Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10689
Docket No. 10588
2-B&O-CM-'85

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States (and Canada
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(Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That the Baltimore and Ohio Railroad Company violated the terms and/or provisions of the controlling Agreement, when on the date of October 13, 1982, they arbitrarily and without just cause, subjected Claimant, Michael J. Gaboda, Car Inspector, Philadelphia, PA, to an unfair and partial investigation, such investigation held in direct violation of the provisions of Rule 32 of the controlling Agreement, whereby Claimant, as an alleged result of such investigation, was unjustly subjected to discipline to the extent of thirty (30) days actual suspension, commencing with the date of November 10, 1982 and extending through the date of December 9, 1982.

2. That accordingly, Carrier be ordered to compensate Claimant, Gaboda, for all time lost as a result of such administered discipline, allegedly account the above referred to hearing, that the alleged charge against Claimant be declared null and void, that he be made completely whole, both monetarily and benefits to which entitled, as though he were never subjected to suspension, (30 days) from November 10, 1982 through December 9, 1982, and that his record be cleared accordingly.

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 employes 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 employed as a Car Inspector by the Carrier at its facility in Philadelphia, Pennsylvania. He was assigned the work of inspecting inbound and outbound trailers from 7:00 A.M. to 3:00 P.M. On October 7, 1982, Claimant was charged with falsification of his time card, and leaving company property without permission on October 2, 1982. After a formal investigation conducted on October 13, 1982, Claimant was assessed a thirty (30) day actual suspension.

The Organization in its argument and submission to this Board maintains that Claimant was not advised of a precise charge, and that the Carrier failed to meet its burden of proof. The Board finds that the Carrier's charging letter sufficiently informed Claimant that he was being investigated for leaving company property without permission, and falsification of a time card on October 2, 1982. Claimant had adequate notice from which he could prepare his defense to the charges including the presentation of witnesses on his behalf, and effective cross-examination.

The Board is compelled upon examination of the entire record to uphold the Hearing Officer's determination that Claimant had left company property without permission. The evidence consisted of testimony by Carrier's Assistant Car Foreman that Claimant had left Carrier's property to vacuum his personal motor vehicle. This testimony was based on hearsay statements by the Middle Track Patrolman who did not appear at the investigation, and Claimant's own statement upon his return to the gate sometime after 3:00 P.M. While it is undisputed that Claimant left his assignment for a minimum of forty minutes, Claimant admits that he did so only because he suffered from a sudden attack of diarrhea, and the corresponding need to use the men's restroom. The Carrier Patrolman on duty when the Claimant left his assignment, and called as a defense witness, testified upon examination by Claimant's representative as follows:

"Q. Did carman Gaboda talk with you when he left the gate:

A. Yes.

Q. Could you tell us what he told you?

A. To the best of my knowledge, Mike Gaboda kiddingly stated that he had to vacuum his car and I stated that you better get out of here. At this time Mr. Gaboda said he was going to the Yardmaster to take a shit."

The question of the credibility of witnesses and the weight to be given their testimony is primarily one for determination by the Hearing Officer, but this general rule should not be mechanically applied. The Board finds that whether Claimant was ill as he contended or simply performed personal chores on Carrier's time, he did leave the property without permission under circumstances where such permission should have been obtained. Claimant offers no explanation why he drove approximately one mile to use a restroom, rather than waiting to use one nearby which was occupied, or have another nearby facility unlocked for his emergency use. While Claimant testified that he tried to reach his Supervisor by radio in his car, he admitted that he left the radio in his car during the time he was in the restroom, and therefore was incommunicado.

The Board finds, however, that the charge of time card falsification was not supported in the transcript of the investigation. The Claimant testified that it was common practice to complete his time card before his shift commenced at 7:00 A.M. in the morning. The Assistant Car Foreman testified that he had signed his approval to Claimant's time card during the shift in question, and that his reason for removing his signature of approval was that Claimant had "walked off the job." He testified that Claimant arrived back at the gate at 3:15 P.M. at which time Claimant was immediately asked to leave Carrier's property. In light of Carrier's apparent common practice with respect to employees presigning their time cards, the Supervisor's signature of approval on Claimant's card, the reason for his removal of same, and Claimant's immediate removal from the property, the Board finds the Carrier failed to meet its burden of proof that Claimant falsified his time card for October 2, 1982.

This Board is of the considered opinion based upon the evidence of record that the discipline assessed was excessive and unreasonable in relation to the proven offense. Therefore, the Board orders that Claimant's discipline be modified to a fifteen (15) day actual suspension. Claimant shall be compensated for the difference between the amount he earned while improperly withheld from service, and the amount he would have earned on the basis of his assigned working hours during the same period. Claimant's personal record shall be so noted.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1986.