

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { International Association of Machinists and  
                                  { Aerospace Workers  
                                  { Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated the controlling Agreement, particularly Rule 32, when they unjustly dismissed Machinist C. C. Jones from service for his alleged failure to properly protect his assignment on May 30, 1979.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Machinist C. C. Jones for all time lost due to his unjust dismissal from service and for failure of Missouri Pacific Railroad to inform him of the results of the first investigation resulting in a misunderstanding on the employees part.

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.

On May 9, 1979, Claimant, a Machinist with service date of July 21, 1969, at Carrier's North Little Rock, Arkansas Wheel Shop, was notified to attend a formal investigation which was to be held in order to:

"... develop the facts and place your responsibility, if any, for your failure to properly protect your assignment, Tuesday, May 8, 1979 at 400 Yard Service Area 3:00 p.m. to 11:00 p.m. and failure to notify your Supervisors of your absence as per instructions from the Master Mechanic. A review of your personal attendance record file will also be made."

Said hearing was conducted as scheduled and the record indicates that throughout same the essence of Organization's argumentation was a request for leniency. Upon the conclusion of this hearing, which occurred at approximately 12:20 p.m., no disciplinary action was directed at that time by Carrier pending

review of the hearing transcript and determination by the Hearing Officer. Late that same day, however, for reasons which will be developed hereinafter, Claimant, who was scheduled to work from 3 p.m. to 11 p.m., on his regular Tuesday through Saturday assignment, did not report for work nor did he contact his supervisor to report his absence.

On or about May 22, 1979, Claimant, who had still not reported for work on his regular assignment, received a second notice of investigation directing him to attend another hearing on May 24, 1979, in order to:

"... develop the facts and place your responsibility, if any, for your failure to properly protect your assignment, Thursday, May 17, 1979, 3:00 p.m. to 11:00 p.m. at the 400 Yard Service Area and failure to notify your Supervisor of your absence as per instructions from the Master Mechanic. A review of your personal record file will also be made."

Upon receipt of the second hearing notice on May 22, 1979, Claimant reported for work on his regular assignment but was informed that he was being held out of service pending the hearing on May 24, 1979. Said hearing was conducted as scheduled and, as a result thereof, Claimant was adjudged guilty as charged and was dismissed from Carrier's service effective May 20, 1979.

Organization's position in this dispute, stated simply, is that Claimant was unjustly dismissed by Carrier since Claimant's May 17, 1978 absence resulted from the fact that he "... simply misunderstood the final outcome of the first investigation and thought he was not allowed to report to work until he was advised to do so." Accordingly, Organization argues that Carrier failed to properly inform Claimant that he was to report to work on the afternoon of May 17; that Claimant merely made an honest mistake and readily admitted to same at the May 24, 1978 hearing; and that, under the circumstances, dismissal was an extremely "harsh and cruel" punishment to have been assessed.

In addition to the foregoing, Organization also contends that Claimant was not afforded a fair and impartial investigation in this matter and thus was denied due process because: (1) "... (T)he Investigating Officer and the Officer bringing charges ... are one in the same"; (2) "(I)t was the Carrier's intention to dismiss the Claimant at all cost and to have denied the Claimant and his representative the opportunity to due process under the law"; and (3) "Reference is also made to Claimant's past record in which he was disciplined in the past and should not be the bases (sic) in this case."

Carrier from the outset, argues that the Board is without jurisdiction in this matter and should, therefore, dismiss the instant claim "... because of substantial variances ... occurring during handling of the claim on the property and between the claim handled on property and the claim before the Board." In support of this contention Carrier maintains that: (1) the initial claim(s) and the argumentation which was presented by Organization throughout the handling of this dispute on the property focused upon a "leniency pleading" and a request for reinstatement but without back pay, however, according to Carrier, Organization later took the position that the penalty was "excessive" and requested compensa-

tion for all lost time as a remedy; and (2) the dispute as presented by Organization to the Board again requests as a remedy that Carrier "... compensate (Claimant) for all lost time ..." but fails to request Claimant's reinstatement to service. Summarizing this particular line of argumentation, Carrier asserts that such variation of the original claim by Organization is in violation of Rule 31(a) of the parties' controlling agreement and thus should be dismissed (Second Division Awards 3462, 4659, 5783, 6081, 6657, 6810, 6998 and 7022).

Related to the foregoing, Carrier next argues that the only claim which is properly before the Board is Organization's request for leniency and, according to Carrier, in such a consideration, the Board would have no choice but to dismiss the claim because "... it has consistently been held that leniency is the sole prerogative of the Carrier" (Second Division Awards 5345, 5614, 6078 and 6715).

Turning to the merits portion of this dispute, though without diminishing the significance of its aforestated procedural arguments, Carrier maintains that Claimant's hearings were fair and proper; that sufficient evidence was adduced at same -- including Claimant's and Organization's acknowledgements -- to substantiate that Claimant was guilty of the infractions as charged; that, given the seriousness of the infractions as well as Claimant's previous attendance record, the discipline which was assessed was neither unreasonable, arbitrary, capricious or discriminatory; and that, in light of such determinations, the Board should not now substitute its judgment for that of Carrier.

Regarding Organization's contention that Claimant's hearings were not fair or proper, Carrier argues that: (1) Organization representative made no such protest at the time of the hearings and, in fact, said representative avered that the hearings were conducted fairly and properly; (2) Claimant's complaint concerning the multiplicity of roles played by the Hearing Officer in this matter does not, in and of itself, prejudice the conduct of said hearing (Second Division Awards 1795, 5360, 5855 and 6004); and (3) Carrier's reference at hearing to Claimant's previous disciplines and to his attendance record was not improper since the Notice of Investigation indicated that such a review would be made and, furthermore, said information was not used to determine Claimant's guilt for the instant charge, but instead was merely used to determine the amount of discipline which was to be assessed in light of Claimant's proven infraction (Second Division Awards 1367, 1541, 5360, 5987, 6373 and 6706).

Carrier's position concerning Claimant's absence on May 17, 1979, is that said absence was improper and that Claimant had no reason to believe that he was automatically being withheld from service following the hearing which was conducted earlier that same day. In this regard Carrier argues that: (1) Claimant reported for work on May 22, 1979, without having been specifically directed to do so; (2) pursuant to a similar investigation which was held on March 11, 1977, Claimant continued working until discipline was assessed which was on March 30, 1977; and (3) both Claimant and Organization at the March 24, 1979 hearing admitted to the propriety of Claimant's continuing to work following the first investigation since both referred to the May 17, 1979 absence and subsequent absences as a "mistake" on the part of Claimant.

The last significant area of argumentation proffered by Carrier in this dispute is that Claimant's attendance record is poor and that he has been disciplined for similar infractions on several previous occasions. On one such occasion, according to Carrier, Claimant was discharged and was later reinstated because of a procedural error on Carrier's part; but even in that decision the Board saw fit at that time to note that "... Claimant's previous attendance record is far from exemplary ..." (Second Division Award 8250).

The Board has carefully read and studied the complete record in this dispute, and, upon careful reflection thereof, is convinced that the Carrier's position as presented herein must prevail.

Obviously, given the complexity of this dispute as well as the many diverse arguments which have been proffered by the parties in support of their respective positions, there are any number of directions which this award could pursue. Suffice it to say, however, that this award will endeavor to focus only upon those factors which have been significant in this determination.

Therefore, of the various procedural issues which have been raised by the parties, it is apparent that most of these contentions are either unfounded, or are insufficient to serve as a forfeiture in this matter. Despite Organization's contentions to the contrary, Claimant's hearings, quite clearly, were conducted fairly and properly. The fact that the Investigating Officer may have served in more than one role throughout the processing of this dispute does not, in and of itself, impinge upon the propriety of the hearing. Organization/Claimant offers no more proof for this contention other than the contention itself, and such an evidentiary offering is totally insufficient to substantiate such a serious charge. Additionally, Carrier's reference to Claimant's prior attendance record and to the resultant disciplinary actions which were taken did not prejudice Claimant in any way since Carrier's intention was clearly articulated in Claimant's Notice of Investigation, and said data was merely utilized by Carrier to determine the degree of penalty which was to be assessed.

Regarding Carrier's procedural contentions, while the Board cannot discern any real difference between Organization's "leniency argument" and its "excessive penalty argument", the Board does note that Organization's remedy request does appear to have fluctuated considerably throughout the handling of this dispute. Even more significantly, however, the Board further notes that Organization's Submission Statement as presented to this Board makes no request for Claimant's reinstatement as a part of its remedy request, but simply asks that Carrier "... be ordered to compensate (Claimant) for all lost time due to his unjust dismissal from service ..." Ordinarily such fluctuation and imprecision on the part of Organization in a case of this nature would be sufficient to warrant a dismissal of the claim itself since it has been established that a claim which is submitted to the Board cannot differ from that which was presented and handled on the property (Second Division Awards 6998, 6657, 5783, 4659 and 3462). In the instant dispute, however, because of the fact that the matter can be disposed of on the basis of the merits of the case itself, and because of this Board's predilection to attempt to avoid a forfeiture if at all possible, the Board is inclined to rule that the parties' procedural arguments as presented are inconclusive and the resolution of this dispute must be based upon the merits.

Having made the above determinations, the remainder of this award appears to be somewhat anticlimactic because the merits of the case clearly indicate that Claimant's actions regarding his May 17, 1979 absence are completely unsupported by the evidence of record. There can be no question that Claimant was absent as charged; there can be no question that such an absence was a chargeable offense; and there can be no question that because of Claimant's previous attendance record up to that point, any further willful infraction on his part could have resulted in dismissal. Thus the only question which remains in this analysis therefore is whether there were any considerations or circumstances which otherwise would absolve or mitigate Claimant's guilt. In this regard Claimant contends that there was a "misunderstanding" on his part as to whether or not he was to report for work later that afternoon following his hearing. Further along these same lines Claimant also asserts that: "... I thought I was relieved of my duties following the investigation"; "... I thought to my own knowledge that if you are under investigation, pending and (sic) investigation, that you were relieved from your duties"; and, "... now I understand that I should have gone to work".

The foregoing assertions are most damaging to Claimant's case for the following reasons: (1) Claimant's assumptions were obviously erroneous; (2) at no time either before, during or after Claimant's hearing did Carrier indicate in any way that Claimant was to be withheld from service pending the outcome of the investigation; (3) while it may very well be said that Carrier could have specifically informed Claimant that he was to return to work on the afternoon of May 17, such an obligation is not contained in Rule 32 nor does said rule preclude Claimant or his representative from inquiring about such matters if there is any doubt or question in their minds concerning same; and (4) despite Claimant's contention that "... I thought to my own knowledge that if you were under investigation, pending and (sic) investigation, that you were relieved from your duties", the record clearly indicates that Claimant knew or should have known otherwise because Claimant had undergone similar investigations previously and was not relieved from duty in those instances but continued working until Carrier had made its determination relative to the assessment of a particular penalty. Such a situation, undoubtedly, was operable following the May 17 hearing and for Claimant to surmise otherwise was his own unfortunate error for which only he can be held responsible and for which only he must now bear the consequences. Moreover, however, given Claimant's less than exemplary attendance record as well as his absence which led to the May 17 hearing itself, the discharge penalty cannot be considered as being either harsh or excessive, for had the latter events never even occurred, it appears that the disposition of this matter would not have been any different since Claimant, quite literally, had "reached the end of his rope", and his absences were too numerous and too frequent for Carrier to endure any longer.

A W A R D

Claim denied.

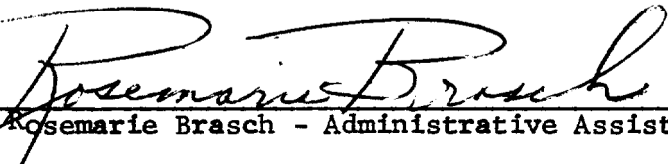
Form 1  
Page 6

Award No. 9078  
Docket No. 8696  
2-MP-MA-'82

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 19th day of May, 1982.