Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11115
SECOND DIVISION Docket No. 11150
2-C&NW-EW-'87

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

Parties to Dispute: (International Brotherhood of Electrical Workers
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(Chicago and North Western Transportation Company

Dispute: Claim of Employes:

1. That the Chicago & Northwestern Transportation Company violated the controlling agreement, dated July 1, 1921, as amended and specifically Rule #35, when they arbitrarily suspended Electrician Mohammed Khan from service for 60 days.

2. That the Chicago & Northwestern Transportation Company make Mr. Khan whole for all wages, insurance, pension, vacation and seniority rights and benefits contractually available to him.

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 alleged by Carrier to have falsified his time card on August 9, 1984, by entering eight hours as time actually worked, whereas Claimant was off the Carrier's property without permission for approximately 50 minutes on the date in question.

Claimant contends that Carrier's accepted past practice, notwithstanding the Carrier's Rule, allowed for outlying employees to leave the Carrier's property for short periods of time during the scheduled tour of duty to obtain coffee and other similar items.

After two postponements, the Investigation was conducted, and the record reflects that the Carrier's witness, the Claimant's Supervisor, observed that Claimant was absent or was not observed on the Carrier's property for a period of 50 minutes after the beginning of the Claimant's normal shift time. Claimant's testimony indicates that he was off the premises to obtain coffee to counteract drowsiness caused by certain medication. Claimant's testimony showed that it was an accepted practice for outlying employees such as Claimant to be absent from the Carrier's premises to obtain coffee and similar items. Claimant offered a co-worker's testimony which corroborated Claimant's testimony with regard to leaving the Carrier's premises. Carrier refused Claimant's request for the presence, as a witness, of the former Superintendent for the purpose of testifying as to the existence of the claimed "accepted practices."

As a general rule, the Board will not substitute its judgment for that of the trier of fact when it comes to resolving discrepancy in the testimony of the witnesses. The conclusions of the trier of fact will not be disturbed unless it can be shown that the conclusions are not supported by the evidence, in the record. Here, the Claimant's direct testimony, regarding the accepted practice of the Carrier notwithstanding the Carrier's Rule, was corroborated by uncontroverted direct testimony of the Claimant's witness. Accordingly the preponderance of the evidence will not support the conclusion of the Hearing Officer.

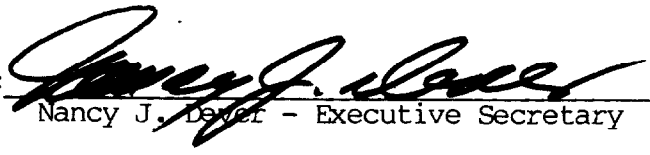
In addition, the Carrier has failed to meet the requirement of conducting a fair, impartial, and complete Hearing. Fundamental fairness requires that the accused be allowed to develop all the pertinent facts relative to his defense to the charge lodged against him. The Hearing Officer abrogated his responsibility of conducting a fair and impartial Hearing by denying the Organization's request that an Official of the Carrier with specific knowledge as to the "accepted practices" be allowed to testify. Such testimony predictably would have resolved the difference in the testimony of the Claimant and the Carrier's witness. Such denial was fatal in this case.

For the reasons cited above, this Board finds that the Carrier did not meet its burden of sustaining the charge by a preponderance of the evidence, and did not conduct a full and impartial Hearing.

A W A R D

Accordingly, the Claim is sustained in accordance with the Controlling Agreements.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

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