

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

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

Dispute: Claim of Employees:

1. That the N&W Railway Company violated the controlling Agreement of September 1, 1949, as subsequently amended when on August 19, 1981, Car Repairer-Welder, L. W. Montgomery was given a formal investigation resulting in an unjust assessment of fifteen (15) day deferred suspension against his service record, effective, October 8, 1981.
2. That the investigation was improperly arrived at, and represents unjust treatment within the meaning and intent of Rule No. 37 of the Controlling Agreement.
3. That because of such violation and unjust action, the Norfolk and Western Railway Company be ordered to adjust the discipline of L. W. Montgomery.

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 employees 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 15-day deferred suspension following a formal investigation on the charges:

"... to determine your responsibility in connection with your excessive absenteeism and early quits, the latest of which were December 10, 11, 12, 26 and 31, 1980; January 9; February 13; March 9, 13; July 22, 30, 31, 1981."

Claimant's supervisor, Foreman J. Fiery, testified at the investigation that, after a period of recurring absences, he informed the Claimant in November of 1980, in the presence of union committeeman Thatcher, that formal action would be taken if the Claimant's attendance did not improve. Subsequent to this conversation, Claimant's attendance record worsened rather than improved. According to Fiery's testimony, the Claimant had an absentee rate in 1980 of 7.4%; after he was warned his absentee rate deteriorated in 1981 to 8.75%. The Carrier contends that this alleged absenteeism was excessive and warranted the imposition of the discipline imposed herein.

Claimant testified in his defense that the absences assessed on December 10, 11 and 12, 1980 were improper because he attempted to work but was sent home by Foreman Fiery. That testimony was rebutted by Foreman Fiery, who stated that Claimant was sent home on November 10, 1980 because he had injured his right eye in a fight; on the December dates, Claimant had not been sent home, Fiery stated.

Other than the exceptions noted above, neither the Claimant nor his representatives offered any explanation concerning his absences. To the contrary, Claimant testified at hearing that "on the days that I missed like I know I've missed too many days. A lot of them was, I don't know. There's no excuse."

Nevertheless, the Organization contends that the claim should be sustained because the Claimant did not receive a fair and impartial investigation, in that: 1) the Hearing Officer permitted testimony concerning Claimant's attendance record prior to the dates for which he was actually charged; 2) a recording device was used to obtain a transcript of the formal investigation; 3) the General Foreman, rather than the charging officer, signed the original letter of charges; and 4) an excessive amount of time elapsed before a decision was rendered following the investigation. None of these contentions is in our judgment meritorious in this case. As to the first point, the evidence adduced at the investigation regarding Claimant's prior absences was clearly relevant and established that Claimant was notified that further absences would result in discipline. With respect to the other procedural objections, the Board finds that the Claimant was not deprived of the fair and impartial investigation to which he is entitled under Rule 37 of the controlling agreement. Prior awards have held that the use of a recording device at an investigation is neither violative of the relevant rule nor prejudicial to the Claimant's rights. See, e.g., Fourth Division Award No. 3754; Public Law Board 1760, Award No. 29. By the same token, the signing of charges by someone other than the charging officer, and the rendering of the decision twenty days past the 30 day deadline did not prejudice Claimant's appeal and are not grounds for overturning the Carrier's disposition.

As to the merits, it is apparent that there was a narrow issue of credibility as to whether Claimant had unexcused absences on December 10, 11 and 12 of 1980. Prior awards often note that the Board is neither authorized nor constituted to make credibility determinations, but instead inquires as to whether the evidence adduced at hearing reasonably supports a finding of Claimant's culpability. See Second Division Awards 8280, 7912, 7955, 8201 and 7973. In the instant case, especially in view of the Claimant's own admission that his absences were excessive, we find that there is no basis for the Board to disturb or interfere with the determination of the hearing officer that Claimant's absenteeism warranted a fifteen-day deferred suspension.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Devet - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1985.