

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 27980  
Docket No. MW-26820  
89-3-85-3-579

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employes  
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The ten (10) days of suspension imposed upon Trackman J. M. Bailey for alleged unauthorized absences on May 30, 1984, June 4, 5, 6, 11 and 12, 1984 was without just and sufficient cause and on the basis of unproven charges (System Docket CR-1099D).

(2) The claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

The Claimant was advised to attend an investigation to determine facts and place responsibility, if any, in connection with alleged unauthorized absences on six (6) days in May and June of 1984. After postponements, the investigation was held on July 11, 1984. The Claimant was advised after the investigation that he had been found guilty as charged and he was given a ten (10) day suspension.

The Claimant sustained a job related injury on May 14, 1984. While attempting to manually pull a cross-tie from under a track he suffered what was subsequently diagnosed as abdominal muscle strain. He was put on light duty by his physician until May 29, 1984. The alleged unauthorized absences occurred after that date on May 30, June 4-6 & 11-12, 1984.

As threshold issue, the Organization argues that the Carrier was in violation of Rule 27(1)(a) of the Agreement because of the behavior by the Hearing Officer at the investigation. Rule 27 reads, in pertinent part, as follows:

"Except as provided in Section 2 of this Rule, employees shall not be suspended nor dismissed from service without a fair and impartial hearing."

The Claimant was represented at the investigation by his District Chairman. The District Chairman from Canton, Ohio was also present to observe and assist at the investigation. During cross-examination of the Carrier's main witness, a recess was requested by Claimant's representative in order to discuss with the Claimant an exhibit entered by the Carrier. The recess was denied by the Hearing Officer on grounds that the Claimant's own representative would not be "permitted to confer at any length or be advised by an observer...of the direction and content of his questioning...". The Hearing Officer stated that the Organization had had time "...since the date of notice" to prepare its line of reasoning. In response, the Claimant's representative observed that two postponements had been taken by the Carrier itself in order that it might be able to prepare for the investigation and that a request for a short recess, at the time requested during the investigation, and the granting of such was within the intent of Rule 27. A review of the record by the Board raises considerable concern with respect to the proper application of Rule 27 by the Carrier in this case. The Rule calls for a fair and impartial hearing. The rationale behind the Hearing Officer's denial of a recess to permit Organization officers and the Claimant to confer over new evidence at the investigation and/or to develop a line of reasoning in their examination of witnesses is unclear. In view of the record, and the language of the Rule at bar, the Board must view the Hearing Officer's behavior as partial. Such conclusion with respect to this Officer's partiality is corroborated by the manner in which this same Officer attempts, at a later point in the investigation, to actually answer for a Carrier witness when the latter testified on recall. An evidentiary point was raised by the Claimant's representative about the veracity of testimony by this Carrier witness when he stated that he had attempted to telephone the Claimant on each of the days the latter had allegedly been off-duty without permission. The Carrier witness had testified that he had attempted to call the Claimant at a certain number which he identified, then on recall, this witness testified that he had made a mistake in his earlier testimony since the number he had attempted to call was different. The verisimilitude of this testimony is called into doubt by the Claimant's representative because the Claimant's telephone number was actually different than the two numbers identified. These are discrepancies of fact and evidence in the record. The Hearing Officer interjected, however, at that point in the investigation and actually attempted to defend the Carrier witness by making the following statement: "...let the record show that the question to (the

Claimant) regarding his phone number was not asked until after (the Carrier witness) had been excused and that the correctness of the number was not in doubt until after (the Carrier witnesses') departure." While the logic of the Hearing Officer escapes the Board since the Carrier witness himself was present, on recall, when this statement was made, the motive of the Officer is clear enough: it was an inappropriate attempt to reconcile, for the witness, evidentiary discrepancies on recall which the witness himself was unable to clarify. Any determination by the Board with respect to the instant claim must, therefore, necessarily taken into account violations by the Hearing Officer of the intent of Rule 27 of the Agreement when the investigation was held.

On merits, the Claimant presents evidence, both by means of testimony which the Board finds credible, and by means of medical statements to the effect that he had attempted to call supervision about his health on May 30 and June 4, 1984, and that he had in fact seen a physician about his condition on June 5 and 11, 1984. But why did the Claimant not call in on these two latter days and also on June 6 and 21, 1984? The Claimant states that he thought he had "done what (he) thought (his) part was" when he called in on May 30 and June 4, 1984. At the same time the Claimant states, which is not refuted, that he had been spitting up blood on May 29, 1984, because of the May 14, 1984 accident, and that supervision was "harassing" him about coming to work after he had the accident? What does the Claimant mean by this? He states that after the 14th he missed some days because of his injury. On the days he missed, he received telephone calls from supervision. (Apparently supervision, including the track supervisor referenced above, did have the correct telephone number of the Claimant. The earlier procedural point with respect to Rule 27 does not deal with whether this was the case or not, but with the intervention by the Hearing Officer, on behalf of that Carrier witness, when the latter became confused about this at the investigation.) The tone of the calls was that supervision just wanted the Claimant to "show up" for work. In his appeal on property, the General Chairman argues that the reason that Carrier's supervision just want the Claimant to "show up" after the 14th, despite his injury, was because the "injury would not (then) have to be reported as lost time to the FRA if the employee worked the ten days following the accident." What lends credibility to this line of reasoning is the undisputed testimony by the Claimant that he was either completely absent, or only worked part of the day, on the days of May 16, 18, 1984, after his accident, yet he was paid in full for each of those days. The Claimant also testified, which was not disputed, that supervision attempted to keep him from reporting "a lost time injury."

None of these facts vindicate the error made by the Claimant when he did not call in prior to the beginning of his shift on June 5-6 and 11-12, 1984, when he knew he would not be coming to work. He knew that this was proper procedure and he testified to that effect. The record does point to the fact, however, that the Claimant was continuing to experience discomfort on those days because of the May 14th injury. In view of this, and because

of the Carrier's undisputed attempts to get the Claimant to show up for work after his May 14th injury, for its own record keeping if not for the Claimant's health when the Claimant was not felling well on those days, disposes the Board to reasonably conclude that there are extenuating circumstances to be taken into consideration in its determinations both about the Claimant's guilt, and the propriety of the length of the suspension the Claimant received from the Carrier. An added factor in the Board's deliberations is the violation of the intent of the Agreement by the manner in which the investigation was conducted by the Hearing Officer.

The Board concludes that the Claimant was guilty of what may be termed aggravated indiscretion when he did not inform the Carrier on each day that he knew he was going to be absent. The Claimant had taken unauthorized absences before and had been counseled for this although the Board is not privy to the circumstances surrounding that set of issues. Irrespective of extenuating circumstances and/or procedural violations by the Carrier, however, the Claimant cannot be permitted to violate Carrier policy dealing with attendance with impunity. In weighing the full evidence of record before it the Board rules that the Claimant be given a two (2) day suspension. He shall be compensated for the other eight (8) days he was off duty without pay. The Claimant's record shall reflect this decision by the Board.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest;

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1989.