

Award No. 5973

Docket No. 5793

2-C&O-FO-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Firemen and Oilers)**

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Laborer Fred C. Keys was unjustly dismissed from the service of the Carrier effective June 10, 1968.

2. That accordingly the Carrier be ordered to reinstate this employe with all employe rights unimpaired and compensated from June 12, 1968, for any losses resulting therefrom, including wages, holiday pay, vacation pay, health and welfare benefits, life insurance, and that his record be cleared of charges made and that any compensation due would be without deduction because of other earnings.

EMPLOYEES' STATEMENT OF FACTS: On November 14, 1951, the Chesapeake & Ohio Railway Company, hereinafter referred to as the carrier, employed Fred C. Keys, hereinafter referred to as the claimant, as a laborer in its locomotive department at Silver Grove, Kentucky. After the introduction of diesel power, the claimant was furloughed and worked at Newport News, Virginia, in the barney yard, and at Charleston, West Virginia, and eventually secured employment due to prior service at the carrier's Stevens Shops, in the Locomotive Department at Silver Grove, Kentucky, on December 3, 1962.

Under date of May 3, 1968, General Foreman Taylor charged the claimant as set forth in letter of that date and requested him to attend investigation at 10:00 A.M., Thursday, May 9, 1968.

At the request of the organization, the investigation was postponed and rescheduled for May 21, 1968.

On May 21, 1968, General Foreman M. I. Taylor requested a postponement of the investigation until Friday, May 24, 1968.

time and gave no indication of any illness. Keys, of course, was familiar with the procedure for postponing investigations and could have requested a further postponement, had one been desired. He had already requested, through his committeeman, a postponement for the investigation which had originally been scheduled for May 9, 1968. It is interesting to note that Dr. Dorger's letters of June 11 are dated the day after the letter notifying Keys of his dismissal. While it is stated, by Dr. Dorger, in the statement submitted by the employees that Keys was seriously ill since the latter part of April, Dr. Dorger advised the local officers that he first attended Keys on May 7, 1968, which was four days after Keys was notified initially to attend investigation to answer charge of absent without permission. This is confirmed in Carrier's letter of September 13, 1968.

It having been shown that Keys was guilty as charged and that there was no justifiable reason for his not attending the investigation scheduled for May 24 and which he did not request a further postponement, the only decision then to be determined is whether or not carrier's discipline was unjust or excessive. Review of Keys' record, as previously stated in this submission, reveals previous disciplinary entries for the same type, as well as other types of offenses; yet, Keys continued to persist in frequent absenteeism without even reporting off, etc. Review of the record also indicates that Keys had been given several opportunities to improve his attendance record and that he had promised to do so, yet no improvement was made. In view of Keys' record and his length of service with the carrier, it is quite evident that he was not a satisfactory employee, that he was not interested in his job, that he was unreliable, and that he had been given several opportunities to improve, yet no improvement was made. Under these circumstances, it certainly cannot be held that the dismissal discipline, as rendered, was excessive or unjust.

The employees have included in their claim request for compensation for time lost. As may be expected, Keys' record indicates that he was frequently absent and during the calendar year 1968, up until the time of his dismissal, he performed service a total of only 72 days, and he did not work a full eight-hour tour on each of the 72 days. From the information available, it has also been determined that Keys was incarcerated for some time after his dismissal by the Railway Company, and if your Board were to reinstate him and allow him compensation for time lost, as he claims, his earnings out of service for the Carrier would far exceed what his earnings would have been had he continued continuously in service.

It has been shown that the dismissal of Keys was fully justified, that he made no attempt to defend himself in connection with the charges, his record was such that his employment with the Carrier should not be continued, that he had other opportunities to improve his attendance, and notwithstanding his promises to do so, failed in this respect. It is, therefore, urged that the discipline as rendered by the carrier's local officers be undisturbed by your Board and that the claim of the employees be denied.

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

44-157
This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

1
It would appear that something other than indifference or unconcern caused claimant to stay away from the investigation on May 24, 1968. After all, he did show up on May 9, the date the investigation was originally scheduled to take place, and he also presented himself on May 21, the date of the first postponement thereof. From this it may be deduced that he would have been present on May 24 had he been aware of the continuance and had he been well enough to attend.

2
Claimant insists that he was kept from getting to the hearing by Carrier's failure to inform him that the matter had been rescheduled for May 24. Of course, all uncertainty on this score would have been removed had a notice of hearing been sent to claimant via certified mail, and signed receipt of delivery obtained, or by having claimant receipt for the letter allegedly handed to him on May 21. Curiously, Carrier did not take either of these precautions to foreclose the question of improper notification being successfully raised.

3
In deference to claimant's almost 17 years of service with Carrier, it is to be expected that Carrier would make doubly sure that claimant was afforded a reasonable opportunity to be present at the investigation before going ahead to try him in absentia.

4
Irrespective of whether it was lack of notice, or claimant's alleged illness that prevented him either from putting in his appearance, or from making a request for a postponement, Carrier should have attempted to find out the reason for his absence, and then set up a new convenient hearing date. The evidence does not establish that claimant, on his own volition, chose not to attend.

5
The opportunity to be heard and to defend himself against the charges brought against him are basic attributes of the "fair hearing" concept envisioned in and preserved to claimant by the first sentence of Rule 44. In our considered opinion, these rights were not accorded to him. See Awards 4255 and 5542, National Railroad Adjustment Board, Second Division.

6
Accordingly, it must be concluded that claimant was unjustly dismissed on June 10, 1968, and he should be reinstated with seniority and vacation rights unimpaired, and compensated for straight time lost, if any (on such days of his work week that he was physically capable of performing the duties of laborer), during the period from June 12, 1968 up to the date of his reinstatement, less earnings, if any, from other employment during the period for which he is awarded back pay herein.

AWARD

Claim sustained in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of July, 1970.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.