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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6425
Docket No. 6214
2-N&W-CM-'72

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman 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 Car Repairer J. D. Wilkinson was unjustly deprived of his service and seniority rights when he was discharged from his position on or about November 22, 1969.
2. That the Carrier be ordered to restore J. D. Wilkinson to service with seniority rights unimpaired, and compensation at his applicable rate for all time lost as a result of his dismissal, including 6% per annum compounded annually on the anniversary date of claim.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all 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.

This is a discipline case which resulted in employee's dismissal for failing to protect his job. On November 12, his foreman wrote a letter to him stating that he was absent since October 29, and that, "We would like to hear from you as to your intentions concerning your job. If we do not receive a reply to this letter by November 17, 1969, your name will be stricken from the roster." At 4:30 P.M. on November 17, employee telephoned the foreman and said that he would return to duty on November 18. The foreman told him that he was being carried as AWOL, gave him one days extension and added that he would have to drop him from the roster if he didn't return on the 18th. The employee did not return and on the 20th, the foreman went to employee's home to find out why the employee had not returned. The employee was not home. The foreman told employee's wife that she should get the employee to return to his job; that he was trying to prevent the employee from losing seniority because of his long period of service. Later that

day, the employe telephoned the foreman's office to say that it was his rest day. He was given until November 22, to return. He did not come back to work, no word was received from him and on November 24, the employe was dropped as of November 22. This account is from the foreman's testimony at the hearing. The employe was very uncertain as to dates, times and events at the hearing but did say that the foreman had always been a good friend, "--and I wouldn't deny any word he said." The employe also stated at the hearing that, "--, I am probably partly in the wrong. If I weren't in the wrong, I wouldn't be here." A committeeman representing the employe at the hearing was asked if he felt that the employe made any arrangements to protect his job. He answered, "Not under the circumstances, he didn't, I wouldn't think."

The local chairman representing the employe asked about employe's working record and it was made a part of the hearing. The employe's Disciplinary Record shows twelve offenses from 1956 to 1969. There were four suspensions, the last of which was in lieu of dismissal for unauthorized absence. Two suspensions were for intoxication while on duty. From November 1967 to August 1969, there were seven unauthorized absences. The notice of hearing stated that it was, "--in connection with being absent without permission."

The claim of the Organization is that the employe, "--was unjustly deprived of his service and seniority rights when he was discharged from his position on or about November 22, 1969." It would be a simple matter to dispose of this case by accepting the judgment of the Carrier based on substantial evidence of unauthorized absence in violation of Rule 21 of the Agreement, failing to protect his job and thereby prejudicing efficient operation of the railroad. There would be no reason to substitute our judgment for the Carrier's decision to dismiss the employe based on his Disciplinary Record, Second Division Awards No. 4854, 5049, 5835, 5848.

We would not do justice to this situation if we failed to consider the technical point raised by the Organization's insistence that the Carrier violated Rule 37 of the Agreement in failing to conduct the disciplinary hearing promptly.

Rule 21 states that, "An employee desiring to be absent from service must obtain permission from his foreman." The rule goes on to provide that an employee "unavoidably" kept from work will not be discriminated against. But, if detained by sickness or other good cause, he, "--shall notify his foreman as early as possible." The words, "must" and "shall" leave no way out. The employe violated this rule.

Rule 37 provides, "No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule." The foreman testified at the hearing that the employe was dropped as of November 22. The local chairman made a written request for investigation on December 29. The investigation was then scheduled for January 13, following. The Carrier's letter after the hearing stated, that, "as a result of the investigation--, you are hereby dismissed--." The Organization filed its claim by letter stating that the employe had been, "--arbitrarily terminated by you on November 22, 1969,--." Carrier in its rebuttal argued

that, "Claimant was not dismissed until he was given a formal investigation--."

If the Carrier's interpretation is to be accepted, what was the claimant's status from November 22, 1969 until dismissal on February 6, 1970 after the hearing? The Organization's letter of December 29, 1969 referred to oral requests made in mid-December for a hearing. This was denied at the hearing. The employee's testimony and that of his representative was not convincing on this. The Organization's December 29, letter asked for reinstatement and wages for denial of hearing, but at the same time requested that there be a hearing.

The prior Awards listed above do not involve the issues raised here. The claimant's conduct appears to be tantamount to a resignation which would make a hearing unnecessary but no provision appears in the Agreement for conduct of an employee to be such as to add up to a resignation. In legal terminology, it would be called a constructive resignation. Another way to put it would be to say that the Carrier had every reason to believe that the employee had quit. The Agreement does not provide a specific remedy or procedure if the hearing is not held promptly.

The claimant did receive a hearing. It was a thorough investigation of the facts, conducted fairly and with no objections raised. At the hearing, the testimony against him, the admissions made that he had not protected his job, that his absence was not authorized, the failure to follow Rule 21, and his Disciplinary Record, justified the decision to dismiss him. It may have been justice delayed but it did not result in prejudice to the claimant. The damage caused by delay of the hearing, if any, would be the possible uncertainty in the employee's mind of the final result. The final result should have been apparent in these circumstances.

The Organization's allegation of illness and tragedy in claimant's family is not supported by any testimony at the hearing or other evidence in the record to indicate that it occurred during the absence in question. Claimant testified at the hearing that he could have obtained work after November 22, but that wages were such that, "I can get the welfare and get that much money." There are no mitigating circumstances.

The facts of this case are such as to overcome the technical question raised by the Organization. However, it would have been more decisive if the Carrier had followed through after November 22, by holding the hearing promptly, making its decision known and thus avoid any doubts as to its position.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killean
Executive Secretary

Dated at Chicago, Illinois this 11th day of January, 1973.