

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25188
Docket Number CL-25262

M. David Vaughn, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Arline and Steamship Clerks
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(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9786) that:

(a) Carrier violated the Clerks' Agreement at Argentine, Kansas, when it improperly removed A. A. Romero from service, and

(b) Carrier shall now allow Claimant eight (8) hours' pay for each work day (forty (40) hours per week), commencing April 19, 1982, up to and including date of return to service of the Carrier at the rate of Chauffeur II position at Argentine, plus any subsequent wage adjustments, and

(c) Claimant's record shall be cleared of all charges that now appear in the transcript of the investigation held March 22, 1982.

(d) In addition to the moneys claimed, A. A. Romero shall now receive fifteen per cent (15%) interest on moneys claimed, such interest to be compounded on each and every pay period from date of removal from service forward for the period of time Claimant is held out of service (40 hours per week).

OPINION OF BOARD: Claimant A. A. Romero was employed by the Carrier as a Chauffeur II. On February 26, 1982, at approximately 12:45 p.m., while on duty, Claimant left the property and was gone for a period of approximately one-half hour. Following the incident, the Carrier conducted an investigatory hearing to determine if Claimant's action was in violation of the applicable Agreement.

The record of that hearing shows that Claimant requested from his Foreman permission to leave the property for the stated purpose of assisting his girl friend in starting her car, which was parked nearby. It is undisputed that the Foreman told Claimant in response to Claimant's initial request that he did not have authority to let him leave the property. It is also undisputed that the Carrier had distributed a list of Supervisors, not including Claimant's Foreman, who were, under the Carrier's written procedures, the only persons authorized to grant such requests.

It is further undisputed that Claimant returned to his Foreman shortly after his initial inquiry and again requested the Foreman's permission to leave the property. The Foreman again informed Claimant that he lacked authority to grant the request. Here, the factual assertions of the parties diverge. The Foreman testified that he denied Claimant's second request, but told the Claimant that he should punch out if he was going to leave. The Claimant asserts that the Foreman nodded yes in response to his second request and that he took the nod to constitute permission to leave. Claimant did, in any event, leave the property. He punched out on his departure and back in on his return.

Following an investigatory hearing, the Carrier dismissed Claimant from service for violation of Rules 2, 13, and 15 of the Carrier's General Rules for the Guidance of Employees. Those Rules state, in relevant part:

Rule 2: "Employee must be conversant with and obey the Company's rules and special instructions. If an employee is in doubt, or does not know the meaning of any rule or instruction, he should promptly ask his supervisor for an explanation."

* * *

Rule 13: "**** Employee must not be absent from duty without proper authority...".

Rule 15: "Employee...****must not absent themselves from duty...without proper authority".

The Organization's appeals from the Carrier's action were unsuccessful, and the claim was brought before the Board. The Organization argues, in essence, that the Carrier's action must be overturned for four reasons: that the notice was defective because it was too imprecise, that the Carrier representative did not conduct a fair hearing, that the facts demonstrate that Claimant had permission to leave the property, and that the penalty assessed is out of proportion to the offense, even if Claimant lacked permission.

The Carrier clearly resolved the conflicting testimony in favor of the Foreman, who testified that he had denied Claimant permission to leave. That conclusion appears more consistent with the Foreman's undisputed prior statement that he lacked authority to let Claimant go than with Claimant's assertion that the Foreman thereafter gave him silent approval, but the Board need not reach independently such a conclusion. Under the Board's precedent, credibility determinations are for the hearing officer to make, and the Carrier's conclusions with respect to disputed facts will not be disturbed if supported by substantial evidence in the record. The Board concludes that there was such support here, and, therefore, declines to disturb the Carrier's conclusion that Claimant intentionally left the property without permission and in violation of the cited Rules.

With respect to the severity of the penalty, a balance must be struck between the principles that absence from duty without permission is a serious offense, and that dismissal is a penalty to be invoked only in extreme cases. The Board concludes that dismissal for the conduct described here would not be arbitrary or excessive if the incident giving rise to the discipline formed part of an ongoing pattern of conduct demonstrating Claimant's inability to function successfully in his job.

Claimant was employed by the Carrier for approximately two and one-half years. During that time, he was suspended on three occasions and subjected to disciplinary conferences on five occasions. Claimant's irregular attendance was an ongoing problem. During his service with the Carrier, Claimant was absent for all or part of 25.5% of the days he was scheduled to work. He had been suspended for being absent without authority six months prior to the incident here in question. Without substituting the Board's judgment for that of the Carrier, the Board is unable to conclude from a review of Claimant's short service and his record of attendance and discipline that the penalty imposed by the Carrier was arbitrary or excessive. See, e.g., Third Division Award 24288.

The Board must reject the Organization's complaint that the notice of hearing was defective. The notice must be sufficiently specific as to allow the Claimant and the Organization the opportunity to prepare their defense; and the Board concludes that the notice here met that standard.

The Board is concerned about the manner in which the Carrier representative conducted the hearing. While the Carrier has the right to conduct the hearing in an orderly manner and to exclude irrelevant testimony and evidence, those rights must be exercised in a manner which does not interfere with the requirement that an employee disciplined by a Carrier is entitled to a fair hearing. A number of actions by the Carrier representative at the hearing give rise to the Board's concern. The Organization sought to make a closing argument and the Claimant to make a statement on his behalf. The Carrier denied both requests. Some of the conduct of the hearing officer, including denial of these two requests, was simply unnecessary, and an abuse of the presiding officer's power. Constructive labor-management relations and the confidence of employees in the grievance process are ill-served by such a rigid, legalistic, hostile proceeding.

However, the Board must, in reviewing the record, look to the impact of the offending conduct on the employee's rights; mere hostility on the part of the hearing officer, or even erroneous rulings, will not constitute grounds to set aside the Carrier's otherwise sustainable action unless the conduct denies Claimant fundamental due process under the Agreement. In addition, it is the duty of the Organization in such a situation to make offers of proof or otherwise preserve or indicate on the record the substantive evidence which it sought, but was denied, the opportunity to present; mere generalized assertions of ill-treatment at the hands of the hearing officer will not support reversal of the action.

The Organization sought, and was denied, permission to cross-examine the Foreman with respect to treatment of other employees. The Board believes that the better course would have been to allow the questions. However, the Organization presented no testimony with respect to disparate treatment and made no offer of proof at the hearing to support an assertion that Claimant was singled out. The essential evidence with respect to the Carrier's rules and Claimant's conduct with respect to those Rules is in the record, as set forth in the Opinion. Under the circumstances, the Board declines to set aside the Carrier's action.

Accordingly, for the reasons set forth in the Opinion, the claim is denied.

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

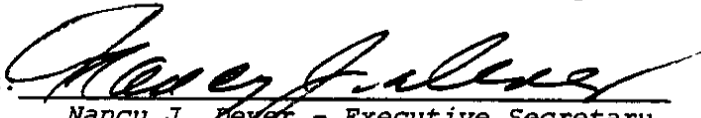
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1984.

