

The Second Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

Parties to Dispute: (International Brotherhood of Fireman and Oilers
(System Council #11 AFL-CIO
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That Mr. H. N. Boykin was unjustly dismissed from the service of the Missouri Pacific Railroad Company on December 4, 1981, on charge of his failure to protect his assignment as a mechanical laborer at North Little Rock Arkansas.
2. That accordingly, the Missouri Pacific Railroad Company restore Laborer, Mr. H. N. Boykin to service
 - (a) with his seniority rights unimpaired;
 - (b) compensation for all time lost, plus 12% annual interest;
 - (c) make whole all vacation rights, personal leave days, and all other benefits that are a condition of employment;
 - (d) pay premium (or hospital dues) for hospital, surgical and medical benefits for all time held out of service;
 - (e) pay premium for his group life insurance for all time 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 employes 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.

After a hearing was held on November 30, 1981, the Carrier dismissed Laborer, H. N. Boykin, the Claimant, from service on December 4, 1981 for failure to protect his assignment due to excessive absenteeism, the "dates being November 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20 and 23, 1981 and upon a review of his prior work record. Before his dismissal from service, the Claimant had been employed by the Carrier for nine (9) years.

Rule 26 of the Controlling Agreement which is entitled "Absence From Work Without Leave", provides as follows:

"Rule 26. Employees shall not lay off without first obtaining permission from their foreman to do so, except in cases of sickness or other good cause of which the foreman shall be promptly advised."

The Organization contends that the Claimant was absent for good cause, inasmuch as he was unavoidably detained on November 5, 1981. On that date he was placed under arrest and incarcerated for failing to notify a pre-trial probation officer. Moreover, the Claimant was unable to notify the Carrier as to his absence because he was not permitted any outside phone calls, other than to an attorney. Also, the Organization claims that the Carrier was aware of the Claimant's predicament after the weekend beginning November 6, 1981. Accordingly the Organization states that the Carrier pre-judged the Claimant's dilemma and had already decided to bring him up on charges.

Based on the evidentiary record, the Board has concluded that the Claimant could have avoided incarceration by satisfying the requirements of "pretrial probation". He failed to do so and was jailed. The Board is of the view that incarceration is not "good cause" to be absent from work. Accordingly, in Second Division Award 6606 (Yagoda) it was stated:

***Does Claimant's incarceration constitute unavoidable absence from work on account of sickness or any other good cause? The Board has previously held that confinement in jail does not constitute unavoidable absence for good cause. (Award 4689, Second Division, Daly, April 28, 1965.)

* * *

Claimant has placed himself in a position of being absent from service, but not unavoidably. He should be cognizant of and is liable for the consequences of violating the law. His conscious violation of the law does not constitute an unavoidable absence for good cause; violations of the law are presumed avoidable.***"

Consistent with Award 6606, Second Division Award 8266 indicated:

***Numerous previous awards have supported the right of a carrier to consider incarceration for a cause not to be 'good cause' for absence..."

The Claimant was given advance notice that a review of his "personal record" would be included in the investigation. The Board finds nothing improper in the introduction of the Claimant's personal record at the investigation. See for example, Second Division Award 6606, in which it was stated:

"The introduction of Claimant's prior record for review in the investigation, in conjunction with the facts attendant to the present record, was properly considered in arriving at the discipline to be imposed."

The review of the Claimant's prior record disclosed a consistent pattern of attendance problems from 1973 until his thirty (30) day deferred suspension in January, 1981 for his failure to protect his assignment on January 9, 1981, and his repeated failure to call in and report off as instructed by the Master Mechanic. The Board finds that the Claimant's prior record in conjunction with his excessive absenteeism in November 1981 was properly considered in arriving at the discipline imposed by the Carrier.

The Board cannot conclude that the Carrier acted in either a capricious or arbitrary manner in dismissing the Claimant from service for failing to protect his assigned job on account of excessive absenteeism in November, 1981. As a final consideration, the Board has concluded that there is substantial evidence in the record to sustain the Carrier's dismissal of the Claimant.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of April, 1984