

The Second Division consisted of the regular members and in addition Referee Robert E. Fitzgerald, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 76, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
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(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Coach Cleaner Elijah Gates was unjustly dismissed from service on August 10, 1977.
2. Coach Cleaner Elijah Gates was erroneously charged with failure to protect his assignment without proper notification or permission from July 6 through July 26, 1977.
3. That the Chicago and North Western Transportation Company be ordered to reinstate Coach Cleaner Elijah Gates with seniority rights, vacation rights, holidays, sick leave benefits and all other benefits that are a condition of employment, unimpaired, and compensated for all time lost plus 6% annual interest on all such lost wages; also reimbursement for all losses sustained account loss of coverage under health and welfare and life insurance agreements during the time held out of service, dating from August 10, 1977.

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.

From the record submitted in this case we are able to determine the following course of events.

On May 5, 1977, Claimant was the principal in a disciplinary hearing concerning a three-day unauthorized absence. As a result, Claimant was assessed a thirty (30) day suspension which was served from May 20 - June 19, 1977. Recent Second Division Award 7888 upheld the imposition of discipline.

Thereafter, Claimant did not return to service. On July 27, 1977, a Notice was issued to Claimant to attend an investigation to be held on August 5, 1977, concerning Claimant's absence "without proper notification or permission on July 6 through July 26, 1977."

Receipt of the Notice was acknowledged by Robert Gates, Claimant's father. Subsequently, telephone conversations were had with Claimant's mother, father and uncle, each of whom indicated that they would relay the information to the Claimant to contact the Carrier. When the Investigation was opened, Claimant was not present, but he was represented by the Local President of the Union. A request for a postponement was made because Claimant's whereabouts were unknown, and because the Local Chairman could not be present to represent the Claimant. The request was denied.

Claimant was indeed absent from duty from July 6 - 26, 1977.

The Employees have argued that the hearing was improper because it is alleged that Claimant did not receive the Notice of Investigation, thus justifying his absence from the investigation. However, while the conclusion that Claimant had not been informed may be drawn from the facts of record, an equally valid conclusion would be that Claimant had been appraised by one or all of the means employed by the Carrier, and that he simply chose not to attend. The Employees have argued that the Carrier was well aware of Claimant's difficulties as a result of the prior investigation. Yet, Claimant was in attendance there; and no contention has been raised here that Carrier's means of notification to the Claimant was less diligent.

Other than their assertion, the Employees have submitted no probative evidence that Claimant was not notified of the August 5, 1977, hearing. In Third Division Award 22408 (Franden), we stated:

"An employee cannot prevent the holding of a fair and impartial hearing by the simple expedient of staying away after due notice has been made without proof that the absence was justified."

However, the Employees, in appealing this matter on the property, assert that Mr. Diesch (trial officer) told the Claimant at the end of the prior investigation that:

"... when your (sic) released from your doctor you call me and tell me that you're released...."

This assertion was made in the initial appeal letter of the Employees (October 4, 1977), and at each successive level of appeal on the property. No response to this statement is to be found in the Carrier's replies made while the matter remained on the property. Thus, this Board is confronted with the established principle that in discipline cases we are confined to the transcript, and the equally valid argument that there were mitigating

circumstances raised on appeal which were unrefuted and must be accepted as facts by this Board.

On this record we must conclude that that transcript supports the Carrier, but that the mitigating circumstances require that the discipline be less than dismissal. Claimant is to be returned to service without back pay; the time out of service to be considered a suspension.

A W A R D

Claim sustained only to the extent set out above.

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 28th day of November, 1979.