

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

Parties to Dispute: { System Federation No. 97, Railway Employees'
{ Department, A. F. of L. - C. I. O.
{ (Firemen & Oilers)
{ Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employees:

- (1) That, the Carrier erred and violated the contractual rights of Mr. John Henried Ramirez when they removed him from service as a result of an investigation held on July 12, 1977 and re-opened on August 17, 1977.
- (2) That, therefore, Mr. Ramirez be returned to service with all rights, privileges and benefits restored.
- (3) That, he be made whole for all health and welfare benefits, pension benefits, unemployment and sickness benefits and any other benefits he would have earned had he not been removed from service.
- (4) Further, that he be compensated for all lost time, including overtime and holiday pay plus 6% annual interest on all lost wages and that such lost time be counted as vacation qualifying time.

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, a laborer with a seniority date of October 25, 1972, was discharged from service for unauthorized absence from work from June 20 to July 5, 1977, and for failing, during this period, to obtain a proper leave of absence. Carrier cites Rule B, Form 2626, Standard General Rules for Guidance of Employees, revised 1975 edition, as its authority for this action.

The Organization protests the carrier's action on the basis that claimant did not receive a fair hearing. In addition, it claims that carrier knew he would be off. In the organization's view, his absence was legitimate, since he has a medical history of back trouble and was under a company doctor's care.

The events that gave rise to this dispute may be summarized as follows:

Claimant was absent from work from June 20 to July 5, 1977. On July 6, 1977, he appeared with a union representative at the office of the Superintendent of Shops to request a leave of absence. He was denied that leave. The record reveals that on June 24, 1977, claimant was sent a certified letter reminding him that he should contact the Superintendent's office regarding his absence from work and obtain an authorization for leave. This letter, marked unclaimed, was returned to carrier by the post office. On July 5, 1977, claimant was advised by certified mail that a formal investigation to develop the facts and place responsibility for his alleged unauthorized absence would be held on July 12, 1977.

An open chair investigation was held as scheduled on July 12, 1977. As a result of this investigation, claimant was found to have violated Rule 13. He was removed from service. Subsequent to the July 12 hearing, it was learned that claimant charged that he did not receive notification of the hearing until after it had taken place. On request of the local chairman, the investigation was reconvened. On August 17, 1977, claimant came to the investigation; his wife appeared to testify on his behalf. The record of the July 12th hearing was read into the record at the August 17, 1977, hearing. As a result of this second hearing, carrier again notified claimant that he was dismissed from service. The organization filed a claim for reinstatement on October 26, 1977. This claim for reinstatement rested on the following arguments.

First, the company witnesses were not present to be questioned by the union representative. Second, the grievant stated that carrier was notified on all dates that he was absent, account of his back, for which he has proof from his doctor.

The organization has pressed the point that carrier witnesses who testified at the open chair hearing were not present for questions at the reconvened hearing on August 17, 1977. It concludes that failure of the carrier to make its witnesses available for cross-examination at the second hearing constitutes a violation of the requirements of a fair hearing for claimant. As such, claimant's claim should be upheld by the Board.

The organization's arguments on this point cannot prevail. On numerous occasions this board has ruled that objections to the way in which a hearing is conducted must be made at the hearing or else the right is waived (Second Division Award No. 7955, Weiss). The record does not contain any indication that the organization representative or the claimant requested or was denied the presence of any witnesses or information at the hearing.

The organization submitted for this Board's review, two awards on the issue of a fair hearing (Awards No. 17 028 and No. 21 235, First Division). A careful study of these awards reveals that they are not on point in this case. In award No. 17 028, a majority of the First Division Board decided that a claimant did not receive a fair and impartial hearing, even though claimant did not protest the procedure of the hearing during proceedings. This decision, however, was based on the fact that charges were levied against claimant, but never argued at the hearing, and on what the Board considered improper use of claimant's past record. The Board decided that claimant's past record had been used to prove guilt and that was inappropriate. Those facts are not present in this case. Award No. 21 235 involves the reading of hearsay statements into the record of a hearing and not calling as a witness the person who made the statement, even though he was present at the hearing. The instant case involves reading into a second hearing record the direct testimony of two witnesses from the first hearing. No element of hearsay is involved here.

As to the merits of the case, here, too, carrier's position must be upheld. Claimant was notified by a letter on June 24th that he should appear at the Superintendent's Office and make arrangements for a leave. Had he done so, this case would not be before the Board. He did not appear; as the record shows, he claims that he did not receive the June 24th letter.

The fact that this letter was not received by claimant goes unexplained. There is no evidence in the record before this Board to indicate that failure of this letter to be received by claimant was the fault of carrier. Numerous awards by this Division, as well as those of other Divisions of this Board, clearly support the proposition that once a notice is properly mailed, it is up to claimant to demonstrate why he did not receive the notice, if he chose to use failure to receive notice as a defense in an action.

The facts surrounding claimant's absence from work from June 20 to July 5th and the fact that he appeared and requested a leave of absence on July 6th are not in dispute. Whether he informed his foreman of his intent to be off or whether his wife called in and reported him off each day that he was absent, however, is in dispute.

From the record before us, it cannot be concluded that the decision of carrier on these two points is not the correct one. Testimony by two carrier witnesses indicates that no calls were received by them concerning the claimant's absence or requesting a leave. Claimant, by his own testimony, indicates that he did not ask for a leave until July 6, 1977, nor did he call in and report himself off. The testimony of claimant's wife that she called each day and talked to a person named Betty must be weighed against the testimony of Foreman Munson and Clerk Hall, who both testified that no calls were made. At the investigation, carrier chose to give greater weight to the testimony of Munson and Hall than it did to the testimony of claimant's wife.

We see no reason to consider this decision as other than reasonable.

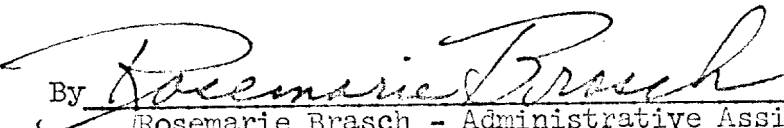
Claimant was absent without authorization from June 20 to July 5, 1977. He did not apply for a leave of absence within the ten-day period specified in Rule 13, Form 2626. A review of claimant's past record reveals that he has been absent without authorization on five previous occasions with two of these five violations occurring within a six month period prior to his last absence. Based on the facts of this case and claimant's poor attendance record in the past, we see no reason to overturn the action of carrier in this instance. No arbitrary or capricious behavior on the part of carrier is evident. Consequently, in keeping with the Board's policy in this regard, this claim must be denied.

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 24th day of October, 1979.