

The Second Division consisted of the regular members and in addition Referee Ronald J. Nelson when award was rendered.

(International Brotherhood of Firemen and Oilers

Parties to Dispute: (

(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That in violation of the current agreement, Laborer R. L. Adkins was unjustly dismissed from all service of the Norfolk and Western Railway Company on March 15, 1985, as a result of an investigation held on February 27, 1985.

2. That accordingly the Norfolk and Western Railway Company be ordered to make Laborer R. L. Adkins whole by restoring him to all service of the Norfolk and Western Railway Company with seniority rights, vacations rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 10% annual interest and reimbursement for all lost benefits under health and welfare and life insurance agreements during the time he was held out of service.

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.

Although the record submitted by the parties is extensive, the issue to be resolved is relatively uncomplicated.

Claimant was dismissed by the Carrier on March 15, 1985, as a result of an Investigation held on the property on February 27, 1985. The Carrier charged the Claimant with being absent without permission and failure to protect his assignment from 9:45 P.M. to 12:00 Midnight on January 4, 1985, and his failure to follow verbal instructions from his Supervisor Gang Leader.

The lengthy record shows that the Claimant approached Supervisory Gang Leader D. L. Harness shortly after 9:00 P.M. on January 4, 1985, and indicated that he wanted to mark off at 9:30 P.M. The record shows that this initial statement was interpreted by the Claimant and the Gang Leader as a request to leave prior to the ending of the shift. The Gang Leader denied Claimant's initial request at which time Claimant informed the Gang Leader that he was sick. Harness told Claimant to check back with him after a short period of time. Claimant approached Harness a second time at approximately 9:30 P.M. on January 4th and reiterated his request to mark off early. At this point, Harness informed Claimant that he needed Claimant on the job, and that if Claimant left it would be without permission. The record reflects that Claimant informed Harness that "... he was sick and to mark him off at 9:45." Claimant then left the Carrier's property without seeking any medical attention, and did not seek any medical attention until February 11, 1985, approximately five weeks after the incident on the Carrier's property.

Although the testimony of the witnesses is conflicting as to the location of the initial discussion between the Claimant and his Supervisor, the substance of the testimony is consistent as to the substance of the testimony regarding the second encounter between the Claimant and his immediate Supervisor. It is not necessary, therefore, for this Board to resolve the discrepancy with regard to the location of the initial discussion.

The Organization's contention that the Carrier did not conduct a fair and impartial Hearing is a serious allegation. Such an allegation attacks the integrity of the grievance/investigatory mechanism itself, and warrants close scrutiny by this Board.

The salient thrust of the Organization's contention is that the Carrier's unilateral exclusion of five of the nine witnesses requested by the Organization resulted in the inability of the Investigating Officer to develop all of the pertinent facts. Such action on the part of the Carrier is a serious flaw in the investigating process, however, in light of the particular facts of this case, the Carrier's actions were not fatal. The Carrier notified the Organization of its actions prior to the onset of the Investigation, and did not take steps to prevent the five witnesses from being present at the Investigation. The notice to the Organization advised the Organization that it could take steps to have the five witnesses present. Further, there is no serious controversy as to the substance of the testimony of those witnesses who were present at the Investigation.

The Claimant's contention that he thought he had permission to mark off cannot be sustained by the facts in the record. Given the Claimant's number of years of service, his knowledge of his job responsibilities, and his experience in Union-Management relations, Claimant's position cannot withstand the practical application of day to day Shop/Labor relation principles.

Further, the record reflects that the disciplinary steps taken by the Carrier reflect the generally accepted progressive nature recognized in the Labor relations field, and the Board finds that the discipline was not excessive nor improper in light of the facts contained in the entire record.


Accordingly, for the reasons cited above, the Claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy O. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of January 1987.



LABOR MEMBERS DISSENT

TO

AWARD NO. 11112, DOCKET NO. 11127)  
(REFEREE NELSON)

The denial decision of Award No. 11112 violates the fundamental principle of due process. It ignores the substantial weight of the record and allows the Carrier to circumvent and then shift its exclusive duty of burden of proof in discipline cases from its own shoulders to the shoulders of the Organization. The Carrier is also awarded disparity of treatment and these skirtings of justice breach the fundamental tenets of the judicial and due process principles.

The employees, in written documentation, had requested nine witnesses to testify in the Claimant's behalf. All but one of the employees was still employed at the Carrier's facility. In pre-hearing discussions with five of these witnesses, the Carrier predetermined that their testimonies would be useless and never called them to the investigation. Turning instead to the Organization it stated to them that they could take steps to have these five witnesses present. In Award No. 11115, rendered by this same honorable Referee and issued on the same date as this Award, it is stated:

"Fundamental fairness requires that the accused be allowed to develop all the pertinent facts relative to his defense to the charge lodged against him." (Emphasis added)

In correlation with the developments of the facts, Award No. 8236 (Roukis) states:

"This Board has consistently held as a matter of due process that the burden of proof in discipline proceedings rests exclusively upon the employer..." (Emphasis added)

Additionally, Award No. 10946 (Briggs) correctly states that when two divergent opinions exist, the moving party must prove their allegations. A myriad of Awards (See 4780, 7494, 7663, 7634, 8077, and 8695) reestablish and reaffirm that principle and yet the erring Majority conversely state in Award No. 11112:

"The salient thrust of the Organization's contention is that the Carrier's unilateral exclusion of five of the nine witnesses requested by the Organization resulted in the inability of the Investigating Officer to develop all of the pertinent facts. Such action on the part of the Carrier is a serious flaw in the investigating process, however, in light of the particular facts of this case, the Carrier's actions were not fatal. The Carrier notified the Organization of its actions prior to the onset of the Investigation, and did not take steps to prevent the five witnesses from being present at the Investigation. The notice to the Organization advised the Organization that it could take steps to have the five witnesses present." (Emphasis added)

This allowing of the shifting of the burden of proof is more than a serious flaw. It constitutes no less than annihilation of long held principles of this Board. The Carriers actions were most certainly fatal, fatal to this Claimants due process rights, fatal to a fair, full investigation.

The Award goes on to state:

"Further there is no serious controversy as to the substance of the testimony of those witness who were present at the Investigation."

With this we agree! The substance of those testimonies clearly indicate that the Claimant was ill on the night in question. Each witness, some as early as two hours before the Claimant's initial request to mark off, indicated that they had heard the Claimant say he was ill or heard him request permission from the Gang Leader to go home because he was ill. What we disagree and dissent to is that the substance of these testimonies were not given substantial weight.

As Referee Nelson states in Award No. 11116:

"...The General Rule is that the conclusions of the trier of fact must be supported by the substantial weight of the evidence as shown in the record." (Emphasis added)

What was given substantial weight was the hearsay testimony of the Carrier's foreman and the personal feelings of the Gang Leader. The foreman related in the record the hearsay happenings of the night in question. His evidence consisted of the story told to him by the Gang Leader. The foreman was not even present on the night in question. The Gang Leader bases his decision on the Claimant's health by how the Claimant looks and how he personally feels about the whole situation. Hearsay evidence and the personal feelings of management do not constitute the substantial evidence needed to assess any discipline, let alone the supreme penalty of dismissal.

The record also contains testimony that another employee, one of five Carrier predetermined useless, uncalled witnesses had been excused because of illness on the same night as the instant case, but no discipline was assessed to him. This disparity of treatment could have been fully developed had the due process requirements of a fair and fully developed hearing been honored and if the burden of proof had not been improperly shifted from the Carrier to the Organization.

Most certainly, justice was swayed toward the Carrier in this Award. The Majority turned a deaf ear to the quantum measure of evidence and allowed gross violations of due process and disparity of treatment.

Most certainly and vigorously, the Labor Members dissent to Award  
No. 11112.

Don A. Hampton

RA Johnson

Charles D. Early

M Cullen

Thomas D. Schmitt