

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
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(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated Rules 32 and 33 of the controlling Agreement when Carman D. M. Pawlak was assessed a thirty (30) day actual suspension on March 3, 1980, as a result of formal investigation completed on January 9, 1980, at Buffalo, New York.
2. That the Norfolk and Western Railway Company be ordered to make Carman D. M. Pawlak whole for all lost wages, all vacation rights, and all other rights and benefits due him by contract as an employee of the carrier had he not been unjustly suspended.

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.

In early 1979, General Foreman M. S. Bishop reviewed the absence rates of employes in the Carrier's Bison Car Shop and discovered that the Claimant's was high in comparison to that of other employes. He spoke to the Claimant regarding his absenteeism on several occasions, in addition to sending him letters about absenteeism and other aspects of his work related behavior.

In early October, 1979, Bishop heard that the Claimant was also working for the City of Buffalo, New York-Water Division. He learned upon contacting the City of Buffalo directly that the Claimant worked there from June 1 through October 5, 1979, and from October 16 through October 24 of the same year. He was absent from his job with the Carrier from October 12 through 16, October 19 through 23, and on October 26, 1979.

In a letter dated October 29, 1979, the Carrier called the Claimant to a November 8, 1979, hearing to investigate the following charges:

"... to determine your responsibility in connection with excessive absenteeism from your assigned position at Bison Yard, the latest of which was October 26, 1979, and your being continually absent from your assignment without permission from October 12 through 26, 1979."

The investigation was ultimately held on November 19, 1979, at which time the proceeding was tape recorded by the Carrier. When the Carrier subsequently reviewed the tapes to provide a typed transcript of the proceeding it discovered that a portion of them had been damaged, resulting in garbled testimony. The Carrier then notified the Claimant of the problem and the hearing was reconvened on January 9, 1980, to recreate the lost testimony.

By letter dated March 3, 1980, General Foreman Bishop notified the Claimant that, as a result of the formal investigation completed on January 9, 1980, he was being assessed a 30-day actual suspension.

The Organization believes the Claimant was unjustly suspended, in violation of Rules 32 (Grievances) and 33 (re. discharges) of the controlling agreement. Its principle arguments may be summarized as follows: (1) the Carrier's method of transcribing the proceedings (i.e., the tape recorder) and the malfunctioning of the tape recorder were improper; (2) resumption of the investigation on January 9, 1980, after the formal investigation had previously been declared closed by the Carrier, was improper; (3) the Claimant testified that he was sick on the dates in question and that he reported off properly; no evidence in the record conclusively proves that he did not; (4) the Claimant presented evidence that he was under a Doctor's care from October 12 through October 26, 1979; (5) the Claimant was charged with "excessive absenteeism," yet by the Carrier's own admission the charges focused only upon the period from October 12 through 26, 1979; and (6) the hearing officer was biased against the Claimant, since he took exception to the Local chairman's raising legitimate objections during the proceeding.

The Carrier believes the Organization's claims are unclear and unproven. Moreover, it cites the testimony of General Foreman Bishop and that of the Claimant himself as supporting evidence of the charges.

The Board has carefully evaluated the arguments of both parties and, as a result, has concluded that the Carrier's actions were proper. With respect to procedure, we find nothing inherently or contractually wrong with the use of a tape machine to record the verbatim comments at an investigatory hearing. Rule 32 does not specify the method for recording a hearing, or, for that matter, it does not even require that a verbatim transcript be taken. It merely mandates that "... if stenographic report of investigation is taken, the committee shall be furnished a copy." In this case the Carrier did indeed furnish the Organization with a copy of the proceedings.

Nor do we view the tape malfunction and resulting resumption of the investigatory hearing as inherently or contractually improper. On the contrary, the Carrier's action in reconvening the hearing to recreate the missing testimony reflects what appears to be honest concern for an accurate record.

Turning to the claimant's absences, the Board notes his testimony that he reported off sick by telephone, but we are not persuaded by that testimony. First, he claims he was told by a person at the other end of the line that it was OK to miss work, yet he does not know who that person was. The Carrier's decision to discount such testimony seems appropriate. Moreover, the Claimant admitted working for the City of Buffalo during his absence from the Carrier's employ. He essentially testified that he was too ill to work for the Carrier, but that he was able to perform the lighter duty work required of him as an employe of the City. The Carrier was not persuaded by that excuse and neither is this Board. If an employe is not physically or mentally able to report for work, his employer has a legitimate right to expect that he will be doing his best to recuperate during his absence, not working for another employer.

And we find nothing in the record to convince us that the Carrier's appointed hearing officer was biased against the Claimant. the transcript indicates that several procedural questions arose during the hearing, but the hearing officer's conduct in addressing them appears to be aimed at appropriately expediting the hearing, not at constraining the Local Chairman's ability to represent the Claimant.

In view of the above analysis, the seriousness of the Claimant's absenteeism, and the fact that he was counselled several times prior to these incidents about his poor attendance, we do not feel that a 30-day suspension was an unreasonable penalty.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of October, 1983.