

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employees:

1. That the Illinois Central Gulf Railroad Company violated the controlling agreement, particularly Rules 37 and 39 when they unjustly dismissed from the service on October 21, 1978 Sheet Metal Worker Rocco M. Bovino as result of investigation held October 12, 1978.
2. That accordingly the carrier be ordered to reinstate Mr. Rocco M. Bovino to service, seniority rights unimpaired and compensate him for all time lost beginning October 21, 1978, the date he was improperly withdrawn from service.
3. Make claimant whole for all losses.
4. Compensate claimant for all overtime losses.
5. Compensate or make whole for the claimant all holiday and vacation rights.
6. Pay premium on health and welfare Travelers policy.
7. Pay Illinois Central Gulf Hospital Association dues.
8. Pay premium on Provident Insurance policy.
9. Pay premium on Aetna dental policy.
10. Pay interest of 6% on all lost wages, overtime, holidays and vacation time.
11. Remove all charges brought against claimant from his personal record.

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.

The record indicates that the Claimant was employed by the Carrier as a Sheet Metal Worker at Woodcrest Shop in Chicago, Illinois, which is a heavy repair center for locomotives and suburban cars. He is assigned by bulletin to work from 3 p.m. to 11 p.m., Monday and Tuesday off days. Claimant has accumulated five (5) years of seniority with the company.

In a letter dated September 22, 1978 Mr. Bovino was notified to attend a formal investigation to be held in the office of the shop superintendent, locomotive, at Woodcrest Shop on Thursday, October 12, 1978, at 1 p.m. "to determine whether or not you absented yourself from your assigned job at Woodcrest Shop without permission on September 2 and 3, 1978". The investigation was held October 12, 1978.

In letter dated October 21, 1978, Claimant was notified that "as result of formal investigation you are hereby dismissed from the service of the Illinois Central Gulf Railroad effective this date".

In addition to the claim that the Claimant was not guilty of the charges, the Organization also raises several collateral issues:

- 1) The charge in the notice is not specific enough to prepare a defense.
- 2) The hearing was not fair and impartial and the hearing officer pre-judged the claimant.
- 3) The Claimant complied with Rule 23.
- 4) The penalty assessed was too severe.

The Organization claims the Hearing Officer violated Rule 39 when he refused to dismiss the charges or to add any additional information.

The Organization further asserts that the Claimant "made every attempt to comply with the bulletin and Rule 23 contained in the current and controlling Agreement, which Rule states in pertinent part:

"No employee shall absent himself from work for any cause without first obtaining permission from his foreman if possible, except in case of sickness, when he shall notify his foreman as soon as possible. Personal business will be sufficient reason to request leave of absence without detailed explanation thereof.

If it becomes necessary to lay off for illness, emergencies, etc., please call into the tower coordinators (suburban number 799-2050 or Chicago number 565-1600 extensions 411 or 412).

Signed: E. M. Meuhlenbein
General Superintendent"

The Organization submits "that within the meaning of Rules 39 and 37 of the controlling Collective Bargaining Agreement, Mr. Bovino is subject to the protection and benefits of the Agreement". Rule 39 reads as follows:

"DISCIPLINE

No employee shall be disciplined without a fair hearing by the designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee will be apprised of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by the authorized committee. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from such suspension or dismissal."

The above quoted rule requires the company to conduct a fair hearing for the charged employee. "The company in the instant case failed to meet their obligation", in the Organization's view.

The Carrier contends the charge is specific, clear, and precise. Carrier maintains it "afforded claimant and his representatives, who were present, sufficient information to prepare an adequate defense". The Carrier asserts the allegation that the Hearing Officer had prejudged the claimant is totally without merit.

The Carrier declares the Claimant did not follow the known procedure and "he informed no one" of his absences on Saturday, September 2, 1978 and Sunday, September 3, 1978. The Carrier concludes that dismissal from service in this case was appropriate given the Claimant's past record.

In discipline claims, the Carrier has the obligation to set forth the charges against an employee with sufficient specificity so as to enable the preparation of an adequate defense. The record indicates that the notice sent to the Claimant on September 13, 1978 specified that the purpose of the investigation was "to determine whether or not you absented yourself from your assigned job at Woodcrest Shop, without permission on September 2 and 3, 1978". The Board finds the notice to be adequate and substantially in conformity to the specificity requirements. The hearing was held on October 12, 1978 after a postponement requested by the Organization was granted.

An objective review of the record of the hearing indicates several intense exchanges, but none that can be elevated to a level sufficient to sustain, on their face, charges of prejudging. The Hearing Officer's active participation during cross-examination by the Organization, while inappropriate, was not a reversible error. Several of the challenges by the Organization center around the Hearing Officer's commentary and attempted explanations during the course of the hearing concerning Rule 23 and its application to the instant case.

There is no evidence in the record which supports a charge of prejudice or bias or which would sustain a claim that the investigation was conducted in a manner to justify an assertion that the Claimant did not have a full and fair hearing within the procedures set by the Parties.

In terms of the two disputed days of absence, the language of Rule 23 is clear and unambiguous. It requires in pertinent part:

"... If it becomes necessary to lay off for illness, emergency, etc. please call into Tower Coordinator..."

Two numbers were listed. Testimony of the General Foreman, the Assistant General Foreman, and the two (2) Tower Coordinators on duty on September 2 and September 3 maintain, without equivocation, that they did not receive any telephone notification from the Claimant on the two days in question. No entry of calls from the Claimant were logged in by the Tower Clerks or Tower Coordinators. Tower Clerks had been previously instructed on March 22, 1978 that:

"Under no circumstances are you to take any messages from employees relative to being off for any reasons. Please see that any calls are referred to Shop Coordinators concerning being absent."

The Shop Superintendent-Locomotive testified further that he had left specific instructions in the Tower that the Claimant was not to receive permission to be off for personal business "because of his habitual absenteeism".

The testimony of the Claimant needs to be examined, since the transcript of the hearing reflects some confusion as to "who said what". The Claimant testified (TR 11-12):

"Q. Mr. Bovino, what are your hours of service and days off?

A. I work afternoon shift, from three to eleven; and my days off--Monday and Tuesday.

Q. Mr. Bovino, did you work your regular assignment on Saturday, September 2, 1978?

A. I did not.

Q. Mr. Bovino, did you have permission to be absent?

A. I requested permission to be absent.

Q. Mr. Bovino, did you have permission?

A. Yes, I felt that I had permission in the circumstances. I called the proper people to excuse myself from work.

Q. Mr. Bovino, who did you call?

A. I called the Tower.

- Q. Mr. Bovino, what time did you call the Tower?
A. It was after five o'clock, approximately, I am not sure about the approximate time.
- Q. Mr. Bovino, was this Saturday, September 2, 1978?
A. Yes.
- Q. Mr. Bovino, who did you talk to?
A. I talked to Mr. John Wiesch, and he instructed me that Mr. Muehlenbein had left a letter on his desk--or ~~instr~~ucted someone to place it there--that I was not allowed to call in to excuse myself.
- Q. You were what?
A. I was not allowed to call in and excuse myself.
- Q. Did Mr. Wiesch give you permission to be off?
A. Yes, in a way he did; he didn't have any idea of the circumstances; I guess he was unaware of it. He said he was following instructions, and I don't know, really the conversation went on and on; it's hard to recall that time.
- Q. Mr. Bovino, did Mr. Wiesch say that he could not let you off for being sick, or what reason?
A. I don't understand.
- Q. What reason did Mr. John Wiesch say that you could not be off?
A. Well, he stated that he was instructed--that he was following his orders. That was the extent of the conversation, which I thought was thoroughly, completely wrong, under the circumstances.
- Q. Mr. Bovino, what reason did you request to be off?
A. I explained to him--I didn't have the opportunity to explain to him--he made it emphatically the circumstances which he was instructed to perform.
- Q. Mr. Bovino, did you request to be off for being sick?
A. I don't know--no--I honestly don't know; and I can't recall it clearly.
- Q. Did you request to be off for personal business?
A. Yes, I did. Very personal matters pertaining to myself.
- Q. Mr. Bovino, did you work your regular assignment on Sunday, September 3, 1978?
A. No. I did not.

- Q. Mr. Bovino, did you have permission to be off that day?
- A. Yes, I felt that under the circumstances I went thru the proper channels and I thought I had the legitimate reason for calling off.
- Q. Mr. Bovino, who did you talk to on Sunday, September 3, 1978?
- A. I called the Tower and I received the same response.
- Q. Mr. Bovino, who did you talk to in the Tower?
- A. I don't know.
- Q. Mr. Bovino, who did you request permission from to be off on Sunday, September 3, 1978?
- A. I went thru the proper channels; I went thru the proper channels and requested time off under the circumstances that befell me. Actually, I don't know who really gave me the particular say-so, as far as that is concerned."

The Claimant's testimony (TR 14) stands in sharp contrast to that of Tower Coordinator Wiesch, whom the Claimant asserts he spoke to:

- "Q. Mr. Wiesch, please state you name, occupation, and length of service.
- A. John Wiesch; Mechanical Foreman; a little over five years.
- Q. Mr. Wiesch, was you working Saturday, September 2, 1978?
- A. Yes, sir.
- Q. Mr. Wiesch, what shift did you work Saturday, September 2, 1978?
- A. Second shift.
- Q. Where did you work that shift?
- A. The Tower.
- Q. Mr. Wiesch, what was your job in the Tower?
- A. I was the Coordinator.
- Q. Mr. Wiesch, did Mr. Rocco M. Bovino request permission from you to be off Saturday, September 2, 1978?
- A. No."

There is no showing of animus by the Coordinator toward the Claimant. The Claimant's vagueness, hesitancy, and ambiguity (TR 18-19) raises serious questions of credibility, particularly since no witness to support his claim of calling in on either day was produced to corroborate his contention. Further, given even the broadest interpretation, the alleged conversation he claims to have had with Coordinator Wiesch, cannot be considered as authorization to lay-off. Based upon

the entire record, the Board finds the Carrier has sustained its burden of proof concerning the unauthorized absences on September 2-3, 1978.

In terms of the penalty of dismissal sought by the Carrier, the Claimant's past record since he commenced employment with the Carrier on May 19, 1974 was reviewed by the Carrier. That uncontroverted record indicates a pattern of absences, tardiness, or checking out early for the period March 1977-December 1977. It also indicates a five (5) day suspension in March 1977, insubordination on June 30, 1977 while on furloughed status, dismissal on January 18, 1978 for being under the influence (with reinstatement without pay on June 22, 1978), and a letter of warning on June 22, 1978 for being absent without permission. Based upon this prior record, the Carrier decided that dismissal from service was justified.

The Board concludes, upon consideration of all the facts of the case, the determination of the Carrier to terminate was neither arbitrary or capricious. The evidence adduced at the hearing and the Claimant's past record justify the dismissal from service.

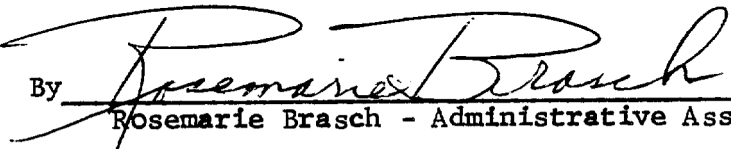
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1982.