

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Carrier violated the Current Working Agreement when they unjustly dealt with Carman P. Miskow by holding him out of service from May 24, 1972, and subsequently dismissing him from all services with the Carrier on July 5, 1972, as a result of an investigation held on June 8, 1972.
2. That the Carrier be ordered to return Carman P. Miskow to service with seniority rights unimpaired, make him whole for all wages lost from May 24, 1972 until restored to service, make him whole for all health and welfare benefits, vacation rights, pension benefits including Railroad Retirement and Unemployment Insurance, and make him whole for any other benefits that he would have earned during the time he is unjustly held from service.
3. That the Carrier be ordered to pay Claimant an additional 6% compounded annually from the anniversary date of being withheld from service on all wages lost.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 Philip Miskow, an upgraded carman in the employ of Carrier at Lorain, Ohio, received the following letter under date of July 5, 1972:

"As a result of the investigation held at Bellevue, Ohio June 8, 1972 you are hereby notified that you are dismissed from the services of the Norfolk and Western Railway Company for claiming time for work not performed on time card dated May 22, 1972.

J. G. Foos
Car Foreman"

By letter dated August 28, 1972, Petitioner on behalf of Claimant appealed the dismissal on both procedural and substantive grounds. On the property and before this Board Petitioner contends that the hearing was not fair and impartial and that the penalty assessed was unreasonably harsh in the circumstances.

Carrier asserts that procedural objections were not timely raised at the hearing and are in any event unfounded. Moreover, Carrier maintains that record evidence supports the finding of guilt and that dismissal is warranted by Claimant's past discipline record.

The scope of our Board's authority to review discipline cases has often been stated. A concise summary of these principles is found in Third Division Award 13179 (Dorsey) as follows:

"In discipline cases the Board sits as an appellate forum. As such our function is to determine whether:
1) Claimant was afforded a fair and impartial hearing;
2) the finding of guilty as charged is supported by substantial evidence; and 3) the discipline imposed is reasonable."

In pursuit of the first of these lines of appellate inquiry we turn to the question of fair hearing.

Carrier contends that procedural objections were waived at the hearing on June 8, 1972 and untimely raised in the Petitioner's appeal letter on the property August 28, 1972. We have reviewed the record in this connection and cannot agree that the procedural objections raised at the first appeal step were barred by any express or implied waiver at the hearing. The hearing transcript shows clearly that Claimant and his representative reserved the right to raise post hearing objections upon review of the transcript of the investigation.

The question remains whether the hearing was so tainted with procedural irregularities as to nullify Claimant's right to a fair and impartial hearing. Careful review of the transcript convinces us that the hearing officer did not function as an objective fact finder but rather evinced a clear prejudgement of the Claimant's guilt. This was evidenced by excessively restrictive limits on cross examination and by direct assertions by the hearing officer on the record regarding Claimant's guilt, to wit:

Hearing Officer B. L. Booth:

"Mr. Miskow, I will read a notice to you dated April 2, 1971:

"To all employees: Employees will not leave company premises during working hours without permission of their supervisor unless in the performance of their duties. Signed: B. L. Booth, General Foreman'

"Mr. Miskow, by leaving your job before your quitting hour, you not only violated company policy, you also violated my instructions of long standing." (Emphasis added)

Further close analysis of this record sustains the Petitioner's assertion of serious procedural impropriety in yet another respect, i.e., Mr. James Foos, the Carrier supervisor who proffered the charges against Claimant, was the chief witness against Claimant at the hearing; yet Mr. Foos also weighed the evidence and assessed the penalty of dismissal following the investigation.

This Board has not infrequently sustained claims in discipline cases where Carrier has deprived claimants of a fair hearing either by prejudice and prejudgement of the hearing officer, see Second Division Awards 4988 (Weston), 6158 (McGovern) and 6225 (Dugan); or by having the same Carrier official perform the several functions of complainant, witness, jury and judge. See Second Division Awards 4536 (Seidenberg), 5642 (Ritter) and Fourth Division Award 2150 (Seidenberg). We have read carefully the awards cited by Carrier herein, including 6196 (Quinn), and find nothing inconsistent with the foregoing principles therein.

On this record we have both hearing officer prejudgement at the hearing and an improper overlapping of prosecutorial and judgemental roles, the net effect of which is to deprive claimant of a fair hearing. Carrier bears the serious responsibility of assuring an accused employee a fair and impartial hearing. This responsibility is ignored only at the peril that serious and prejudicial procedural defects may prove fatal to Carrier's substantive case. Such is the case herein and we shall sustain Part 1 of the claim to the extent that Claimant was unjustly dismissed from all services on July 5, 1972 as a result of the investigation held on June 8, 1972.

As to the question of damages claimed in Part 2, we must be guided by the controlling Agreement language at Rule 28(e): "If the charge against the employe is not sustained, it shall be stricken from the record. If by reason of such unsustained charge the employe has been removed from the position held, reinstatement will be made and payment allowed for the assigned working hours actually lost, less any earnings in or out of the service." Accordingly, Carrier shall return Claimant to service with vacation rights and pay him for the assigned working hours actually lost since June 8, 1972, less any earnings in or out of service. Finally, the record herein does not support Part 3 of the claim and it is hereby denied.

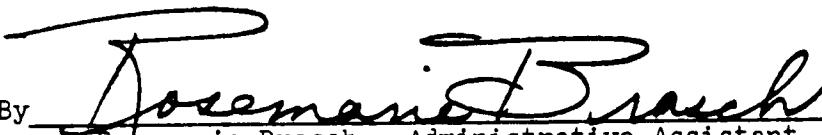
A W A R D

Claim sustained in part and denied in part in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of December, 1974.