

SPECIAL BOARD OF ADJUSTMENT NO. 986

Case No. 16
Docket No. NEC-BMWE-SD-1309D

PARTIES: Brotherhood of Maintenance of Way Employees
TO :
DISPUTE: National Railroad Passenger Corporation (Amtrak)

FINDINGS:

On May 21, 1985, Claimant C. Turner was notified to appear at a hearing in connection with the charge that he had been absent without authorization during April and May 1985, in violation of the parties' absenteeism agreement. The hearing was held on June 4, 1985; as a result of the hearing, Claimant received a ten-day suspension.

The Organization contends that Carrier filed an untimely charge in violation of Rule 71, which provides that a hearing must be scheduled within 30 days from the date that the Division Engineer has knowledge of a possible violation. The Organization asserts that that the Division Engineer had knowledge of the alleged absences by the end of Claimant's scheduled tour of duty on each of the cited days. The thirty-day period commenced as of the day following each alleged absence; the hearing therefore was held after the thirty-day period expired. The Organization asserts that the discipline is void, and the claim should be sustained.

The Organization further contends that Carrier failed to prove its case by a preponderance of the evidence. Claimant testified that he notified supervisors of his absences, contradicting Carrier's charge. The Organization argues that Carrier then had the burden of rebutting Claimant's statements. Carrier could have done so by calling as a witness the employee to whom Claimant spoke on the dates in question; because Carrier chose not to call this employee,

Claimant's statements are unchallenged and must be accepted as true. The Organization therefore argues that the claim should be sustained.

The Carrier contends that its time sheets and the general foreman's testimony establish that Claimant was absent without authorization on the cited dates. Moreover, Claimant admitted he was absent on these dates. Carrier further argues that the record shows Claimant did not report off prior to his absences. Claimant's testimony does not indicate that he spoke with any supervisors. The record also shows Claimant was absent without either permission or legitimate reason.

The Carrier next argues that Claimant was timely charged as required by Rule 71. This was Claimant's second offense under the absenteeism agreement; one of the cited dates falls within the thirty-day period specified in Rule 71. Under the parties' past practice, this charge was timely. The Carrier further argues that even if the Organization's assertion as to Rule 71 is correct, the record shows that Claimant was absent without permission on May 6, 1985, within the thirty-day period. This absence violates the absenteeism agreement.

The Carrier finally asserts that the assessed discipline is appropriate under the circumstances. The Carrier therefore contends that the claim should be denied in its entirety.

This Board has reviewed the evidence and testimony in this case, and we find that Rule 71 requires that the Carrier must schedule a hearing within 30 days from the date that the division engineer or his representative has knowledge of the employee's involvement in the incident that led to the charges. The Carrier contends that the Claimant was absent without authorization on April 3, 1985; April 9,

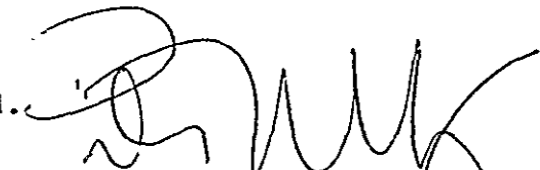
1985; and May 6, 1985. The hearing was not scheduled until June 4, 1985, which was more than 30 days after the April dates. Consequently, the Carrier violated Rule 71 by bringing those charges against the Claimant in an untimely manner; and those charges must be dismissed.

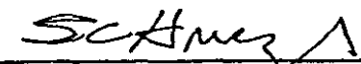
With respect to the May 4, 1985, absence, the hearing was held in a timely fashion; and there was no procedural violation with respect to that charge.

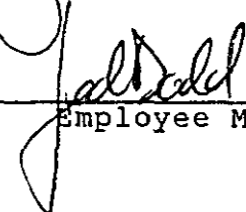
Turning our attention to the substantive issue, Claimant testified that he was unable to contact his immediate supervisor on May 6, 1985, but that he did speak with his secretary by the name of "Ms. Linda." The Carrier did not call the secretary to rebut the testimony of the Claimant. Moreover, the Claimant presented evidence that he had attended a doctor's appointment on May 6, 1985; and doctor's appointments fall within the exception to unauthorized absences. The record reflects the Claimant's testimony that he went to the doctor on May 6, 1985, which is a proper reason for being absent, and that he contacted the office of the supervisor. Since there is no contradictory evidence, the Carrier has not met its burden of proof. This Board must find that the hearing officer's finding of guilty is not based on sufficient evidence.

Award:

Claim sustained.


Chairman, Neutral Member


Carrier Member
(DISSENT ATTACHED)
Date: 3-25-87


Employee Member

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CASE NO. 16
CARRIER MEMBER DISSENT

The Carrier must dissent to this Award. It is not with the reading of the Absenteeism Agreement language or the logic in the application of that language to which the Carrier must dissent. The Carrier dissents because the manner in which employees have been charged under that Agreement which had become the practice was that originally urged by the Organization and to which the Carrier had generally acquiesced in response thereto despite its original position, which position was that supported by Award Nos. 16, 17, 18 and 19. Either party is within its rights to demand adherence to clear language despite practice, but if such were the Organization's choice, advance notice should have been provided the Carrier.

The Award effectively ends the practice that had developed and requires that the language of the Absenteeism Agreement as interpreted in the above referenced Awards govern the future application of that Agreement.



L. C. Hriczak
Carrier Member