

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

Parties to Dispute: { International Brotherhood of Firemen and Oilers
{ Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That, in violation of the current agreement, Laborer A. E. Corley was unjustly dismissed from service of the Carrier following trial held on July 27, 1979.
2. That, accordingly, the Carrier be ordered to make the aforementioned A. E. Corley 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.

On June 14, 1979, Claimant, a Laborer at Carrier's Avon Diesel Terminal, Avon, Indiana, with seniority date of June 20, 1978, was sent a Notice of Trial directing him to attend an investigatory hearing on June 22, 1979, in connection with the following charge:

"Absenteeism: May 2, 4, 6, 7, 15, 23, 29, 30
June 2, 3, 4, 5, 6, 9, 11."

Said notice was sent by Carrier via United States Certified Mail to Claimant's last known home address but was undeliverable, and Claimant failed to claim same, as well as a second notice, as was directed in Post Office's written instructions. On July 2, 1979, the Post Office returned the two unclaimed notices to Carrier. In the meantime, however, Organization requested and was granted a postponement of Claimant's trial to July 9, 1979; and, on June 26, 1979, Claimant telephoned Carrier and was informed of the rescheduling. Said hearing, however, was again

postponed a second time, and according to Organization Local Chairman, P. Kern, because he was going on vacation from July 16 to July 31, 1981, "... it was agreed that the Carrier would re-schedule all trials after Mr. Kern's return from vacation."

Claimant's hearing was conducted on July 27, 1979, without Claimant present and with G. Keys, Organization's Committeeman, serving as Claimant's representative. As a result of said hearing Claimant was adjudged guilty as charged and was terminated effective July 31, 1979. Said termination is the basis of the instant claim.

Organization's basic contention in this matter is the Carrier's action herein was in violation of Rule 20 (d) and (e) of the parties' current agreement thereby denying Claimant his right to a fair and impartial trial and the right to representation. In support of this position, Organization specifically asserts that (1) Carrier improperly held Claimant's trial during the vacation of Organization's duly authorized representative after having agreed not to do so; (2) Carrier neglected to send Mr. Kern a notice of the new trial date; and (3) there is nothing in the record which shows that Claimant's trial was to be held on July 27, 1979, or that Claimant had been properly notified to attend this trial.

Carrier's position herein is that "... the evidence of record ... established Claimant's guilt as charged ..." and that "... Claimant's failure to appeal (sic) at his trial which he knew was pending and his further refusal to appear at the appeal hearing demonstrates that he had no credible defense to the charge nor any interest in his employment relationship with the Carrier". Additionally, Carrier further argues that the termination of a short-service employee such as Claimant for such a serious offense cannot be considered excessive or arbitrary (Second Division Awards No. 6240, 6710, 8380, and 8381).

Regarding Organization's procedural contentions concerning the holding of the trial on July 27, 1979, Carrier argues that "every reasonable effort was made (by Carrier) to notify Claimant of the trial date"; that "... Claimant had no intention of attending the trial and deliberately thwarted Carrier's attempts to serve written notice" (Third Division Award No. 21696); and, that Carrier fully complied with the provisions of Rule 20 (d) of the applicable Agreement (Third Division Awards Nos. 15575 and 15007). Carrier also posits that said trial was held after repeated unsuccessful attempts were made to reach Claimant; that Organization Committeeman G. Keys, made unsuccessful attempt(s) to reach Claimant and agreed to represent Claimant at said hearing; that Mr. Keys was "a certified Committeeman authorized to represent employees coming under jurisdiction of ..." Organization at Carrier's facility; and that Carrier had been so advised of Mr. Keys' status by Mr. Kern himself in letter dated December 18, 1978; and that Organization did not raise any objection to the conducting of the disputed hearing at the time of the hearing itself nor did Organization offer any credible defense in behalf of Claimant at that time.

While it can be said with absolute certainty that neither party is entirely blameless herein or has attempted to effectuate the resolution of this matter with the proper amount of diligence and dispatch which this Board would deem

to be appropriate in such matters, in the final analysis, however, after carefully weighing the evidence which has been presented, the Board is persuaded that Carrier's position must be sustained.

The resolution of this dispute focuses exclusively upon the question of the fairness of Claimant's July 27, 1979 hearing and whether he was properly notified of the rescheduling thereof. Admittedly, the Board is unable to find in the record any evidence which would indicate that Carrier issued a notice to Claimant regarding the rescheduling of said hearing as required in Rule 20 (d). By the same token, however, the record does indicate that Carrier had endeavored to contact Claimant on numerous occasions regarding the holding of previously scheduled hearings for the same incident, but that these efforts were unsuccessful -- though^h no fault of Carrier. While the Board is unprepared to concur with Carrier's assertion that Claimant "thwarted" Carrier's efforts in scheduling a hearing or attempting to resolve the matter as expeditiously as possible, the record sufficiently establishes that both Claimant and his Organization were considerable less than fully cooperative with Carrier's efforts in this regard. Given the extant circumstances which were operative at the time, Carrier's subsequent actions cannot now be faulted.

Regarding Organization's contention that Carrier had agreed not to conduct Claimant's trial until after Local Chairman Kerns had returned from his vacation and further that Committeeman Keys was not Organization's "duly authorized representative" empowered to represent Claimant at his hearing, suffice it to say that, other than Mr. Kern's assertion, there is no probative evidence in the record which supports this particular argument, and the evidence which does exist (Mr. Kern's letter of December 18, 1978), clearly supports Carrier's position as presented.

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 September, 1982.