

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24161
Docket Number SC-24470

Robert E. Peterson, Referee

PARTIES TO DISPUTE: {
Brotherhood of Railroad Signalmen
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Norfolk & Western Railway Company:

On behalf of Signal Maintainer R. L. Lewis, who was dismissed by notice dated January 18, 1980, for reinstatement to the position of Signal Maintainer, Sardinia, Ohio, with all rights and benefits restored, and with pay for all time lost."

OPINION OF BOARD: In this case we have a situation wherein an employee became involved in an accident while off duty and driving a company vehicle assigned to him by the carrier for the performance of his duties as a signal maintainer. The damage to the signal truck was estimated to approximate \$2,000. There were no reported property or personal damages to others, the truck having gone off a state highway into a ditch. The accident occurred at about 9:15 P.M. on December 27, 1979 and, after being transported to a hospital for examination and treatment of minor personal injuries, Claimant was reportedly cited by the State Highway Patrol for driving while under the influence of intoxicants.

Claimant was thereafter withheld from service and properly notified to appear for a hearing scheduled for 9:00 A.M., January 4, 1980. Claimant did not appear for the hearing and it was held in absentia. He was notified by letter dated January 18, 1980 that as a result of his responsibility as developed in the formal investigation held on January 4, 1980 that he was dismissed from all service of the Carrier.

It is to be noted that at the hearing Carrier's Supervisor Signals and Communications testified to Claimant having told him on the night of the accident that he had been drinking; that he had finished working at Cincinnati around 4:00 P.M.; came back to Sardinia, where he got something to eat; met some friends; and, had three or four beers before starting home. The Supervisor's testimony was corroborated by testimony of a Carrier police officer who stated he had been present with the Supervisor when the Claimant admitted to having been drinking.

Petitioner on behalf of Claimant has brought this case to our Board, alleging: (1) The hearing in absentia did not afford Claimant the "fair and impartial formal investigation" which is his right under the negotiated Rules Agreement; and (2) The record is fatally flawed because the same Carrier official made the charge, appeared as a witness at the hearing, and then assessed the discipline.

In regard to Petitioner's second protest as above, suffice it to say that its allegation relative to the record being flawed account the one official serving in multiple roles was raised by Petitioner for the first time in their submission to this Board. Under such circumstances, we have no alternative but to summarily dismiss such allegation from our consideration of the claim.

Petitioner's other allegation relative to Claimant's right to a fair hearing does, however, give us reason to pause for deliberation. The right to a fair hearing is written into the negotiated rules. It is axiomatic that a fair hearing presupposes adequate advance notice of a charge as well as the development of all testimony relating to the charge. There is no question in this case but that Claimant did in fact receive adequate advance notice. The difficulty in this case comes from the fact that Claimant did not have the opportunity to present "his side" of the story at the hearing.

The hearing record as it was developed recognized that there was an inclement weather situation present on January 4, 1980 in the Portsmouth, Ohio, area, the location at which the hearing was held. The hearing officer clearly established this as fact, directing that the transcript indicate then current weather conditions, i.e., snow. He also had the record show the hearing commenced at 9:45 A.M.; that all present had been 60 present since 9:00 A.M.; that one witness did drive from Cincinnati to Portsmouth; and, that there had been no communication with Claimant or request for a postponement of the investigation.

The record as developed during the cm-property handling of this case clearly established, however, that Claimant was not willfully attempting to avoid the scheduled hearing. In fact, the record reflects the opposite to be true. Claimant had reportedly been entangled in a weather related traffic tie-up and was in a position where he could not establish timely contact with the Carrier. He did, however, subsequently contact the Carrier, allegedly at his first opportunity, albeit after the hearing had been concluded in his absence.

While we subscribe to the principle that an employee cannot avoid discipline by the simple expedient of failing to appear at a scheduled hearing after proper notice has been given (see Award No. 22408 - Referee Franden); we find that, in fact, the opposite seems to be true in this instance. Here, Claimant was making an effort to be at the scheduled hearing. In this respect, we believe Carrier would have been better advised to have re-opened the hearing when Claimant did make contact with them and established his reason for not being able to appear on time. The essence and indication of fairness would thereby have been clearly established.

The above considerations notwithstanding, it is our opinion that the hearing record in this particular case contains substantial probative evidence to support the charges made and an absence of any allegation that Claimant's presence would have possibly changed that fact. When this factor is considered against Claimant's right to be present at the scheduled hearing, we are compelled, in this instance, to find that Carrier's action was not 60 unjust, unreasonable or arbitrary as to constitute an abuse of its discretion to impose discipline. We will not therefore substitute our judgment for Carrier's in this case. We would,

however, repeat that a fair hearing requires consideration by the Carrier of reasonable excuses which are advanced as reasons for failure to timely appear at a scheduled hearing. There are possible situations over which an individual has no personal control which should be considered in a fair manner.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of February 1983.