

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

Parties to Dispute: (International Brotherhood of Firemen & Oilers
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(Consolidated Rail Corporation

Dispute: Claim of Employee:

1. That, in violation of the current agreement, Laborer Thomas R. DeVaughn was unjustly dismissed from service of the Carrier following trial held on May 29, 1979.
2. That, accordingly, the Carrier be ordered to make the aforementioned Thomas R. DeVaughn whole by restoring him to Carrier's service, with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been held out of service.

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.

The record in the instant dispute shows that the Claimant, a Laborer - Hostler Helper at Carrier's Brier Hill Diesel Shop, Youngstown, Ohio, with service date of September 22, 1975, suffered a back injury on June 30, 1978, and, as a result thereof, was absent from work both frequently and extensively through April of 1979. On April 20, 1979, however, Claimant visited Carrier's Medical Department and was examined by a Dr. Vuksta who allegedly qualified Claimant as being fit to return to work. Claimant maintains, however, that at said examination he told the doctor that he would be "...coming to work Wednesday or Thursday (24th or 25th) if (his) back was not bothering (him)..." and that the doctor approved this arrangement; and that the doctor also "...said if (Claimant's) back was bothering (him) any more before that time to come back for more treatment." Subsequently, according to Claimant, he suffered a relapse of his back ailment, and, when contacted, the doctor refused to provide him with additional treatment as promised. Thereafter, either on April 26th or 27th, Claimant returned to work and allegedly spoke with two supervisors, Messrs. Barber and Marsillio, concerning his right to "bump" into the Car Shop from the Diesel Shop. According to Claimant,

at that time Mr. Barber informed him that he "...was supposed to be back to work the 20th of April regardless of how (his) back was..." and that he "...was absent from work and would have to go to trial."

Carrier, in letter dated May 16, 1979, notified Claimant that he was being charged with "unauthorized absenteeism from April 20, 1979 to the present", and that Claimant's trial was scheduled for May 29, 1979. Pursuant to said hearing, at which Claimant requested "...that no union representative be in attendance...", Claimant was adjudged guilty as charged and was terminated from Carrier's service effective May 31, 1979. Said termination is now the basis of the instant proceedings.

Organization offers several procedural and substantive objections for consideration in this dispute.

As for the procedural objections, Organization maintains that: (1) charges levied against Claimant were not exact and precise and were stated differently in the trial transcript than on Claimant's Notice of Investigation; (2) Claimant's trial was not conducted fairly or impartially since Carrier's Hearing Officer made various statements at that time concerning Claimant's prior attendance record which were unrelated to the pending charges; (3) Claimant's request for a postponement of the hearing was improperly denied by Carrier and thus in violation of Rule 20(d); (4) Carrier should have made an effort to counsel Claimant on the significance and ramifications of his refusal to have Union representation at the hearing; (5) there is evidence of Carrier's prejudgment of Claimant in this matter; and (6) Carrier's failure to produce several key witnesses at Claimant's hearing was a denial of his right to cross examine said witnesses.

Regarding its substantive arguments, Organization argues that: (1) Claimant was denied his right, as per Rule 9(d), to exercise his seniority and "bump" from the Diesel Shop into the Car Shop upon his return to work on April 26th or 27th; and (2) Carrier has failed to prove its case in this matter since, among other things, Carrier's principal witnesses did not appear to testify at Claimant's hearing and thus "...all facts pertinent to the charges were merely assumptions."

Carrier, from the outset, argues that the Board has no jurisdiction in this matter because, following the issuance of Claimant's May 31, 1979 Notice of Discipline, Organization failed to appeal this matter within the fifteen (15) calendar days time limit which is specified in Rule 21(a) of the applicable agreement (Second Division Awards 474, 2028 and 5308). In addition, Carrier further argues that several of the arguments which have been proffered by Organization in support of Claimant's position were not made when the matter was handled on the property and are new arguments and, therefore, are not properly before the Board and should be dismissed.

Carrier next asserts that the "...trial record clearly establishes that the Claimant is guilty as charged; that the trial was fair and impartial; and that no change in the Carrier's assessment of discipline is warranted". In specific, Carrier maintains that "(A)lthough the Claimant was qualified to return to duty (by Carrier's Medical Department) on April 20, 1979, he failed to do so and at no time other than April 27, 1979, did Claimant...contact his supervisor to inform him of his whereabouts or inform him of his reasons for his continued absences". Carrier additionally argues that Claimant's excuse that he was unable to contact his supervisor by telephone "...is highly suspect"; and that his allegation that his absence was caused by problems with his union is without merit".

As its final area of significant argumentation, Carrier contends that "unauthorized absence is a serious offense warranting the imposition of discipline as severe as outright discharge and inasmuch as the Claimant has been disciplined on three occasions in his relatively short period of employment, his dismissal in this instance is in no way arbitrary, capricious or discriminatory..." and "...is fully justified and should not be disturbed by the Board".

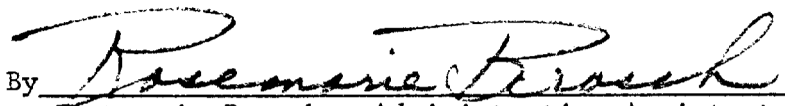
While the instant case appears to be considerably less than ideal in terms of clarity and comprehensiveness of either party's investigation or presentation, the Board, nonetheless, is led to the inescapable conclusion that Carrier's position as presented herein is correct and therefore must be upheld. Organization's procedural contentions, unequivocally, were not presented when the matter was handled on the property and thus cannot be considered by the Board at this time. Moreover, irrespective of Claimant's contention of his allegedly having been denied the contractual right to "bump" from the Diesel Shop to the Car Shop, Claimant's admitted dereliction of failing to attempt to apprise Carrier of his continued absence for seven (7) days following his release from the physician's care coupled with his three (3) previous disciplinary actions for similar attendance infractions, are sufficient justification for Carrier's present disciplinary assessment. Claimant committed the infraction as charged; his investigatory hearing was conducted fairly and properly as per Claimant's acknowledgment and in accordance with Claimant's own specifications; and Carrier's disciplinary assessment was neither arbitrary, capricious or an infringement of its managerial discretion.

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 22nd day of July, 1982.