

The Second Division consisted of the regular members and in addition Referee Martin I. Rose when award was rendered.

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

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company violated the controlling agreement, particularly Rule 34, when it unjustly dismissed Carman Helper C. J. Colbert from service effective March 8, 1974.
2. That accordingly, the Southern Pacific Transportation Company be ordered to reinstate Carman Helper Colbert to service with seniority unimpaired, all service rights and compensated for all time lost on the basis of what he would have earned had he not been dismissed from service beginning March 8, 1974, until reinstated 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.

Claimant was employed as a carman helper at Carrier's Houston Car Heavy Maintenance Plant, Houston, Texas. By letter dated February 26, 1974, Carrier wrote to the Claimant that he was charged with absence from his assignment and that "as there may be a violation of Rule 3 of the Rules for Employees of the Mechanical Department, investigation of those charges will be held" on March 6, 1974. Carrier sent this letter to the Claimant by certified mail, return receipt requested.

The investigation was held on March 6, 1974. Claimant did not appear and the proceeding was concluded without his presence. The Local Chairman

and Vice Local Chairman appeared and participated in the investigation. By letter dated March 8, 1974, sent certified mail, return receipt requested, Carrier informed the Claimant that the charges were sustained and he was dismissed from Carrier's services.

Petitioner contends that Claimant was not afforded the right to defend himself pursuant to Rule 34(b) of the controlling agreement in that he did not receive prior notice of the investigation and charges. Petitioner asserts that the facts of record show Claimant's compliance with Rule 3 of Carrier's Mechanical Department rules and Rule 19 of the applicable agreement with respect to giving notice of absence from work and being detained from work, and that there was no valid basis for the discharge.

Carrier maintains that by their failure to protest the holding of the investigation in the absence of the Claimant, their failure to request postponement, and by their participation in the investigation, the Local Chairman and Vice Local Chairman acquiesced in the conduct of the investigation, and that the assertion in the Local Chairman's appeal letter to the Plant Manager dated April 21, 1974 that Claimant "did not receive any notification directing him to appear" for the investigation was too late. Carrier argues that the case on the merits is not in issue here in that this aspect of the claim was not disputed on the property, and that the charges against the Claimant were sustained.

Rule 34(b) of the controlling agreement obligates Carrier to give the charged employee notice of the "precise charge against him and the time, date and place set for the investigation". The claim and the contentions of the parties pose the question whether this prior notice requirement may reasonably be regarded as satisfied. If this question cannot be answered in the affirmative, we must conclude that Claimant was not given the fair and impartial investigation required under Rule 34(a).

The record here does not disclose the Post Office return receipt, or a copy thereof, received by the Carrier for its notice letter dated February 26, 1974 which was sent to the Claimant by certified mail, return receipt requested. Obviously that return receipt would have revealed, prima facie, at least some basic delivery information at issue here. No explanation for the absence of this return receipt from the record is suggested.

Nor does the participation of the Local Chairman and Vice Local Chairman in the investigation, standing alone, fill this gap in the record on the acquiesce theory urged by Carrier. Rule 34(b) required the Carrier to furnish the Local Chairman with a copy of the notice of investigation. Nothing in the record suggests that he and the Vice Local Chairman participated in the investigation in response to desires indicated by Claimant.

Third Division Award 15575, cited by Carrier, is inapposite. In that case, the Post Office return receipt was presented, there was conflicting evidence as to whether or not the claimant there actually sought to avoid service of the notice of investigation, and the Third Division said, "Here, claimant should have expected notification of an investigation following the events which occurred ... but apparently made no effort to make himself available for service..." No similar situation is presented in the instant case.

On the record here, we are required to conclude that the requirements of Rule 34(b), affecting Claimant, were not met and that the investigation was fatally defective under Rule 34(a). Accordingly, the claim must be sustained in accordance with Rule 34(d) -- reinstatement with compensation for "wage loss, if any, suffered" including deduction of earnings from other sources.

A W A R D

Claim sustained to extent indicated in above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of March, 1977.

CARRIER MEMBERS' DISSENT TO AWARD 7252, DOCKET 6962

(Referee Martin I. Rose)

We dissent. The matters of record which clearly establish that this claim is completely invalid were discussed and presented to the Referee in the memorandum submitted by the Carrier Members. That memorandum is incorporated herein by reference.

A. T. Nagler

J. C. Carter

John W. Johnson

Johnson

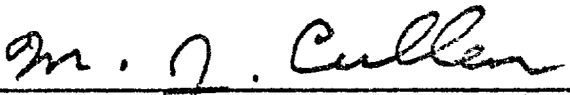
W. M. Johnson

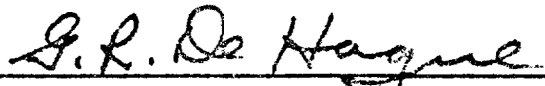
LABOR MEMBERS' ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NOS.  
7252 (DOCKET NO. 6962) AND 7258 (DOCKET NO. 7084)

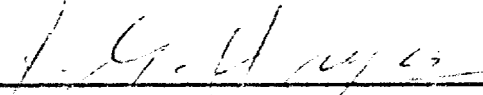
In their Dissent to Award Nos. 7252 and 7258, the Carrier Members of this Division place special emphasis on Memorandums submitted to the Referees and attempt to incorporate those Memorandums into the record by reference.

Members of the Board are not Parties to disputes submitted for adjudication. Memorandums submitted by Members are notes of interest and words of persuasion and do not become a part of the record.

Procedures of the Board prohibit surrebuttal. If Memorandums or Briefs submitted by the Members of the Board were to be considered a part of the record, which they cannot, they would constitute surrebuttal. For that reason the Carrier Members' Dissents to Award Nos. 7252 and 7258 are improper.

  
M. J. Cullen

  
G. R. DeHague

  
J. G. Hayes

  
R. S. Rodgers

  
C. E. Wheeler