

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21278
Docket Number CL-21237

Walter C. Wallace, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7845)
that:

1. Carrier acted in an arbitrary, capricious, discriminatory and uncalled for manner when on August 9, 1974, it assessed a ten (10) day deferred suspension against the record of Clerk James P. McDaniels.

2. Carrier shall now be required to remove and expunge the ten (10) day deferred suspension from the record of Clerk James P. McDaniels forthwith and any reference thereto.

OPINION OF BOARD: Certain procedural arguments are advanced on behalf of claimant which should be considered. First, it is claimed the July 16, 1974, notice of investigation failed to meet the requirements of Rule 27 in that it did not provide claimant with the required specificity concerning the charges against him. Claimant was required to report for:

"....a formal investigation which will be held to develop facts and fix responsibility including yours, if any, in connection with your being absent from work without permission on Friday, July 12, 1974, at approximately 11:45 a.m..."

The Brotherhood cites awards of this Division and Public Law Boards on this property to the effect that the claimant must be "advised in writing of the precise charge or charges" (Award No. 27 of Public Law Board No. 650 appears to be improperly cited for this rule.) We have examined these awards and they (except for No. 27) involved problems of specificity with the charges. The two awards under Public Law Board No. 650, however, are not helpful because the notice under consideration is not described in either award. The Third Division Awards are more in point. Award 15855 (McGovern) concerned notice of a hearing "to determine your responsibility, if any, in connection with collision...." Award 14801 (Lynch) dealt with a notice of a hearing "to develop facts and determine your responsibility, if any, for violation of Rule 702." The cited rule contained five paragraphs and covered at least twenty transgressions. And, Award 14778 (Dorsey) dealt with a notice of hearing "to develop facts and place responsibility of collision...." In effect, the Third Division Awards maintained that the notice, in each case, failed to apprise the accused of the precise charges

against him. We believe there is a significant difference here. The notice includes the formula of words that has the ring and sound of a fishing expedition, i.e., "to develop facts and fix responsibility including yours, if any...." However, the added phrase "in connection with your being absent from work without permission...." makes the difference and satisfies the requirements of specificity. We conclude the accused here was afforded the proper notice so he could understand the accusations, prepare his defense, and meet the charges against him. On this basis we find there is no merit to claimant's argument concerning lack of specificity in the charges here.

Next, it is claimed that claimant was denied a fair and impartial trial insofar as the carrier's officer Mr. Wegmann preferred the charges against claimant, assessed the discipline against him and testified at the hearing.

No rule has been cited which prescribes who shall fulfill these roles. We have examined all the awards cited by the parties and we conclude the Third Division Award 8986 (Johnson) provides the applicable law here. In that case the carrier officer notified claimant of the investigation and subsequently notified him of carrier's decision that he was guilty of the charges. This same officer did testify at the hearing on a charge that was not involved in the decision. He did not preside at the hearing and he did not act as a prosecutor. Further, the opinion stated:

"To the extent to which claimant's representative questioned General Superintendant Dolan upon matters to which he had not testified as the company's witness, he was claimant's witness, and claimant cannot complain."

This latter point gains force here, a fortiori. Mr. Wegmann was called to testify by the claimant's representative. We conclude, therefore, that the multiple roles of carrier's officer Mr. Wegmann did not serve to deny claimant a fair hearing under the precise facts of this case.

When we consider this claim on the merits we find that claimant had approval to leave work at noon on July 12, 1974, to donate blood. He requested permission to leave earlier than the noon release and his immediate supervisor, Mr. Smith, gave this permission. Later, when Mr. Smith learned that his supervisor, Mr. Tom, had denied similar permission to one Mr. Scales, Mr. Smith contacted claimant and withdrew the prior permission

for early leave. Mr. Smith, however, told claimant he could request permission directly from Mr. Tom. Claimant said he would not do this and, instead, he indicated he would leave early and he could be docked from leave or vacation for the time. Mr. Scales, it appears, did receive permission from Mr. Tom to leave early and when Mr. Scales was leaving, it is claimant's testimony that Mr. Smith said to him: "There goes Scales; go on."

Mr. Smith denies making this statement while Claimant relies upon it as his authority to leave early. Claimant, in fact, left twelve minutes before noon. Although something is made of the discriminatory treatment accorded claimant, this is explained by Mr. Tom who asserts it is a simple matter that Mr. Scales requested permission while claimant did not.

There is a conflict in the testimony here and the carrier chose to believe the version advanced by Mr. Smith rather than the claimant. We cannot say this was wrong. This Board functions as a reviewing authority and it cannot substitute its version of the facts for that reached by the trier of facts who heard the testimony, observed the demeanor of the witnesses and, by its proximity, was entitled to weigh and evaluate the credibility of witnesses. So long as the conclusions reached are based upon substantial evidence in the record they should not be overturned. Here the record provides the required support for the decision that claimant was absent without permission.

Lastly, on behalf of claimant this Board is advised that the penalty of ten days deferred suspension should be removed and expunged in the light of claimant's approximately eight years of service "without any prior assesment of discipline". Whether or not this latter statement is true, we cannot know because no such evidence was advanced on the property and this Board cannot consider evidence presented for the first time at this level in the proceedings. In any event, we conclude the penalty imposed here is neither arbitrary, capricious nor unreasonable.

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;

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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:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of October 1976.