

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31067
Docket No. SG-31295
95-3-93-3-418

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc. (former Seaboard
(Coastline Railroad Company)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Company, Inc. (former Seaboard Coast Line Railroad):

Claim on behalf of D. B. Bailey to be made whole for all lost time and benefits resulting from a disciplinary suspension from September 14 through September 18, 1992, and for removal of the discipline from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it failed to provide the Claimant with a fair and impartial hearing and imposed harsh and excessive discipline on the basis of unproven charges. Carrier's File No. 15 (92-50). General Chairman's File No. 22/OPR/92. BRS File Case No. 9116-SCL."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was ordered to attend a Hearing:

"... to develop the facts and place your responsibility if any in connection with your absence from work July 28, 1992 through July 31, 1992 claiming you were home resting due to heat exhaustion on July 28, 1992. You are being charged with non-compliance with CSX operating rules."

The Hearing was held as scheduled at which time Claimant was present, represented and testified on his own behalf.

Following completion of the Hearing, Claimant was notified as follows:

"This refers to investigation held at Florence, SC on Friday, August 7, 1992 to develop the facts and determine your responsibility, if any, in connection with your absence from work July 29, 1992 through July 31, 1992.

The investigation proved conclusively that your total disregard of Operating Rules when you absence (sic) yourself without proper permission from your position of Signal Maintainer, Lake City, SC from Wednesday, July 29, 1992 through Friday, July 31, 1992. Additionally, you had been advised that the FRA Signal Inspector would be on your territory the week of July 27, 1992 and that your presence would be required.

A five (5) days suspension is being imposed for your offense, such suspension will be served September 14, 1992 through September 18, 1992.

I trust that this will serve to impress upon you, the importance not only of our rules, but the necessity to use good common sense in your job responsibilities in the future."

The discipline as imposed was appealed through the normal on-property grievance procedures and is now properly before this Board for final resolution.

In this, as in any discipline case, absent some jurisdictional or procedural contentions of which there are none in this instance, the single most important document for the Board's review and consideration is the transcript of the Hearing record. In this, as in any discipline case, the Carrier has the burden of proving the charge by substantial evidence in the Hearing record. Regardless

of the eloquence or imagination of the written or oral presentation of the case to the Board, the substantial evidence must be found in the Hearing record. The term "substantial evidence" has been defined for us by no less authority than the U. S. Supreme Court as follows:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229)."

Here we have a Signal Maintainer with approximately 21 years of service with the Carrier who had requested a change in his vacation schedule. His Supervisor had advised him that the change could not be granted as requested due to certain exigencies of the service which required his presence on his assignment. On July 28, 1992, after working his regular assignment, Claimant's wife contacted his Supervisor at approximately 11:00 P.M. to advise that Claimant had been required to seek emergency medical attention and would not be available for service for the next few days. On July 29, 1992, at approximately 7:00 A.M., Claimant called his Supervisor to confirm the information given by his wife the previous night. Later that day, at approximately 6:50 P.M., Claimant again contacted his Supervisor "wanting to know how the inspection went that day...." No contact was had with Claimant thereafter. Claimant's Supervisor made several telephone calls to Claimant's home on July 29 and received no answer. He made one visit to Claimant's home on July 31 and found no one there. The Hearing notice was issued on July 31, 1992.

The Board studied with interest the transcript of the Hearing record. The Supervisor testified to the effect that he was suspicious that Claimant, after having been denied permission to take vacation time, had used this sickness as an excuse and was, in the Supervisor's opinion, "being dishonest or disloyal."

Claimant testified that after working his full tour on July 28, he required medical attention because of heat exhaustion. He sought that attention on July 28 and presented at the Hearing documentation from the attending physician relative to the medical attention given and the instructions issued by the physician. Claimant testified that on July 29 he contacted a relative to seek the use of "her condominium at Garden City" where he pursued the rest and relaxation prescribed by the attending physician.

Carrier attempted to make an issue of the fact that Claimant was not at his home during the "R and R" period and that he did not advise the Supervisor of his absence from his home. There is, however, no indication in the Hearing record that the Supervisor even attempted to ascertain Claimant's whereabouts. He never asked Claimant where he was when he called the Supervisor at 6:50 P.M. on July 29 in spite of the fact that he had been calling Claimant at

his home during the day and had received no answer. Rather, the Supervisor testified as follows:

"I assumed he was at home I told him that I had been trying to call him all day and he just said yea and I didn't know exactly where he was at, I assumed he was at home because I asked him how he was feeling and he said well he said his legs were still like tight from the cramps that he'd had from the night before and he had just been taking it easy all day and trying to do as little walking as he could so I assumed he was at home and I had to call him back right after that and I didn't get any answer then also."

and

"Part of it I feel like, about being dishonest or disloyal, I feel that some aspect of it that he was, he didn't really, I assumed he was at home because of what he had said and as far as I can tell from my phone calls he wasn't at home and I feel like he might have just went ahead and took off somewhere."

Of additional interest to the Board is the absence of information relative to the location of the Garden City condominium. Claimant stated that he and his family went there for rest and relaxation as prescribed by the attending physician. Carrier says Claimant was dishonest for not revealing this fact to the Supervisor. Without any further explanation or logical connection, Carrier charges that Claimant:

"... attempted to deceive his supervisor into thinking that he was at home recuperating when in fact he left home (immediately after phoning his supervisor at 7:00 A.M., July 29, 1992) traveling with his family to a distant location for a mini-vacation."

It is the Board's conclusion on the basis of the relative convincing force of testimony and evidence that Carrier failed to carry the burden of proof of the charge in this case. Carrier's entire position and conclusions are based upon assumptions, conjecture, surmise and suspicions. The only relevant evidence present in the Hearing transcript is Claimant's introduction of the attending physician's documentation relative to Claimant's condition and the prescribed course of corrective action. While the Board is reluctant to interfere with Carrier's right to make discipline determinations, we have consistently refused to uphold the assessment of discipline which is primarily based on suspicion, surmise, assumption and conjecture. The definition of "substantial evidence" demands much more than is present in this record. The discipline as assessed cannot stand.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.