NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26020
THIRD DIVISION Docket Number TD-25840

Robert W. McAllister, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Southern Pacific Transportation Company (WL)

STATEMENT OF CLAIM:

"Request that the notice of discipline, dated May 26, 1981 be withdrawn from R. R. Tomren's record and that he be compensated for all time lost as a result thereof. Carrier file CLK-A-LA-1-11."

OPINION OF BOARD: After a formal hearing, the Carrier found the Claimant, R. R. Tomren, with service since October 9, 1972, had absented himself without authority on April 25, 27 and 28, 1981. He was assessed a suspension of fifteen (15) working days. Noting the Carrier had charged the Claimant with violation of Rule 810, the Organization contends he reported his absence in the usual and customary manner, and his vacancy was filled in the usual and customary manner provided for by the Agreement.

By way of background, it is undisputed that on April 18, 1981, Chief Train Dispatcher R. M. Gregory issued the following message:

> "Coast/West ACDs are not to accept any dispatcher layoffs. They must be referred to R. M. Gregory until present shortage alleviates."

Examination of the Claimant's testimony establishes he was aware there was a memo out about no layoffs without the Chief Train Dispatcher's permission. As for the absence of April 25, 1981, the Claimant admitted he did not mention he was ill to Train Dispatcher Bryant. He also admitted Bryant told him no one could be off. Nevertheless, the Claimant told Bryant to lay him off because he was not coming in. For the absences of April 27 and 28, the Claimant did call Train Dispatcher Bryant. However, he neither asked for nor received permission to be off. Rule 810 specifically states, in pertinent part, that employees "must not absent themselves from their employment without proper authority." Notwithstanding prior understandings of what constituted proper authority, when on April 18, 1981, the Chief Train Dispatcher clearly enunciated what was deemed proper authority as of that date, the Organization's contention the Claimant complied with usual and customary practices is without merit. We find the Carrier's actions were a reasonable exercise of its rights and that the fifteen (15) day suspension issued the Claimant was equally reasonable.

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 Employes involved in this dispute are respectively Carrier and Employes 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. Dever - Executive Secretary

Dated at Chicago, Illinois this 28th day of May 1986.

LABOR MEMBER'S DISSENT
to
Award No. 26020 - Docket TD-25840
(Referee McAllister)

In this discipline case, the Appellant was assessed a 15-day suspension on the charge of absenting himself from his employment without proper authority in violation of Carrier's Rule 810. This is tantamount to a fine of approximately $1200.00.

This suspension should have been voided because he was not afforded the "fair and impartial" hearing agreed upon by the parties to the Agreement. The hearing officer, in order to fulfill this requirement of the Agreement, must be totally unbiased and objective. That cannot be said of this hearing officer. In questioning the Appellant, he tried to provoke the Appellant into admitting a rule violation. When the representatives tried to calm the Appellant, in order to proceed in a more orderly manner, the hearing officer accused them of coaching the witness. When they requested a short break for consultation, the hearing officer denied the request with a comment, "To coach the witness".

The conduct displayed by him throughout the hearing, as revealed by the transcript, is conduct unbecoming an officer of any Company, and violates every principle of fairness. It displays a total disregard of impartiality.

Third Division Award 5359:

> ". . . The hearing officer must not engage in argument with the witnesses or the accused and must not comport himself in such a way so as to in effect prejudice the hearing. . . ."

As for the merits, the manner in which the Appellant was allowed to be off work — yes, by acquiescence — and then accused of misconduct, amounts to nothing more laudable than entrapment. If his absence was impermissible, he should have been informed in unequivocal terms. As it turned out, he laid off in the usual and customary manner, and the silence of all concerned — no one said, "You can't be off" — coupled with the Carrier's own acknowledged practice ("Dispatchers are allowed to lay-off from service at will."), led him to believe his absence was authorized; or, at least, not unauthorized.

In short, the Carrier failed its burden of proof of the accusations against Appellant, and erred in assessing discipline. The Appellant called

the West Assistant Chief Dispatcher on each of the dates in question to report he would be unable to protect his assignment. The controversy arose as a result of the message issued to the Coast/West Assistant Chiefs (quoted on page 1 of the Award) concerning the handling of layoffs. This message was not directed to the Appellant. Transcript page 7:

> "Q. And you informed Mr. Tomren that you could not accept his layoff. Is that correct?
> A. No sir, I didn't. That sentence was more less a post script to the fact that I did not have that notice in front of me about layoffs being accepted without R. M. Gregory's permission. I had only worked the job a few days and after the phone call, I took the message out of the drawer, re-read it, and at that point, I didn't know that I was supposed to obtain Mr. Gregory's permission, as in fact, I was. The notice implied that he must be notified. So, a couple of hours later I did call him, I believe around 5:30, and I told him what the note says, that Russ did lay off..."

In each case, Mr. Gregory was notified and took no exceptions. He only questioned if the job was appropriately filled.

If there were any violations of Chief Dispatcher Gregory's mesage, it would have been on the part of the Assistant Chief on duty, not Appellant, as the message was directed to the Assistant Chief. However, no exception was taken. Transcript page 41:

> "Q. Did Mr. Gregory take any exceptions to your layoffs prior to this notice dated April 29th?
> A. He never said anything to me about it."

There can be no question the Appellant's absence was properly reported to the proper authority and handled properly under existing Agreement provisions and the Operating Rules. In this case, the Carrier erred in assessing discipline to Appellant under Rule 810 for having allegedly violated a message of instructions directed to Assistant Chief Dispatchers.

On one of the three days when Appellent was absent, his absence was due to illness. Certainly, there should have been no hesitation in finding

for the Appellant on that occasion. We are not yet at the point that sick employees must work regardless of their physical condition, although some carriers, with the support of a few neutrals, seem to be headed in that direction.

Second Division Award 10438:

> "Justifiable absences, properly documented, must be permitted by the Carrier although much inconvenience may result. . . ."

This appeal of discipline improperly imposed on the Appellant should have been sustained on the evidence. Indifference to the facts, such as manifested by this errant decision, warrant this Dissent.

R. J. Irvin
Labor Member