

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12504
Docket No. 12461
93-2-91-2-271

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of
(Electrical Workers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

1. That the Missouri Pacific Railroad Company is violative of Rule 32 of the June 1, 1960, controlling agreement and has unjustly dealt with damaged Electrician J. P. Reed at DeSoto, Missouri when they denied him a notice that was precise, and subsequently denied him a fair and impartial investigation, resulting in the unjust and improper discipline of suspension from service for thirty (30) days by notice dated September 11, 1990.
2. That, accordingly the Missouri Pacific Railroad Company be ordered to make Electrician J. P. Reed whole for all contractual rights concerning seniority, vacation, holidays, health and welfare benefits, and all other benefits that are a condition of employment that may have been impaired as a result of the wrongfully assessed discipline, and Electrician Reed be compensated.
 - A. Eight (8) hours at straight time rate for September 12, 13, 13 (sic), 17, 18, 19, 20, 21, 24 through 28, 1990, October 1 through 5, 1990, and October 8 through 11, 1990, and;
 - B. The Missouri Pacific Railroad Company completely clear and remove from Electrician Reed's personal record the investigation, the thirty (30) day suspension and all other matters related, and;

- C. In addition to the money amount claimed herein the Missouri Pacific Railroad Company shall pay Electrician Reed an additional amount of six percent per annum compounded annually on the anniversary date of the claim.

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 employe 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.

On July 20, 1990, the Carrier served notice on Claimant, an Electrician in the Carrier's Car Shop in DeSoto, Missouri, to appear for an investigatory hearing on charges of excessive absenteeism in violation of Rule 604 of the Safety, Radio and General Rules for all Employees. The Carrier's letter of notice did not cite any dates of absenteeism. The hearing, originally set for August 8, 1990, was postponed to September 6, 1990. The Hearing Officer also rendered the 30-day suspension meted to the Claimant on September 11, 1990, in his capacity as Manager of Car Maintenance. The Claimant was suspended from September 11 to October 12, 1990.

The Organization claims that the Notice of Investigation was imprecise and did not give proper notice to satisfy Rule 32 of the Agreement. The Organization notes that the Carrier's notice gives only a blanket allegation of "excessive absenteeism" but no specific dates or times when those absences occurred. It claims that the Carrier then used the Hearing to establish the dates or record of the employee's absences.

It also asserts that the Claimant was denied a fair and impartial Hearing because the Carrier officer served as both the Conducting Officer of the Investigation as well as the officer who rendered the discipline assessed to the Claimant. It further claims that, in introducing the Claimant's 1989 record of absenteeism into the record, as well as his absenteeism record for 1990, the Carrier erred because it had stated at a January, 1990 safety meeting at the DeSoto facility that all rulings related to 1989 absenteeism would be deleted from employees' personal files.

The Carrier denies any procedural defects alleged by the Organization, claiming that the notice itself was not an issue at the Investigation and that it cannot now claim that "excessive absenteeism" is not sufficiently definitive to afford proper notice under Rule 32 of the Agreement. It points out that neither the Organization nor the Claimant objected to, attempted to deny, or substantially refute the bona fide dates of absenteeism set forth by the Carrier at the investigative hearing. The Carrier contended that Claimant was assessed discipline only for absenteeism from January 1, through July 20, 1990. It claims that it introduced the 1989 record of absenteeism and its warning letter of December 13, 1989, only to show that the Carrier was applying progressive discipline.

The Carrier also denies that there was any impropriety in the Manager, Car Maintenance acting as both the Hearing Officer and the officer who assessed discipline and cites Second Division Awards 5360 and 5855 in support of its position on this point. It claims that the Organization failed to show that the Claimant was disadvantaged or prejudiced in any way by the Manager acting in multiple capacities. It also points out that the Manager rejected certain dates introduced as evidence that he considered inappropriate and that the Organization objected to.

While this instant case was appealed on the property, the Carrier explained in its November 15, 1990 letter to the Organization that certain letters concerning the late arrivals or early check-outs of approximately 30 employees in 1989 had been removed from those employees' personal files, but at no time did the Carrier indicate that it would expunge personal files of attendance records.

The Board has examined the entire record, particularly the Hearing testimony, and the Awards cited by the Carrier in support of its position.

Article 32 (b) reads, in part, as follows:

"At a reasonable time prior to the investigation, the employee will be apprized of the precise charge against him and time, date and place set for the investigation...."

Rule 604, as read into the record of the Hearing by the Carrier, reads:

"DUTY - REPORTING OF ABSENCE: Employees must report for duty at the designated time and place. They must devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority."

The Board finds that the Carrier's July 20, 1990, Notice is inconsistent with the requirements of Rule 32(b) that the charges against an employee must be precise. Charging an employee with excessive absenteeism without specifying the dates of the absences is akin to charging an employee with misconduct without specifying the nature of the misconduct. The effect of both is to deny the employee Agreement due process. The employee and his representative would not know, for example, which witnesses or what documentary evidence to seek and bring to the hearing in order to challenge the accuracy of the dates of alleged absence, nor would they be able to determine whether it could reasonably be argued that the absenteeism at issue was not "excessive" (as one might if, e.g., only a couple of dates of absence were specified), or to determine (or at least investigate, contend, and provide supporting evidence) whether the employee is being subject to disparate treatment because other employees with even poorer attendance records have received no or lesser discipline.

It is true that the Carrier's supervisor had met with the Claimant in September 1989, and again in a formal conference on December 13, 1989, about his absenteeism, and also served fair warning by its December 13, 1989, letter to the Claimant that the next step would be a formal Investigation. However, that does not relieve the Carrier of the responsibility of citing particular dates in its letter of Notice to the Claimant, especially since that letter was not served until July 20, 1990.


For this procedural deficiency, the Board sets the Carrier's discipline aside. The Claimant shall be made whole under the terms of the Agreement for the 30-day period he was removed from service. However, interest will not be allowed, as there is no Agreement provision for the payment of interest. See Second Division Awards 11479, 11767, and 12200.

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 27th day of January 1993.