

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(CSX Transportation, Inc. (formerly the Baltimore
(and Ohio Chicago Terminal Railroad Company

STATEMENT OF CLAIM:

1. That the Baltimore and Ohio Chicago Terminal Railroad Company in violation of the Controlling Agreement, arbitrarily, capriciously and unjustly assessed Electrician R. L. Bradley discipline consisting of dismissal from company service as a result of investigation on May 11, 1989; and,

2. That the Baltimore & Ohio Chicago Terminal Railroad Company return Electrician Bradley to service with his seniority unimpaired and compensate Electrician Bradley for all time lost from June 1, 1989, until he is returned to service; and,

3. That the Baltimore & Ohio Terminal Railroad Company allow Electrician Bradley all contractual entitlements and benefits including but not limited to; credit for vacation and personal day purposes, credit for Railroad Retirement purposes; health and hospitalization, dental and life insurance premiums; and,

4. That the Baltimore & Ohio Terminal Railroad Company expunge Electrician Bradley's service record of all mention of the unjust discipline.

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 were given due notice of hearing thereon.

The Claimant, an Electrician at the Carrier's Riverdale, Illinois, facility, has a seniority date of April 28, 1978. The Claimant was dismissed from service effective June 1, 1989, as a result of an Investigation held on May 11, 1989, for alleged excessive absenteeism.

It is the Carrier's position that there was no merit to the Claim, and the Claimant was afforded a fair and impartial Investigation within the meaning of the controlling Agreement. The Claimant was responsible for the charges of absenteeism, tardiness and leaving work early. The Organization just relied on unjustified procedural arguments. The Organization alleged that a postponement should have been granted at the time of the Hearing because the Claimant was under stress. This argument is without merit and was not supported by any medical evidence. Requests for postponements must be based on a valid need or a good and sufficient cause. In addition, the Claimant did not show that he was treated any differently than any other employee. The Carrier does dock all employees for tardiness under the same circumstances. The Carrier stated that its Hearing Officer is not required by any rule or practice to personally record his findings. As to the credibility of the witnesses and the credibility of witness Sullivan, it is not a decision to be made by the Organization, but by the Hearing Officer. It is the Hearing Officer that bears the responsibility in weighing the relative merits of conflicting testimony. Since the Carrier's conclusions are based on substantial evidence, they should not be overturned. Finally, the Claimant took exception to the length of the Hearing. However, neither he nor the General Chairman presented evidence that such a lengthy Hearing could prejudice the Claimant's right to a fair and impartial Hearing.

The Organization alleged that the Claimant's absences and tardiness were due to various problems. Therefore, the Claimant was relieved of responsibility of protecting his assignment. The Carrier cited numerous cases which bolstered its contention that excessive absences can also be excused. The Carrier stated the Claimant's work record was deplorable and is not a recent development or an isolated occurrence. He received a number of disciplinary letters and suspensions with the last being a 30-day actual suspension on September 16, 1988. During the period in contention in this case, the Claimant was absent, tardy or left early 9 times within a 9 week period of time. This is excessive, and the Claimant is either not able or unwilling to protect his assignment on a regular basis. The Carrier cited a number of Awards to back its contention and the Carrier asked that the Claim be denied in full.

It is the Organization's position that the Carrier failed to provide a fair and impartial Hearing as required by the controlling Agreement. The employees requested a continuance from the Hearing on May 11, 1989, because the Claimant did not feel he was in a mental condition to continue the Hearing. The Carrier unreasonably denied this request and the Organization protested the Hearing Officer's arbitrary denial at the Investigation. The Claimant was under treatment by a Carrier counselor and felt that he was unable to properly represent himself at the Hearing. The Organization suggested a two week postponement which was denied. The Hearing Officer is not supposed to have an adversary role at the Investigation. His job is to create a record on which decisions can be made. There is no indication that the granting of the reasonable request for a continuance would have in any way inconvenienced or harmed the Carrier. In addition, the Organization attacked the credibility of the Carrier witness, Sullivan, and provided alleged examples of this lack of credibility from the transcript.

Regarding the merits of the case, it is the Organization's position that the Carrier failed to meet its burden proving the Claimant's guilt by a preponderance of the evidence. It was the Organization's position that the Claimant had permission to be off, or late, or to leave early on a number of the occasions with which he has been charged. On other occasions he was delayed by trains on his way to work, and the Carrier did not refute this contention during the Investigation. In addition, another employee was not charged with tardiness even though he and the Claimant rode together and arrived at the worksite at the same time. Therefore, it was the Organization's position that the Claimant is not guilty as charged and the Claim should be sustained in its entirety.

Upon complete review of the evidence, the Board finds there is a threshold issue in this case. The Claimant and the Organization had asked for a two week postponement of the May 11, 1989, Investigation due to the alleged mental stress of the Claimant and the resulting inability to properly defend himself at the Investigation. The Board notes that the Carrier did grant one postponement in this matter. However, it was for only one day and it was prior to the Hearing. While the Board does not expect carriers to grant postponements for anything other than good or sufficient cause, there should have been enough doubt raised due to the alleged mental condition¹ of the Claimant that it would have been appropriate for the Hearing Officer to grant the Organization's request. There was no showing by the Carrier that such a request would have caused any undue inconvenience to the Carrier and the resulting record would not then be left open to substantial doubt as to whether or not it fulfilled the fair and impartial criteria in the Rule of the controlling Agreement. Therefore, the Board will find that under the very narrow circumstances of this case, the Carrier has not met the fair and impartial requirements of the Rule of the controlling Agreement, and the Claimant will be ordered returned to service. The Claimant should count himself extremely lucky that he is being allowed to return to his job due to this very technical violation. Had the Board been able to rule on the merits of this case, this Claimant would very likely not be returned to service. Appended to the Carrier's submission of the transcript of this case is the complete written personnel record of this employee. This was not part of the Organization's submission and, therefore, it appears to be something that was added in after the fact. Such written documents are inappropriate to be part of the record unless they were submitted on the property. The Board cautions the Carrier not to add to the submission any documents not discussed on the property.

Because of the technical nature of the Carrier's violation and other circumstances of this case, the Board finds that backpay would be inappropriate in this case. The Board will find that the Claimant is to be returned to service with seniority rights intact but without any backpay and on a last chance basis. All other Claims are specifically denied.


¹The Carrier was aware the Claimant had been under recent treatment by the Carrier's counselor.

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 7th day of August 1991.