

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20148
Docket Number CL-20172

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7272)
that:

1) Carrier violated the Clerks' Rules Agreement at Chicago, Illinois when it failed to afford employee Esther Golden a fair and impartial investigation, assessing a 30-day suspension arbitrarily and without just cause.

2) Carrier shall be required to clear the record of employee Esther Golden and compensate her for all time lost.

3) Carrier shall be required to pay on the total amount claimed in Item 2 above, seven percent (7%) interest commencing January 29, 1972 and compounded annually until the claim is paid in full.

OPINION OF BOARD: On January 19, 1972, charges were preferred against Claimant:

"1. For being tardy for work on January 6, 7, 10 and 14, 1972.

2. For being absent from work on January 17, 1972."

After investigation, Claimant was advised:

"Careful consideration of the testimony received during the investigation held with you on January 21, 1972, in connection with the charges of (1) being tardy for work on January 6, 7, 10 and 14, 1972 and (2) being absent from work on January 17, 1972 and as result of your responsibility in connection with said charges as well as your unsatisfactory past record, you are suspended from actual service for 30 days; suspension period begins January 29, 1972 and ends February 27, 1972 inclusive."

The Organization insists that the claims be sustained because Claimant did not receive a fair and impartial investigation. Carrier suggests that Claimant's challenge is limited to assertions of technical errors.

The conduct of the hearing in this dispute gives the Board considerable concern.

Carrier found Claimant responsible for absence from work on January 17, 1972. Rule 25(a) of the Agreement states, in appropriate part:

"An employe detained from work because of sickness or disability shall notify his Supervising Officer as early as possible; an employe detained from work because of sickness or personal injury to himself or to an immediate member of his family will be regarded as on leave of absence...."

On January 17, 1972, Claimant notified the Carrier of illness. Claimant's Bureau Head testified that said report satisfied the requirements of the cited Rule. Thus, when Claimant (on January 18, 1972) requested leave of absence for the 17th, it was recommended by the Bureau Head, and approved by the Auditor. At the investigation, when Claimant's Supervising Officer was questioned as to the operation of Rule 25(a), (and Claimant's right to be placed on leave of absence) the Hearing Officer ruled that the question was not relevant because:

"The charges are not the reason of her absence, but of her being absent from work on January 17, 1972."

The Hearing Officer ruled, on three occasions, that only the fact of absence on January 17, 1972 was material to the investigation, and that the reason for the absence were immaterial.

Despite the fact that Carrier Officials specifically approved the leave for January 17, the Hearing Officer found Claimant responsible for said absence. Surely such a finding, upon the record before us, could not be sustained. We can only conclude that the Hearing Officer presumed that any absence is, in and of itself, grounds for discipline, without regard to the reason which prompted same. The Hearing Officer's finding is indicative of his handling of the investigation, and is pertinent to our consideration of the fairness and impartiality of the hearing in its entirety.

The record establishes (and Claimant concedes) that she was tardy by 20 minutes on January 6, 1972; five minutes on January 7, 1972; four minutes on January 10, 1972 and four minutes on January 14, 1972.

When (at the hearing) Claimant's Representative sought to inquire of the Supervisor the reasons for the tardiness, the Hearing Officer ruled such question not relevant, stating, in essence, that only the fact of tardiness was in issue.

Claimant attempted to testify as to the reasons for being late and gave some testimony concerning busses running behind schedule and crowded conditions. When she started to explain time intervals involved, the Hearing Officer ruled that any such testimony was not relevant.

On at least five occasions, concerning the charge of tardiness, the Hearing Officer ruled that only the fact of tardiness was before him, and that reasons for tardiness were not material to the charges.

In addition, the Hearing Officer ruled that Claimant could not question a Carrier Official who was an observer at the Hearing, because he was not present to be a witness; ruled that a medical prescription concerning the absence of January 17, 1972 was not relevant to that charge; refused to allow a witness to state who had brought the charges against Claimant; refused to allow Claimant to develop testimony as to where she was stationed when initially hired by Carrier; and made other exclusionary rulings.

The Hearing Officer, in assessing the penalty, considered Claimant's prior "deplorable" attendance record and warnings of disciplinary action. However, at the hearing - when Claimant was asked by her Representative if charges had ever been preferred against her in the past - the question was ruled to be not relevant! Carrier argues that introduction of Claimant's past record (at the investigation) would have been detrimental to her. But that is a determination to be made by Claimant and her Representative. If she chose to introduce potentially dangerous information, she should not have been precluded from doing so.

The Organization repeatedly objected to the conduct of the Investigation while it was in progress, and, in fact, specifically requested the Hearing Officer to disqualify himself. The request was denied. Claimant raised the question of the propriety of the investigation during the handling on the property as well as before this Board.

Surely an employee should be allowed to explain reasons for tardiness and/or absences when charged with specific offenses. To rule otherwise would nullify, in most cases, the very purpose of an investigation. As noted in Award 19589 (Blackwell):

"If the person accused can show that he was not responsible for the absences because of reasons beyond his control, such as illness, or other excusable reasons, he should not be subject to discipline."

Conceding, without deciding, that there may be instances, under certain charges, where reasons for absences are not material; these charges and this record are not in such a posture. Claimant was charged with a precise absence and four (4) specific tardinesses - not a habitual absenteeism rendering her inherently incapable of properly performing her job.

Although we know the reason for the absence, we do not know the reason for the tardiness, nor, we submit, did the Hearing Officer. He did not know what testimony was about to be submitted concerning busses running late, time intervals, etc. nor did he know the materiality of other questions which were excluded. Certainly, a Claimant may not excuse tardiness based solely on subjective reasons, or

inconveniences. Possibly the reasons presented would have been insufficient to excuse the tardiness and would have suggested that the employee should have reasonably predicted delayed transportation and made alternate plans to assure timely arrival to duty. On the other hand, she may have been prepared to testify to certain practical impossibilities. While the burden may have been upon her to establish an affirmative defense, she should have been allowed the opportunity to do so. Yet, the Hearing Officer clearly showed a lack of concern for any excuse, no matter how compelling and essentially he excluded consideration of any defense. We are not prepared to agree with Carrier that the record shows no substantive unfairness or material prejudice. A Hearing Officer's "opinion" as to relevancy and materiality can not operate to prejudice a Claimant's right to present a defense to charges.

The conduct of Investigations has been considered recently by at least two Awards of this Board. In First Division Award 20071, Referee Seidenberg noted that a Claimant's right to a fair and impartial determination was irreparably prejudiced when the Hearing Officer refused to allow Claimant to present his case in full as he thought it should be presented. The Referee noted that an investigation is supposed to develop and bring to light all material and significant facts.

In Award 20014 (Lieberman) between the same parties to this dispute, the Board held:

"The conduct of the hearings in this matter give us considerable concern. Hearings under the grievance provisions of the Agreement (Rule 22) are neither adversary proceedings nor criminal trials. As fact finding investigations such hearings must be conducted with utmost fairness and objectivity by the hearing officer; they must not be impeded by technical rules of evidence and must accord employees reasonable latitude in developing their defensive positions. Above all, such hearings must be conducted in such a manner that the conduct of the hearing officer is unimpeachably objective and unbiased in the development of facts."

We can not concur with Carrier's conclusion that any error was "technical", nor do we concede that Claimant admitted "guilt" when she conceded that she was absent on January 17, 1972 and tardy on four (4) other occasions. We have already noted that a Company Official approved Claimant's leave of absence. Obviously he did not feel that she was guilty. Further, Claimant was precluded from presenting her full evidence concerning the reasons that she was tardy. That evidence may have constituted an admission of guilt, or it may have been the basis for exoneration.

Claimant was entitled to a fair and impartial hearing to present her defenses. She did not receive same.

It may very well be, as argued by Carrier, that Claimant's past record was "deplorable". But, that factor may only be considered after the precise charges have been established.

We cite, with favor, the conclusion in Award 20014:

"We regard the hearing officer's conduct in this case to constitute a serious breach of the intent of the parties as expressed in Rule 22. The right of a claimant to a fair and impartial hearing may not be impeded if the integrity of the grievance procedure is to be maintained."

We will sustain Claims 1 and 2.

Claim 3 requests 7 percent interest on the total amount claimed. While there may be instances where an Award of interest is justified, in this case we adhere to the preponderance of the decisions of this Board and we will deny Claim 3.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated.

A W A R D

Claims 1 and 2 are sustained.

Claim 3 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February 1974.