

The Second Division consisted of the regular members and in addition Referee C. Robert Roadley when award was rendered.

Parties to Dispute: ( System Federation No. 162, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carman)  
( Southern Pacific Transportation Company

Dispute: Claim of Employee:

1. That the Southern Pacific Transportation Company unjustly dismissed Carman R. J. Garza from service effective December 30, 1974.
2. That accordingly, the Southern Pacific Transportation Company be ordered to restore Carman Garza to service with seniority rights, vacation, Health & Welfare Benefits and all other benefits unimpaired, and compensate him for all time lost since December 30, 1974, until restored to service.

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.

This claim is the result of Claimant having been charged with and found guilty of excessive absenteeism. The investigation of this charge was held on December 17, 1974; Claimant was adjudged by the Carrier to be guilty of the charge and was dismissed from the service of the company by letter dated December 30, 1974, which reads in pertinent part as follows:

"You are dismissed for being excessively absent from your employment as a carman at Englewood Yard 7 days in March, 6 days in April, 2 days in May, 7 days in June, 6 days in July, 11 days in August, 10 days in September, 3 days in October and 8 days in November, 1974, which constitutes a violation of Rule 3 of the Rules for Employees of Mechanical Department."

The pertinent part of Rule 3 states as follows:

"Rule 3. ATTENTION OF DUTIES - Employees shall report for duty at the prescribed time and place and devote themselves exclusively to their duties during prescribed hours and shall not engage in other business without permission of the proper office. Employees shall not lay off without permission except in emergency; in such cases, the foreman must be notified as promptly as practicable. ...."

Petitioner has based his appeal on the following:

1. Claimant was genuinely ill, under doctor's care, thus his absence from work was for valid reason;
2. Claimant is considered to be a very good worker by his supervisor;
3. That although he does have a language barrier, he made every effort to comply with the provisions of Rule 3 (quoted above) and Rule 19, which reads in pertinent part as follows:

"Rule 19 - Absence Account Sickness. In case an employee is unavoidably kept from work, he will not be discriminated against. An employee detained from work on account of sickness or for any good cause shall notify his foreman as early as possible. ...."

The record of this case shows that the claimant's ability as a worker on the job was not questioned by the carrier nor was he charged, and subsequently dismissed, for violation of Rule 19. It is noted that Rule 19 treats with the limited matter of being detained from work account of sickness whereas Rule 3 treats with the broader matter of laying off without permission except in emergency, irrespective of the reason for such absence.

The transcript of the investigation shows that claimant was previously dismissed for absenteeism and then reinstated, on December 27, 1973, after a period of approximately three months. The transcript also shows that claimant received several warnings concerning his absenteeism and was counseled by carrier officials subsequent to his reinstatement.

The transcript shows that the claimant has a history of respiratory problems stemming from a lung operation that took place in 1955. Petitioner averred that these problems were the root of claimant's illnesses and introduced two documents at the investigation in support of that assertion; the two documents were one each from the two doctors who had treated the claimant over the years, Dr. Delgado and Dr. Antonetti. The significant portions of these two documents (letters) is as follows:

Letter from Dr. Delgado, dated February 25, 1975:

"This letter is to inform you that Mr. Raymond J. Garza has been a patient of mine for the last ten years. . . . . The exact days and dates on which he was in my office cannot be furnished because unfortunately, at the present time, his record has been misplaced; however, I can assure that the dates he missed work were because of illness."

The reference to "exact dates" was to visits to the doctor's office during the preceding year.

Letter from Dr. Antonetti, dated December 27, 1974:

"Mr. Raymond J. Garza was first seen by me in Jefferson Davis Hospital for a pulmonary lesion, and several other medical problems. These records may be obtained upon request. (These records were not produced by claimant).

"He has only been in my office once for a respiratory viral infection. I request for him to have a pulmonary function test which were normal. His x-ray showed scarring from previous surgery.

"This is all the information I have available. . . . ."

At best, these two letters substantiate that claimant has a history of respiratory problems, but this fact was not at issue. What was at issue was whether on the dates stipulated in the charge the claimant's absences were due to illness and, if such were the case, did he have corroboration from his doctor covering the dates in question. While it is true that the burden of proof in discipline cases rests with the carrier the responsibility for producing probative evidence to support assertions made in behalf of claimant rests with the claimant and/or his representative. The record does not contain such evidence in support of claimant's position.

Additionally, the Carrier determined on the basis of the investigation that the claimant did not have a language barrier to the degree asserted by Petitioner and we find nothing in the record to suggest this determination was unreasonable, arbitrary or discriminatory. (see Third Division Award 19808, 15574, First Division Award 16411 and Second Division Award 2293)

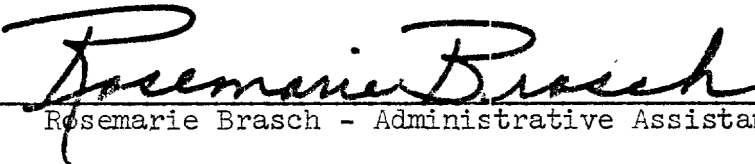
Based upon a careful review of the transcript of the investigation it is our determination that there was substantial evidence to reasonably support the decision of the Carrier. Under such circumstances we may not substitute our judgement for that of the Carrier. (See Second Division Awards 2996, 2993 and a host of other Awards from this Board)

A W A R D

Claim Denied.

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 4th day of March, 1977.