

The Second Division consisted of the regular members and in addition Referee William O. Hearn when award was rendered.

(International Brotherhood of Firemen and Oilers
PARTIES TO DISPUTE: (
(Norfolk Southern Corporation (Southern Railway Company)

STATEMENT OF CLAIM:

1. That under the current and controlling agreement Service Attendant A. L. Turner, S.S. 252-98-5843, was unjustly suspended from service on August 24, 1988 by Mr. J. D. Ricks after an investigation was held on August 17, 1988.

2. That accordingly, Service Attendant A. L. Turner be compensated for the dates of August 24, 1988 through October 22, 1988, both dates inclusive (42 work-days), the payment of 10 percent (10%) interest rate be added thereto and his personal record expunged of any reference to this suspension from 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 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 notified to attend a preliminary Investigation on July 25, 1988, charged with conduct unbecoming an employee and insubordination. At the conclusion of the preliminary Investigation, Claimant was dismissed from service.

Claimant requested a formal Investigation which was scheduled for August 1, 1988, but was postponed twice and subsequently held on August 17, 1988.

Following the Investigation of August 17, 1988, Carrier's Senior General Foreman reduced the penalty from dismissal from service to sixty (60) days suspension beginning August 24, 1988, and ending October 22, 1988.

From reviewing the evidence of record it is noted that the Foreman was instructed by the General Foreman, to have Claimant report to his office for a preliminary Investigation. The Foreman testified that he was instructed by the General Foreman to send two individuals to his office for a preliminary Investigation, a Mr. Grant and Claimant. He found Mr. Grant first and sent him to the General Foreman's office. The Hearing Officer questioned the Foreman.

"Q. Did you notify Grant and Turner at the same time?

A. No, I found Grant first.

Q. And told Grant to go see Mr. Hall?

A. Yes. So then I was in there during that preliminary.

Q. But you hadn't told Mr. Turner.

A. No sir.

Q. So you hadn't found him yet.

A. No sir.

Q. Approximately what time you think that first investigation was over with? Preliminary one?

A. Must have been about 5 til 3 it was cause when Mr. Turner told me had important business it was 1 or 2 minutes after 3 cause I looked to see cause you know I didn't realize it was that late."

There is no evidence of record that it was necessary for the General Foreman to hold the preliminary investigation at the close of Claimant's shift. The record indicates that Claimant's representative was working the same shift as the Claimant and at the late hour, the Claimant's ability to secure representation would have been difficult, if not impossible.

As to the charge "conduct unbecoming an employee and failure to follow direct instruction of a company official," (insubordination), there is no evidence of record that Claimant was given any direct order. He was told by the Foreman to go to the General Foreman's office. Claimant complied with that request even though as testified by the Foreman it was one or two minutes past Claimant's quitting time. The General Foreman testified:

"Q. Mr. Hall will you please tell us what you know regarding the charge being brought against Mr. Turner?

A. On Sunday afternoon, July 24th, I had Foreman Berryman to ask Mr. Turner to come into my office for a preliminary investigation concerning his failure to protect his assignment on July 23rd 1988. Mr. Turner did come into my office and sit down at which time I cited him for a preliminary investigation. At that time, he stood up and said I'd have catch him later that he had to go, and walked out of the office. That led to charging him with failure to follow direct instructions."

Other than telling Claimant he was being cited for a preliminary Investigation, there was no direct order given to the Claimant. He wasn't told that if he left the office he would be charged with insubordination or conduct unbecoming an employee.

We fail to find any evidence of record to support Carrier's position that Claimant failed to follow direct instruction of a company official (insubordination).

The question to be decided here was Claimant given a direct order. If so, what was the order? Advising the Claimant he was being cited for a preliminary Investigation surely cannot be construed as an order.

In discipline cases the burden of proof is on the Carrier to produce substantial evidence in support of the charge.

In our opinion in the instant case Carrier has failed to produce substantial evidence in support of the charge. Based upon the evidence of record, we therefore sustain the Claim in accordance with Section (b) of Rule 34 of the Controlling Agreement.

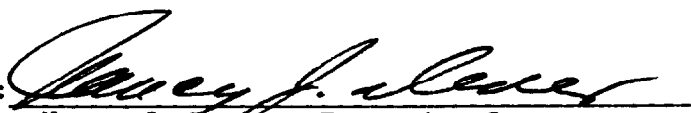
There is no provision in Rule 34 for the payment of interest. This Board does not have the authority to make or amend a rule, this must be done by the parties in negotiation. Claim for interest denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 11th day of July 1990.