.

You are further charged with insubordination in that you failed to obey instructions of your immediate acting Supervisor, L. W. Cox, to perform your assigned work at your assigned station of your regular job assignment during the shift in question."

The investigatory hearing was postponed and rescheduled twice at the Organization's request.

The Organization maintains that the burden of proving the Claimant's guilt rests with the Carrier and that such burden has not been met. Furthermore, the Organization asserts, the Claimant became ill on the morning in question and asked Electrician Apprentice J. C. Hardy to tell Supervisor Cox he was unable to finish his tour of duty. Thus, he was in compliance with Rule 19 of the Controlling Agreement which states, in part:

"In case an employee is unavoidably kept from work he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible either by telephone, messenger, or United States mail." (Underlining added)

The Organization also argues that the Claimant did not falsify his daily service card. Moreover, the Organization maintains, the Claimant's failure to perform his assigned work does not constitute insubordination. It points out that Supervisor Cox did not issue a daily service card to him nor did he assign the Claimant any duties.

Finally, the Organization asserts that the Claimant did not have the benefit of a fair and impartial hearing since Supervisor Cox was not present at the investigation; rather, his written statement was entered into the record. Thus, the Claimant's representative was not able to cross-examine him.

The Carrier maintains that the hearing was fair and impartial and in accordance with Rule 32, quoted in pertinent part below:

"No employee shall be disciplined without a fair hearing by designated officers of the carrier. 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 employee and the duly authorized committee will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

The Carrier also holds that the record contains sufficient evidence to find the Claimant guilty of the charges against him. Though the Claimant says he was ill and had to leave work, at no time did he either request or receive permission

to be absent from his assigned work area. He had seen Assistant Production Superintendent Nave about 12:10 a.m. and Supervisor Cox at about 12:30 a.m. yet did not mention to either of them that he was not feeling well. In view of this, his claim to have been sick to his stomach at 12:45 a.m. is extremely suspect.

The Carrier also argues that the Claimant's conduct constitutes insubordination in that he left his assignment without permission.

The Board has reviewed the Organization's procedural arguments and concluded that they are without merit. Although Supervisor Cox was not present at the investigatory hearing, it is important to note that said hearing had been postponed twice at the Organization's request. According to the Carrier, Cox was on vacation when it was finally conducted but could have attended on either of the two earlier dates. It therefore does not appear that the Carrier deliberately attempted to prevent Cox from testifying. Furthermore, the introduction of Cox's written statement instead of his direct testimony conforms with previously identified criteria for admission: (1) there is no contractual limitation prohibiting the Carrier from submitting such a statement; (2) said statement served merely to corroborate evidence which had been submitted previously; (3) author of said statement was identified and there was no reason to discredit his recorded observation; (4) utilization of the written statement format rather than direct testimony was prompted by valid consideration on the part of the Carrier (Cox was on vacation); and (5) said statement did not add any significant information to the record other than that which had already been presented in direct testimony by other witnesses (Second Division Award No. 8379 (Mikrut)).

After considerable scrutiny of the merits in this case, the Board has concluded that the evidence supports the Carrier's position. It is clear that the Claimant was absent from his work assignment without permission. Furthermore, his claim to have been ill is not supported by the evidence. He failed to mention this alleged illness to either Supervisor Cox or to Assistant Production Superintendent Nave when he saw each of them earlier in the shift. And he testified that he saw Cox at about 12:30 a.m., just 15 minutes before his alleged stomach illness overtook him and caused him to leave his job assignment.

The Board has also concluded, however, that the discharge penalty was excessive for the offense committed. This is not to minimize the seriousness of the Claimant's conduct, for it is fundamental to the survival of any organization that its members remain on the job unless they have permission to do otherwise. Accordingly, the Board has concluded that some severe form of discipline, short of discharge, is warranted.

In view of the circumstances of this case, the Claimant shall be reinstated with seniority unimpaired but without pay or other benefits for time lost.

A W A R D

Claim sustained in accordance with the Findings.

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Award No. 9591
Docket No. 9404
2-B&O-MA-'83

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 10th day of August, 1983.