

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24000
Docket Number SG-24123

Lamont E. Stallworth, Referee

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

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

Claim No. 1

On behalf of Darryl K. Swiney for the removal of a thirty-day deferred suspension from his personal records, which was assessed after an investigation held on January 15, 1980.

Claim No. 2

On behalf of Darryl K. Swiney, who was dismissed following an investigation held on February 20, 1980, for restoration to service on the position of Assistant Signal Maintainer at Willoughby, Ohio, or to any position to which his seniority entitles him, that he be paid for all time lost account of being dismissed, and that Carrier make available to him all other rights and benefits provided for in the agreement."

OPINION OF BOARD: The instant case involves two charges, each arising out of separate incidents. Each incident was investigated separately and disciplinary action was taken. Claim No. 1 arises from the assessment of a thirty (30) day deferred suspension which was the result of formal investigation on January 15, 1980, in connection with Claimant's alleged repeated tardiness and excessive absenteeism from work without permission. Claimant was charged with "your tardiness in reporting for work and excessive absenteeism from work without permission, which includes November 7, 8 and 13, 1979." Mr. Herr, Claimant's immediate supervisor, testified concerning the details of Claimant's work habits:

"Q: Mr. Herr, will you tell us what you know of the incident mentioned in the letter of charge?

A: Mr. Swiney, Mr. Ronald Miller, Mr. Larry Taylor and I had been working together from the latter half of August 1979 up to the end of November. Mr. Swiney had been late for work several different times and tardy for work several different times and I spoke to him on numerous different occasions and had also written him letters

on October 2, 1979 and also November 2, 1979, about absenteeism and on the morning of November 6 he was one hour and thirty minutes late for work I was going to send him home that day and if he was late on the following morning I would send him home. After talking to him on November 6, he worked that day and then he never reported back and made no attempt to notify anyone until November 26, I talked to him at that time and he wanted to report for work on November 27 and I told him he would have to call me on the morning of November 27 about 8:30 AM at which time I would know if I would be able to have him report back to work. About 8:30 AM he called the office here at Bellevue and I instructed him to go to Fairview, Pa., and report to J. Hlavtut, but he did not report until the morning of November 28."

On the date of this hearing January 15, 1980, Claimant was not present for the scheduled 9:30 AM hearing because of car trouble. The hearing commenced at 10:30 AM. Claimant called Carrier at approximately 11:20 AM to advise of his car trouble. Because of Claimant's absence at the hearing, Organization maintains Claimant was not afforded a fair and impartial investigation, pursuant to Rule 701

Claim No. 2 arises from a charge that for January 15, 30 and 31, 1980 Claimant submitted personal expenses for which no service was performed for the Carrier.

Regarding Claim No. 1, Carrier maintains that the transcript of the formal investigation held on January 15, 1980 contains sufficient evidence upon which to base the determination that Claimant was, in fact, guilty of the offense charged, and that the disciplinary penalty imposed was fair, reasonable and fully commensurate with the nature of the proven offense.

Carrier maintains that Claimant was afforded a fair and impartial investigation in full conformity with the provisions of Rule 701 with full and complete protection of his substantive and procedural due process rights.

Regarding the Claim No. 2, Carrier maintains that the testimony given by the Claimant clearly and explicitly established that he falsified his expense account for the month of January, 1980. Claimant testified:

"Q: Can you explain why then, if you made it (claimant's expense account) out on January 29 when you showed meal charges for the 15th when you knew you were off duty that day?

A: Like I stated earlier, I was not aware, that because I didn't show up that was just like not showing up for work at the hearing, so I forgot to take it off. Then I went to get my uniform from the job Friday and told Ron Miller that I was _____ and he asked me did I send my day of work in for the 15th on my Time Sheet. I told him yes, and he said I couldn't do that because I did not show up for the

"hearing, but I was not aware of that because I was on my way to the hearing when I ran into automobile trouble.

Q: Mr. Swiney, are you aware that you are only allowed to charge performing duties for the N & W Railway Co.?

A: Yes.

Q: On January 15, 1980, you did not perform any duties that day, so you could not have submitted expenses for that day, is that correct?

A: Do you mean like meals, traveling?

Q: (Mr. Herr - "Yes.")

A: Well I did eat lunch and breakfast on the way. I ate breakfast on the way and lunch coming back when I found out the hearing was over.

Q: Mr. Swiney, you did not perform any duties that day, is that correct?

A: Right.

Q: Then you would not be entitled to expenses for that day, correct?

A: Right.

Q: On January 30, you charged \$9.97 and you did not work that day, so would you be entitled to that expense - \$9.97 for the 30th?

A: No.

Q: On January 31, you charged \$6.10 for meals and 50 miles automobile expense. You did not work that day, is that correct?

A: Yes.

Q: Would you be entitled to expenses for that day?

A: No.

Q: Mr. Swiney, but you still submitted Expense Account for those three (3) particular days, is that correct?

A: Yes."

Carrier maintains that based on Claimant's testimony, he had a full knowledge of the provisions for personal expenses incurred in the performance of service with the Carrier. Carrier further maintains that it is perfectly clear that the Claimant filed a fraudulent expense form for January, 1980. Carrier points out that the Board has continuously ruled that acts of dishonesty and morality are serious offenses and subjects the guilty employee to disciplinary action. (Fourth Division Award 3779 and Second Division Award 6638).

In regard to Claim No. 1, Organization maintains that the thirty-day deferred suspension should be removed from Claimant's record because he was not afforded a fair and impartial investigation as required by Rule 701(a). Organization maintains that one of the most basic elements of a fair and impartial hearing is that the accused has a right to face the accuser and be present throughout the entire hearing. (Second Division Award 6083; Third Division Award 12812; Fourth Division Award 1034).

In this case, Organization maintains, Claimant's car broke down on the day of the hearing (January 15, 1980). Claimant notified Carrier about his car trouble, yet Carrier continued with the investigation. The hearing was scheduled for 9:30 AM. Carrier started it at 10:30 AM. Claimant called Carrier regarding the car problem at 11:30 AM. Organization points out that it has been held that car trouble may be good cause for a one-day absence from work. (Third Division Award 20198)

Organization further maintains that nothing in the record indicates that Carrier gave any consideration whatsoever to postponing the hearing. Such callous disregard for employee's rights should not be condoned by the Board.

Regarding Claim No. 2, Organization maintains that Claimant was never told that he would not be entitled to expenses under the circumstances of January 15, 1980; i.e., he had been instructed by the Carrier to report to Bellevue and ate breakfast and lunch during the trip. Organization points out that Claimant did not know that he was going to have car trouble, he was a relatively new employee. Organization maintains in these circumstances Claimant did not know that he would not be paid expenses when no one had ever explained whether he would or not. With respect to the expenses claimed for the 30th and the 31st, Claimant testified that he explained about having sent in his expenses account early, just like they do with the payroll.

Organization maintains that in its May 22, 1980 letter of denial, Carrier referred to the expenses account as requiring that the signature is to certify the account has been incurred for the benefit of the company. Organization further maintains that by the same token an employee who submits a payroll also attests to the accuracy, yet the Carrier requires employees to submit a payroll early, thus requiring them to attest at that time to having worked on days that had not arrived yet. Organization maintains: How was Claimant to know it would be considered wrong for him to handle the expense account in the same manner as the Carrier expects them to handle the payroll; i.e., by requiring them to send it in before the end of the period? How was Claimant to know when he prepared expense account January 29th that he would be sick and unable to work on the 30th and the 31st.

Upon careful consideration of the record in this matter the Board concludes Claimant was given a fair and impartial hearing. The Board initially considered Claim No. 2 in this matter. After a close examination of the evidence adduced on the record, the Board concludes that there is substantial evidence to support the charge and the discipline imposed of dismissal. Claim is denied. As a result of the Board's denial of Claim No. 2 it is not necessary for the Board to rule on Claim No. 1.

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 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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 17th day of September 1982.