NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24652
Docket Number SG-24700

THIRD DIVISION

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Missouri Pacific Railroad Company (T&P)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the former Texas & Pacific Railway Company:

On behalf of K. J. Lee, who was dismissed by notice dated January 12, 1981, for reinstatement with full seniority, vacation, and all other rights unimpaired and with full pay for all time lost.

OPINION OF BOARD: Cn December 26, 1980, Claimant was sent the following letter by W. C. Adams, Supervisor Signals & Communications:

"Mr. K. J. Lee, Signal Maintainer, Sweetwater, Texas - Charged

Report to the Missouri Pacific Railway Depot, 101 Bowie Street, Sweetwater, Texas at 9:30 A.M., Friday, January 2, 1981, for formal investigation to develop the facts and place your responsibility, if any, in connection with (1) the charge that you falsified time claimed on your time roll, Form 24125 and your Railway Distribution of Hours Worked, Form 32283, for Friday, December 5, 1980, and Saturday, December 6, 1980, and (2) for leaving your assignment on December 26, 1980, without proper authority, and (3) also to review your work record.

If you desire witnesses or representatives, you must arrange for them in accordance with your applicable schedule working agreement.

You are hereby notified that you will be withheld from service effective 3:30 P.M., Friday, December 26, 1980, pending this investigation."

The hearing date originally set for December 26 was postponed at the request of the General Chairman to January 9, 1981. At the hearing Claimant was represented by General Chairman and both participated by questioning witnesses and reviewing documents submitted into evidence.

Carrier's dismissal letter was issued under date of January 12, 1983, but copy thereof was not provided to the General Chairman within ten days as required by Rule 50 (d) of the labor agreement. Copy was finally provided on January 21, 1981, and only after request was made by letter from the General Chairman. From that point on the appeal of the dismissal action was progressed in the usual manner as required by the Railway Labor Act. It is noted no handicap was experienced by the Claimant or the Brotherhood in progressing the appeals by tardiness in providing the General Chairman with a copy of the dismissal notice. Thus, we must conclude that the error was more procedural than substantive and not fatal to ultimate disposition of the claim. This accords with well established practice in ruling on procedural questions of this kind. Thus, we note Award 11775:

> "... Carries's inadvertent failure to send a copy of the disciplinary decision to the General Chairman. We said:
>
> > 'We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed."

On the charge of falsifying time records Claimant testified he made an error in claiming time for December 5 and 6 and that he was never paid for the time. In explaining his error he stated he explained he was sick in bed on December 15 and under medication when he made the error on his time records. The error was detected by his supervisor who was aware Claimant had not worked on December 5 because he had called in sick for the day. The supervisor took action with the Accounting Department to cancel the time claims for the two dates. Thus, the errors were caught in sufficient time and Claimant was not paid.

On the charge of leaving his work assignment on December 26, 1980, Claimant testified he took his lunch break between 2:00 and 3:00 PM which accounted for his truck being seen at the cafe at that time. While the usual time for lunch break is at Noon, there is no hard and fast rule and Carrier recognizes the need for timing the lunch break with the work at hand. The portion of his testimony that he was making signal inspections during the period his truck was seen at the cafe during the afternoon is hardly credible. Carrier doubts on this point appear well established when it is recognized the Claimant was part owner of the cafe and also that the cafe is some 28 miles from the flasher signals Claimant stated he inspected during the time his truck was seen parked at the cafe. His claim that he did not have a watch is somewhat incredulous in view of his own admission that it was simply too far from the flashers to get to the cafe in the time indicated.

On charge No. 3, "review of work record", it is noted objection was raised that such material was improperly included in the hearing on the grounds the charge was vague and no defense could be prepared in advance of the investigation hearing. While we recognize some merit in the objection the information brought into the hearing under this heading did not pertain so much to Claimant's work record as his supervisor's inability to contact him after hours. Claimant had trouble contacting the office by long distance from points along the road, apparently this problem prompted Carrier at one time to provide Claimant with a telephone credit card. In any event, the information reviewed in his past work record was not disciplinary but the difficulties Carrier encountered in contacting Claimant fix emergency work after regular work hours.

During the appeals process on the Carrier property some consideration was given to returning the Claimant to service on a leniency basis. This offer, however, was declined by the Claimant on the grounds it would indicate guilt. On the basis of thorough review of the record it is our opinion that such a disposition would provide a just and reasonable solution. The circumstances outlined by Claimant in explanation of his truck being seen at the cafe during the middle of the afternoon are completely incredulous. The fact that his account on this point begs belief also casts doubt on his account of how he erroneously filled out his time slips. On the whole, the action of the Carrier in dismissing Claimant from service is understandable and we cannot find it to be arbitrary or capricious. It is noted, however, that Carrier relented during the period claim was handled on appeal and offered to restore Claimant to service on a leniency basis. In the circumstances it would appear he has been disciplined sufficiently during the period since his dismissal and that action to restore him to service would be a just and reasonable settlement of his claim at this time.

Claimant shall be restored to service with seniority unimpaired but without pay for time lost.

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 Employe 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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984.