

The Second Division consisted of the regular members and in addition Referee John B. LaRocco 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

Dispute: Claim of Employee:

1. That the Southern Pacific Transportation Company (Texas and Louisiana Lines) violated the controlling agreement, particularly Rule 34, when they arbitrarily dismissed Carman Painter Eddie Aught, Jr. from service without his being present at his investigation held on April 5, 1978, Houston, Texas.
2. That accordingly, the Southern Pacific Transportation Company (Texas and Louisiana Lines) be ordered to reinstate Carman Painter Aught, Jr. to service with all seniority rights unimpaired and compensate him for all monetary losses since April 12, 1978, until reinstated.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 carman painter at the carrier's Englewood Car Heavy Maintenance Plant at Houston, Texas, was dismissed from service on April 12, 1978 after an investigation held on April 5, 1978 for being absent from his assignment since February 3, 1978. Claimant was not present at the investigation. Claimant's representatives did attend the investigation.

The organization's primary contention is that the carrier failed to properly notify the claimant of the charges and the investigation as set forth in Rule 34(b) of the controlling agreement. Next, the Union argues that the investigation was unfair in that the carrier's plant manager cited the violation by claimant, conducted the hearing, dismissed claimant from service and declined the initial appeal. Lastly, the organization asserts claimant was ill and thus was properly absent from work.

The carrier urges us to deny the claim without a decision on its merits because claimant, subsequent to the filing of his claim, signed a release dated May 3, 1978 which, according to the carrier, fully exonerates the carrier. Alternatively, the carrier argues that notice was sufficient, the hearing fair, and substantial evidence in the record to justify claimant's discharge.

Several months before the facts underlying this claim occurred the claimant suffered injuries as the result of an accident. The claimant, as part of his monetary settlement with the carrier to compensate him for his injuries arising out of the accident, executed a general release after he filed this claim. The first Paragraph of the release states:

"For and in consideration of a draft in the net sum of #Three Thousand Seven Hundred Fifty# - Dollars (\$3750#), acceptance of which is acknowledged, I (we) hereby UNCONDITIONALLY RELEASE and FOREVER DISCHARGE the SOUTHERN PACIFIC TRANSPORTATION COMPANY (hereinafter called Railroad) and all of its officers, agents, employees, surgeons, physicians and any other parties or institution in any way connected with its service or affairs, from any and ALL claims, demands and causes of action for money and for damages, of every kind and of whatsoever nature or basis, known as well as unknown and unanticipated, in my (our) favor, arising out of an accident which occurred while I, Eddie Aught, was employed by Railroad, at or near Houston, Texas, on or about November 22, 1977 as a result of which I, Eddie Aught, sustained many serious and painful bodily injuries which may be permanent and progressive, and I (we) sustained other losses and damages. Section 1542 of the Civil Code of the State of California which provides: 'A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.', and all laws or all other States of like or similar effect, are hereby waived." (Emphasis Added)

The unambiguous language in the release demonstrates that the carrier was forever discharged from all claims by this claimant relating to the single accident on November 22, 1977 and does not extend to any other claims he may have against the carrier. The claim submitted to this Board concerns events which were ensued from February through April of 1978. The release is irrelevant to this claim.

Since the claimant's release does not cover this dispute, we must address the merits of his grievance.

Rule 34(b) states:

"(b) at a reasonable time prior to the investigation, the employe will be apprised of the precise charge against him and the time, date and place set for the investigation. The employe shall have a reasonable opportunity by this notice to secure the presence of necessary witnesses, and representation if he so desires. A copy of the notice directing the employe to report for investigation shall be furnished to the local chairman of the craft involved."

The Rule, in essence, requires the carrier to use means which are reasonably calculated to inform the claimant of the charges against him and the time and place for the investigation. On March 22, 1978, by certified mail, the carrier sent a letter to the claimant sufficiently describing the charges as well as the time and place of investigation. The letter was sent to his last known address. After the post office made several attempts to deliver the notice, it was returned to the carrier. We also note that the claimant was orally informed by one of his union representatives on March 30, 1978 that an investigation was to be held on April 5, 1978. It is impossible to ascertain what other steps the carrier could take to notify the claimant. The carrier used reasonable means to notify the claimant and the claimant received actual notice. Thus, the carrier complied with Rule 34.

The hearing officer, at the investigation, did engage in several different roles but the multiplicity of roles did not in any manner prejudice the claimant. If the claimant took his case more seriously, he would have attended the investigation and defended himself. The claimants' representatives performed well, under the circumstances, to present his defense in the most favorable fashion. This Board has often ruled that even though the carrier assumes the risk of denying a fair hearing when a carrier officer engages in several different roles, the multiple roles must prejudice the claimant's rights under Rule 34. (See Second Division Awards Nos. 5360 (Knox) and 7196 (Rose).) An examination of the record shows that the hearing was fair and that, even without the claimant's appearance at the investigation, an able, albeit unsuccessful, defense was presented on his behalf.

Lastly, there is substantial evidence in the record supporting the charge that the claimant was absent from his assignment from February 3, 1978 to April 5, 1978. The claimant called in sick for the first five days of the period and came back to work for two days. Then, the claimant was absent for the remainder of the two month period. The foreman had not heard or seen the claimant since February 16, 1978. If the claimant was genuinely absent due to an injury or illness, he would have contacted his foreman. Instead, the claimant ignored his fundamental obligation to protect his assignment. Thus, there is overwhelming evidence to support the carrier's charge that the claimant consistently and inexcusably violated Rule 810 of the Rules and Regulations of the carrier.

A W A R D

The claim is denied.

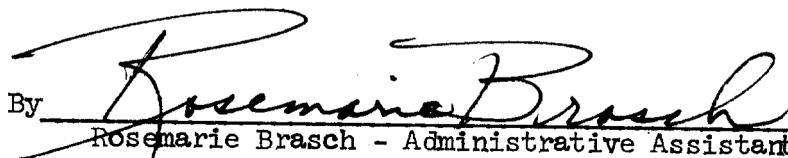
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Award No. 8412
Docket No. 8253
2-SPT-CM-'80

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 23rd day of July, 1980.