

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12895
Docket No. 12876
95-2-94-2-15

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

PARTIES TO DISPUTE: (System Council No. 9, International
(Brotherhood of Electrical Workers
(
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

- "1. That the B&O, in violation of the controlling Agreement, Rule 28, arbitrarily, capriciously and unjustly disciplined Telephone Maintainer K. W. Coblentz, by assessing discipline consisting of dismissal from service, as a result of investigation held in Baltimore, Maryland, on July 18, 1991, and;
2. That the B&O, reinstate Claimant K. W. Coblentz with his seniority unimpaired and that the B&O compensate Claimant Coblentz for all time lost as a result of this arbitrary, capricious and unjust discipline, to include any and all fringe benefits which might have been lost as a result;
3. And further, that Claimant's service record be expunged of all mention of this incident."

FINDINGS:

The Second 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 entered service of the Carrier September 19, 1990. He was employed as a Telephone Maintainer in Carrier's Halethorpe facility at Baltimore, Maryland, and assigned to service and repair radios and other electronic equipment in the Radio Shop. Claimant worked in an unsupervised environment from 3:30 PM to 12:00 Midnight, Wednesday through Sunday, rest days Monday and Tuesday.

Claimant records his record of repairs on the computer and from time to time Carrier's Communications Supervisor reviewed the record. In doing so he noted a sporadic record had developed. Claimant was called in and counseled on several occasions following which there would be a noted improvement in the amount of work turned out, then a return to being sporadic. Investigation by the Communications Supervisor revealed that Claimant was leaving his assignment prior to his assigned quitting time which led to formal charges being filed on June 24, 1991, reading in pertinent part:

"K. W. Coblentz -- ID 320421
Telephone Maintainer

You are hereby directed to attend formal investigation to be held in Division Engineer's Office, Division Office Building, 4712 Holltins Ferry Road, Baltimore, Md., Tuesday, July 2, 1991, at 2:00 pm to develop the facts and determine your responsibility, if any, in connection with your unexcused absence from your assigned work location on 5/31/91 at 10:00 pm; 6/6/91 at 9:25 pm; 6/7/91 at 9:05 pm; 6/13/91 at 9:30 pm; 6/14/91 at 9:25 pm and on 6/20/91 at 9:45 pm.

You are also charged with falsifying your payroll in that you submitted time sheets for eight hours for each of the above dates.

You may be represented in accordance with your working agreement and may have present as witnesses any persons who have first hand knowledge of the matter under investigation.

Your personal record will be reviewed at the conclusion of the investigation.

You are being withheld from service pending the results of the investigation as provided in Agreement Rule 27."

At the request of the Organization the Investigation was rescheduled to July 18, 1991, at 1:00 PM.

Following the formal Investigation held July 18, 1991, Claimant was notified that he had been found guilty of the charges and dismissed from service effective close of work on July 30, 1991.

We have reviewed the Investigation transcript and find that Claimant was afforded a fair and impartial investigation in accordance with the requirements of the Controlling Agreement. In fact, Claimant acknowledged at the close of the Investigation that it had been fair and impartial.

Study of the Investigation transcript convinces this Board that the Carrier adduced substantial evidence in the Investigation in support of the charges of unexcused absence from assigned work location and falsifying payroll. In addition, it is noted Claimant conceded that he left his assignment early without permission and falsified his time sheets.

In the handling on the property, the Organization appealed, arguing that the discipline assessed was arbitrary, capricious and unjust account:

1. Testimony was presented during the Investigation in the form of an affidavit.
2. Claimant was not counseled prior to being charged and removed from service.
3. Claimant did not comprehend the consequences of his actions.

We find the Organization's argument concerning the presentation of testimony or evidence by affidavit comes too late to be heard. It is well settled that if exceptions or objections are to be taken, it must be done in the course of the Investigation. In Second Division Award 7452 the Board held:

"It is a well defined and accepted maxim that the parties to a dispute may not participate in a proceeding without raising any objection and then after the proceeding is concluded be heard to complain relative to the propriety of the proceeding."

See also Second Division Awards 7153, 7009, 6373, and Third Division Award 24296.

The record shows that Claimant was counseled concerning his sporadic work. Certainly, this put him on notice that his work performance was not satisfactory, and Carrier would be looking to find the problem. Under these circumstances, Carrier was not obligated to lead him by the hand. Common sense dictates that an employee must not leave his work assignment without permission or claim compensation for time not worked. To do otherwise is stealing from the employer.

This Board is persuaded by Claimant's testimony at the Investigation that he did comprehend that his conduct was improper and if detected could lead to the assessment of discipline. This is so because in response to the question asking if Claimant were fully aware of the consequences for falsifying payroll, Claimant responded that after it happened once or twice he figured okay, the Communications Supervisor would call him in and reprimand him.

Contrary to argument advanced by the Organization in its submission that the discipline should be reversed because Carrier failed to prove Claimant's intent was to steal or defraud, this Board concludes that Carrier had no obligation to prove Claimant's intent. Carrier's burden was to prove its charges of leaving the work assignment without permission and falsifying payroll. This it did with substantial evidence. In Second Division Award 11627, the Board held:

"In order to sustain discipline of an employee, it is the responsibility of the Carrier to adduce substantial evidence in the investigation in support of the charges. The 'substantial evidence rule' has been set forth by the Supreme Court of the United States as:

'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.)"

Falsification of payroll and leaving work assignment without permission are of serious nature warranting dismissal. On the record before this Board, we are unable to find that discipline of dismissal was arbitrary, capricious or unjust. The Claim will be denied.

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AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 5th day of June 1995.