

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

(Brotherhood Railway Carmen of the United States
and Canada

Parties to Dispute: (

(Milwaukee-Kansas City Southern Joint Agency

Dispute: Claim of Employes:

1. That the Milwaukee-Kansas City Southern Joint Agency violated the controlling agreement, as amended, and the Railway Labor Act, as amended, when it suspended Carman David Hayes from service from June 1, 1983, through June 30, 1983.
2. That the Milwaukee-Kansas City Southern Joint Agency be required to pay David Hayes his proper pro rata rate for each day lost, commencing June 1, 1983, and continuing through June 30, 1983, crediting each day's pay to a proper calendar date, and all mention of this hearing be removed from his 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 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.

While employed as an apprentice Carman, the Claimant was charged on April 20, 1983, with failing to report for his assignment at the prescribed time on March 8, 1983, and April 25, 1983. He was also charged with failing to turn in his time cards at the end of his shift on April 4 and 5, 1983, and with failing to show the correct and true information on the time cards when he did turn them in to the Carrier on April 12, 1983.

Carrier's General Rule "N," ¶4 provides as follows:

"Employes must show on time-slips, timebooks, or payroll required information as to work actually performed. Such employes will be held responsible for the accuracy of these reports."

Rule "Q," ¶¶1-3 states:

"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, nor exchange duties with, or substitute others in their place, without proper authority. They must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer.

Employes subject to call for duty must not absent themselves from their usual calling place without notice to those required to call them and must give them written notice of change of address and telephone number.

Failure by employes to protect their employment shall be sufficient cause for dismissal."

At all times pertinent to the instant dispute Claimant's bulletined job assignment was to work vacation relief. On March 8, 1983, Claimant was assigned to work the 7:30 A.M. to 4:30 P.M. shift. The Carrier's witnesses testified the Claimant called in sick at 8:40 A.M. The Claimant admitted in his testimony at the investigation he called in sick at 8:00 A.M.

On April 2, 1983, Claimant was assigned the 3:00 P.M. to 11:00 P.M. shift. It is uncontested that Claimant failed to report until 5:45 P.M., allegedly due to car trouble. Claimant again called in sick for the scheduled 3:00 P.M. to 11:00 P.M. shift on April 3, 1983, but not until 3:30 P.M. Claimant admitted that when he called in on April 3 he was instructed to bring with him a physician's excuse due to his illness that day at his next scheduled shift. However, despite his timely arrival on April 4, 1983, for his 3:00 P.M. to 11:00 P.M. shift, the Claimant failed to bring a physician's excuse and was ordered to do so before he could report. The Claimant made an untimely appearance with a medical excuse at 7:15 P.M. on April 4, 1983.

The evidence of record established that Claimant reported in at 3:30 P.M. on April 5, 1983, for his assigned 3:00 P.M. to 11:00 P.M. shift. Claimant's tardiness was allegedly due to car trouble.

On April 12, 1983, Claimant turned in time cards for the work he performed on April 4th and 5th. The Claimant testified he believed he had turned these two time cards in at the end of each shift, but that the clerk had indicated that Claimant's time cards for these two dates were missing. The replacement cards submitted by Claimant contained incorrect information as to shift times, locations worked and actual hours worked. The combined total of hours worked as claimed on the April 4 and 5, 1983, time cards was in excess of the actual work performed by 4 3/4 hours.

The Organization contends that the Carrier has ignored Rule 15 of the controlling agreement. Rule 15 provides:

"In case an employe is unavoidably kept from work he will not be disciplined. An employe detained from work on account of sickness, or any good cause, shall notify his foreman as early as possible."

The fact that Claimant notified the Carrier that he would be absent does not act as an automatic bar to a charge of failing to protect his assignment. This is as true where the charge is failure to protect one's assignment as it is when a charge of excessive absenteeism has been made against an employee. See Second Division Awards 7803, 8881, 8876. The Claimant called in sick after his shift began on March 8 and April 3, 1983. He failed to make the proper arrangements to insure he reported to work in a timely fashion on April 2 and April 5, 1983. Despite a warning to report with a medical excuse in hand on April 4, the Claimant failed to do so. The Board concludes upon the evidence of record that Carrier met its burden of proof on the charge that Claimant failed to protect his assignment.

The Organization asserts that prejudicial error occurred when the hearing officer refused to call the Carrier's time clerk to show the ordinary practice, commonly referred to as a "kick back," for correcting obvious errors in time cards submitted by employees. The Board finds that such error, if any, with respect to the failure to call the time clerk was harmless. There is no showing on the record of any pre-hearing effort by the Organization to secure the testimony of the clerk, although such an appearance cannot always be anticipated in advance of hearing. No request for a postponement of the proceedings was made by Claimant's representative in order to produce the clerk and elicit his testimony. The responsibility for the fact that Claimant prepared and submitted time cards with false information contained thereon simply cannot be shifted to the Carrier's clerk. Claimant had ample opportunity to verify the actual hours he worked from his work records, but failed to do so.

The Carrier has conceded that a Memorandum of Agreement was entered into between the parties whereby Rule 29 was amended to provide for all known written documents to be furnished, if feasible, upon written request by the employee or his duly accredited representative if requested within 48 hours of such formal investigation. The Organization argues that failure by the Carrier to comply with the Memorandum of Agreement after it timely presented a written request for written documents compels this claim to be sustained.

The only relevant written documents submitted at the investigation were Claimant's two time cards for April 4 and April 5, 1983, and a copy of Bulletin #21 which calls for time cards to be accurately prepared and turned in daily.

The Board finds that the testimony of Claimant and Carrier's witnesses was sufficient to meet the burden of proof as to the Claimant's falsification of the time cards and failure to protect his assignment required by Rules N, Q and the Bulletin Notice. Careful review of the investigation in its entirety reveals that the effect of the Carrier's failure to timely provide the Organization with the time cards and Bulletin Notice for the investigation was de minimus. The Board finds, however, that there is insufficient evidence that Claimant failed to turn in his time slips on a daily basis as required by Bulletin No. 21.

The Carrier should be cognizant that not every investigation will provide similarly lucid testimony, and the result of harmless error in failing to comply with timely discovery requests. The terms of the Memorandum of Agreement are explicit on this issue, and Carrier would be ill advised to rely on these findings in future cases.

The Board's review of all the facts and circumstances leads to the conclusion that suspension in this case is fully warranted. The Claimant's chronic failure to timely report is not excusable. Falsification of time records has been held to be grounds for the assessment of significant discipline. Second Division Awards 7817, 7673, 10448. This Board concludes that in light of the evidence adduced at the investigation and Claimant's prior record which includes a formal letter of warning on October 18, 1982, for incorrect preparation of time cards, that the penalty assessed was neither arbitrary, capricious nor excessive.

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 4th day of December 1985.