

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Southern Pacific Transportation Company (Western Lines)

Dispute: Claim of Employes:

1. Under current Agreement, Mechanical Department Electrician J. G. Avila was unjustly disciplined when he was suspended from service for a thirty (30) day period commencing September 30, 1985, following investigation of alleged violation of portions of Rule 802 and 810 of the General Rules and Regulations of Southern Pacific Transportation Company (Western Lines). Said alleged violation occurred on August 13, 1985.

2. Accordingly, the Southern Pacific Transportation Company (Western Lines) be ordered to compensate Electrician J. G. Avila for loss of wages during said thirty (30) day suspension, including vacation, payment of medical and group disability insurance, railroad retirement contributions; and loss of wages to include interest at the rate of ten percent (10%) per annum.

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.

The record shows that Claimant, employed by the Carrier as an Electrician in Carrier's Dallas Yard at El Paso, Texas, had been in the service of the Carrier in excess of forty years.

At about 9:05 A. M., August 13, 1985, while on duty, Claimant was involved in an automobile accident while driving a Carrier pickup truck on a city street in El Paso. Claimant was accompanied at the time by a Caboose Laborer, who customarily worked with Claimant while repairing Caboose. The

Carrier states that the accident took place at an intersection controlled by traffic lights, and when Claimant proceeded to cross the intersection on a green light, another vehicle from the right ran a red light and struck Carrier's pickup truck on the right front quarter panel. There was considerable property damage, but the Claimant and the Caboose Laborer, and two sidewalk repairmen who were struck by the truck at the time of the accident, were treated for minor cuts and bruises and released by hospital authorities. There is no charge that Claimant was responsible for the automobile accident.

On August 16, 1985, Claimant was cited to appear at a formal Hearing to develop the facts and place responsibility, if any, in connection with Claimant allegedly absenting himself from Carrier's property during his tour of duty on August 13, 1985, at 9:05 A.M., without proper authority, allegedly in violation of those portions of Rules 802 and 810 reading:

"Rule 802

Indifference to duty, or to the performance of duty will not be condoned.

Rule 810

Employees 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 without proper authority."

The Hearing was postponed and conducted on September 3, 1985. A Transcript of the Hearing has been made a part of the record. On September 30, 1985, Claimant was assessed a discipline of thirty days' suspension.

We have reviewed the Transcript of the Hearing conducted on September 3, 1985, and find that it was conducted in a fair manner, notwithstanding what we may consider unnecessary discussions by all participants of matters of no consequence.

In discipline cases the burden is on the Carrier to produce substantial evidence in support of the charge. The "substantial evidence" Rule was set forth by the Supreme Court of the United States as:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consol. Ed. Co. vs Labor Board 305 U.S., 197, 229).

The proof issue in the present case gives us concern. On our review we find that the Carrier has not produced substantial evidence in support of the charge against Claimant. There is evidence in the record that Claimant was performing his duties in the usual and customary manner on August 13, 1985.

The Claim will be sustained to the extent of awarding Claimant compensation for time actually lost as a result of the suspension, the compensation to be computed in accordance with Rule 39 of the applicable Agreement. We have been referred to no Rule providing for the payment of "interest at the rate of ten percent (10%) per annum," or the other fringe benefits requested. (Second Division Award 5162).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Devey - Executive Secretary

Dated at Chicago, Illinois, this 1st day of April 1987.



CARRIER MEMBERS' DISSENT
TO
AWARD 11240, DOCKET 11298
(Referee Carter)

The Claimant was charged with absenting himself from Carrier property without proper authority. The record shows, without dispute, that at 9:05 a.m. on August 13, 1985, the Claimant was indeed off the property. The only factual issue was whether he was authorized to leave the property. Claimant's position was that he was authorized for two reasons. First, he contended that he was on his way to purchase gasoline for the Carrier pickup truck he was driving. Undisputed testimony at the Investigation, however, revealed that the truck's gasoline tank was three-quarters full and that Claimant had not taken the Carrier's gasoline credit card which was necessary if gasoline was to be purchased.

Second, the Claimant testified that in addition to the purchase of gasoline he also was on his way to service the caboose of a train that was due to arrive at Carrier's depot. Undisputed testimony, however, showed the train was not scheduled to arrive until 10:15 a.m., more than an hour from the time the Claimant left the property of the Carrier; the Claimant had no reason to believe the train would arrive at the depot rather than the Yard where Claimant had been working; the customary manner for Claimant to ascertain where the train was to arrive was by radio and, while the truck had a radio, no information had been requested by the Claimant about the location of the incoming train or the actual time of its arrival which turned out to be 12:55 p.m. In addition, there was evidence that Claimant had left the Yard location before completing all work required of him in the Yard.

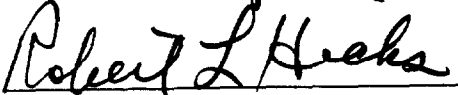
The Majority correctly concluded that the burden of proof was upon the Carrier to establish by substantial evidence, defined as "relevant evidence as

a reasonable mind might accept as adequate to support a conclusion," that the Claimant did not have authority to be off the Carrier property. We submit that the only additional evidence lacking in this case was a signed confession.


We Dissent.



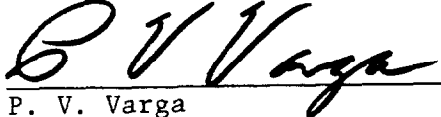
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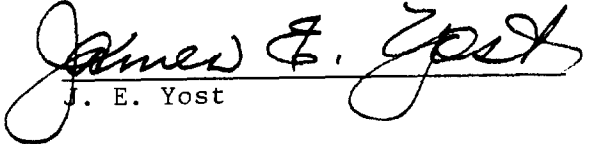
R. L. Hicks



M. C. Lesnik



P. V. Varga



J. E. Yost