Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8055
Docket No. 8047-I
2-AT&SF-I-'79

The Second Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

Parties to Dispute: ( Frederick Sisson, Petitioner
( Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employes:

The claim of the employee is that he was wrongfully terminated from his employment by The Atchison, Topeka and Santa Fe Railway Company on the 13th day of October, 1972, where he was employed as a carman, and that he prays for reinstatement, and back pay for loss of earnings and all other benefits.

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 were given due notice of hearing thereon.

On October 13, 1972, Carrier, at the conclusion of an investigatory hearing at which neither Claimant nor his representative was present, terminated Claimant for a violation of Rule 16 of the General Rules for Guidance of Employees, (Form 2626 Standards) 1966. Claimant had not returned to duty at the conclusion of a medical leave of absence, and was terminated for being absent from work without approval.

The events that led up to this termination are complex. Even though they are outlined in minute detail in the voluminous record presented to this Board, a summary of the pertinent facts/events bears mention.

Claimant was employed by Carrier in March 1959 as a Freight Carman Apprentice. He was promoted to Carman on May 7, 1962. His employment record shows that he had a history of being absent from work without proper authority and had been assessed a total of 110 demerits for such actions in a three-year period between June 1, 1964, and September 1967.

In April 1972, Claimant requested and received a 30-day medical leave of absence. He subsequently requested and received two additional 30-day extensions.

On July 3, 1972, Claimant returned to work and worked for one month. On August 3, 1972, he was arrested by the Sheriff and left the property. He did not return to work after his arrest, nor did he inform Carrier of his whereabouts for about ten days. In the middle of August, Carrier received a request for a medical leave of absence, accompanied by a doctor's statement indicating illness. The leave was granted retroactive to August 4, 1972, and ending on September 4, 1972. Subsequent to the granting of this leave, Carrier received another request for a 60-day extension. This request was also accompanied by a Doctor's statement indicating that the reason for the requested leave of absence was illness.

Questioning the validity of these leave requests, Superintendent of Shops Cantwell wrote Claimant on September 5, 1972, by certified mail, requesting that he come to his office and sign an authorization for Carrier to obtain medical information concerning his illness before his leave could be extended. The letter was returned unopened as unclaimed. Having received no response to this September 5 inquiry, Superintendent Cantwell granted Claimant a 30-day extension of his leave from September 5 to October 5, 1972. On September 27, a copy of the leave approval for the period September 5 to October 4, 1972, together with a second letter stating that a release authorizing Carrier to obtain medical information about his illness would be necessary if further leaves were to be considered, was sent via certified mail. This letter was also returned unopened and marked as unclaimed.

On October 5, 1972, Local Chairman Lyda was notified that Claimant had not responded to Carrier's requests for a medical release, nor had he been in contact with it about his leave termination or an extension. Carrier suggested that the Union see what it could do to get Claimant to contact it and sign the medical authorization form.

Local Chairman Lyda and Vice Local Chairman Blankenship visited Claimant at his home on October 6, 1972. Among other things, they indicated to him that he should go to the office and sign the appropriate forms so that his leave could be extended beyond the October 5 termination date. Claimant said he would, but, upon checking the next day, Lyda discovered that Claimant had not contacted the Superintendent's office. Lyda and Blankenship returned the following day to Claimant's home and again pointed out the seriousness of the situation and again told Claimant to contact the office and take care of the situation. Claimant did not respond to this second request.

On October 10, 1972, Superintendent Cantwell, by certified letter to Claimant, put him on notice that an investigation into his failure to return to work at the conclusion of his leave on October 5, 1972, would be held on October 13, 1972. Lyda also received a copy of this letter.

The hearing was convened on October 13, 1972. Neither Claimant or the Local Chairman appeared at the hearing. The hearing was concluded on the same day, and a recommendation to terminate Claimant was the result. Claimant was notified by certified mail of the results of the hearing -- his termination from employment. Both the letter giving notice of the hearing and the results of the hearing were returned to the Superintendent's office unopened and marked unclaimed.

Claimant subsequently learned of his termination from a hospital clerk, who asked him who would pay his hospital bills, since the hospital had been informed that his hospital insurance had been cancelled. The cancellation was due to his termination by the Carrier. After a series of exchanges between Claimant and Carrier officials and International Union officials, Claimant brought suit in federal court against Carrier for improper discharge and against the Union for failure to represent him properly.

The case was eventually heard and decided by Judge Richard D. Rogers, United States District Court, District of Kansas, Civil Action No. 74-162-05. By a decision dated May 17, 1978, Judge Rogers ordered the case against Carrier and the Union stayed. He ordered the parties to proceed to arbitration before the Railway Adjustment Board, Second Division. Claimant brought the instant proceeding as an individual and was represented by Counsel at an oral hearing before this Board at its Chicago offices on July 17, 1979.

Claimant offered as a defense in the record before this Board and through his attorney at the oral hearing the fact that he at no time was aware of Carrier's desire to have him appear at the Superintendent's office or sign a medical information release. At no time did he realize that his leave was to terminate on October 5, 1972. (He was under the impression that a 60-day leave had been granted, since the Doctor had requested a 60-day leave and not a 30-day leave, which Carrier granted). At no time was he made aware that a hearing was to be held or that his employment was in jeopardy. To support this defense, Claimant points to the fact that the certified letters from Carrier informing him about its desire for more medical information and providing him with information about the length of his final leave and the date of the investigation into his absence were never received by him. Claimant further contends that when the Union officials visited him at his home on October 6 and 7, they at no time stated that he had to go to the Superintendent's office to sign a medical authorization or that his job was in jeopardy. They also did not indicate that an investigation would ensue if he did not make arrangements for an extension of his leave. Claimant contends that he did not go to the Superintendent's office, but rather went to the hospital office where he had always gone to obtain leaves of absence. In his mind, he took care of his obligation by a visit to the hospital office. There, he asked a clerk in the office to make sure that the Superintendent's office received a new application for leave giving more details about his illness.

This Board, after a thorough review of the voluminous record before it and a review of the arguments presented by Claimant's counsel at the oral hearing, finds the Claimant's defense of his actions lacking.

By his own testimony as recorded in an affidavit developed for the legal proceeding in this case, Claimant testified that he was at home each day during the months of September and October. As far as he knew, all mail delivered to his home was claimed by either his wife, his children, or himself. At no time was he aware of any certified mail being delivered to his home nor was he aware that the mail carrier had left a notice in his mailbox that certified mail should be claimed by him at the post office. Claimant's testimony on this point runs contrary to statements made by letter carriers who attempted to deliver mail to Claimant's home. These letter carriers stated that they attempted to deliver the mail, that they knocked on Claimant's door, that they received no response, and that they subsequently left the required notice of certified mail in Claimant's mailbox. These certified letters were eventually returned to Carrier as unclaimed.

This Board, after a review of the record before it, can only conclude that the mail was delivered to Claimant's home, that he was aware of this delivery, and that he chose to ignore these attempts at correspondence from his employer. For whatever reason, Claimant chose not to accept this mail at his own peril. He cannot now be heard to claim that he was not aware of the content of these letters because he chose not to accept them. Carrier in this instance had reasonable cause to obtain medical information about Claimant and made a reasonable attempt by mail and through the local chairman to contact him. Two Union officials testified under oath that the Company's message was relayed by them to Claimant, that he appeared to understand what was required of him, and that a sense of urgency existed. Claimant was told that he should immediately take care of the situation. He, in turn, characterizes these conversations as casual, nondefinitive, and general in nature.

The record before us does not lend itself to that interpretation. Claimant in this case has the burden of proving that he was not aware of the Carrier's attempt to contact him and that he was not aware of what was required of him in order to extend his leave. The record clearly demonstrates that Claimant has failed by any standard to carry that burden.

Claimant was not involved in a dispute with his employer for the first time. His record indicates that he had numerous confrontations with Carrier. He was formerly involved in at least two disciplinary hearings, he received over 100 demerits for absences without authorization, and he participated in civil legal proceedings.

He was not naive and uninformed. He should have been fully aware of his obligation to his employer. He made a conscious decision to do nothing and to be evasive. His claim that he did not understand what was required of him after two conversations with the Union officials, and two attempts at delivery of certified mail from his Employer, must fail.

Claimant asserts that since he was not present at the October 13, 1972, investigatory hearing, nor represented at that hearing, he was denied a fair and impartial hearing. This argument also must fail. Claimant's failure to accept his certified mail announcing the date of the hearing was an overt action on his part. He kept himself uninformed about the hearing and did not attend it at his own peril. His failure to be present or to be represented was a result of his own actions and cannot be considered as a basis to set aside his termination on the grounds that he was denied a fair and impartial hearing. This Board has so observed in numerous cases on this point.

The factual findings of the investigation are not in dispute. Claimant did not report for work at the conclusion of his leave on October 5, 1972. He was absent from duty without proper authorization in violation of Rule 16, as charged. His past record of absenteeism was poor. Carrier, based on the events of the two and one-half months preceeding the investigation, the results of the investigation, and Claimant's past attendance record, chose to terminate the grievant. This Board has consistently held that absenteeism is a serious offense and has repeatedly pointed to its detrimental effect on the operation of railroads. We, therefore, cannot fault Carrier when it takes action to deter such behavior. (We need only cite a few of many such cases on this subject to reinforce our position in this case - Second Division Awards 6710, 6240, 5835, 6706; Second Division 6499, citing Third Division Award 13127; Second Division Award 6921; Third Division Award 20113).

While this Board concurs with Carrier's position that Claimant's charges against his Union are not germane to a decision in this case, the actions of the two Union officials did have some bearing on our decisions and are worthy of mention. The Local Chairman immediately contacted Claimant when he was informed that a problem existed. He followed up to see if Claimant had acted. When he discovered that he had not, he immediately contacted Claimant a second time. Claimant, by his own actions and his evasive behavior, brought about his termination.

A W A R D

Claim denied on all counts.

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 22nd day of August, 1979.