

The Second Division consisted of the regular members and in addition Referee Albert A. Blum when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employees:

That under the terms of the current Agreement, Electrician P. Gilley was unjustly dismissed from service of the Consolidated Rail Corporation (ConRail) on April 22, 1980.

That accordingly the Consolidated Rail Corporation (ConRail) be ordered to reinstate Electrician P. Gilley to his former position with all rights unimpaired and reimbursed for all wage 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.

The Claimant, Electrician Paul Gilly, was charged with excessive absenteeism since he was absent from work February 29, March 1 and 8, 1980. At the hearing on April 18, he agreed that he was absent but he said he had the flu, that he did not have a doctor's note with him, and that his "word is as good as the doctor's statement". He then was dismissed from service on April 22 because of "excessive absenteeism in that (Gilly was) absent from work February 29, March 1 and 8, 1980".

When the decision was appealed, the Carrier, in a letter dated June 3, 1980, stated that Gilly was "guilty as charged and such guilt is substantiated in the trial transcript". The Carrier then added, for the first time for the record, that the Claimant had a bad absenteeism record and that, in fact, he had been dismissed from service on November 8, 1979 for absenteeism and had been returned to service on a leniency basis on January 15, 1980 with a warning that "any further similar infraction would not be tolerated".

The Organization pointed out that the Claimant's prior record was not brought forward as evidence in the hearing, or stated in the original charge or in the dismissal notice. The Organization also states that employes had never been asked before to bring in verification of illness for three day absences. The

Organization, therefore, argues that the Carrier's discipline of dismissal should be overruled on the ground that it was arbitrary, capricious and an abuse of managerial authority.

The Carrier, on the other hand, feels that if the Claimant had a doctor's note, as he claimed he had, he would have and should have brought it in to the hearing. Moreover, the Claimant never showed that he had notified the Carrier about his absences - another violation of the Carrier's rule. In addition, his excessive absenteeism had resulted in a trial, his dismissal, his reinstatement on a leniency basis, and a warning on January 15, 1980 that no further leniency would be extended to the Claimant. Nonetheless, he was absent again at the beginning of March 1980 which shows he would not "mend his ways". The Carrier feels that Board award after award have justified the termination of an employee such as the Claimant, given a failure to report to work after a bad attendance record and adequate warnings.

There is no question that the Carrier has the right to consider the total service record of the employee in making a decision as to whether or not to terminate an employee. Moreover, this Claimant's absenteeism record appears to justify such a dismissal. Consequently, it is difficult to understand why this past record was not brought forward at the hearing so that the Claimant could have been given the opportunity to discuss his past record which is one purpose of a hearing. Moreover, it is also difficult to understand why the only reason given for his discharge, until it was appealed, was the three days of absence.

It is true that Board rulings have recognized that sometimes an original charge can be expanded during the hearing (See Second Division Awards 6391, 7818, 6346, 5244), but these charges were expanded during the hearing when the Claimant and his representative might respond to them, not after the hearing. Such post-hearing acts lessen the value of such a hearing and weaken due process - particularly when the end product may be, as in this case, dismissal.

On the other hand, although these matters were not brought forward in the hearing, the Claimant knew about his past record and the warnings (as did his representative at the hearing). Despite his awareness of the warnings and his past record, he was absent again. His negative attitude toward his past absentee record and the warnings was reflected in his statement that he had a doctor's note but had not bothered to bring it to the hearing as if his past absenteeism record did not justify the Carrier's doubts about his most recent absenteeism.

Because of the failure to hold a proper hearing in which all of the facts that resulted in the Claimant's dismissal was not brought forward by the Carrier, the Claimant should be reinstated. However, because the Claimant knew of his past record and because he, nonetheless, was again absent without any proven justification, his reinstatement should be only with seniority rights unimpaired but without back pay or other retroactive benefits. Moreover, the warning given him on January 15, 1980 should still be in effect - namely, that the Carrier "will not entertain any leniency should M. J. Gilly fail to comply with the requirements of service".

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Award No. 9112
Docket No. 9232
2-CR-EW-'82

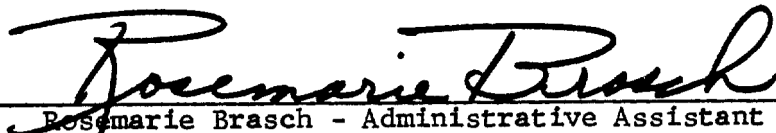
A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of June, 1982.