

The Second Division consisted of the regular members and in addition Referee Donald E. Prover when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
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(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. That the Chicago and North Western Transportation Company (hereinafter referred to as the "Carrier") violated the provisions of the July 1, 1921 Joint Agreement, as amended July 1, 1979, specifically Rule 35, when, subsequent to an investigation which was neither fair nor impartial, it unjustly and improperly dismissed Harrison Street shop Machinist James Kolhoff (hereinafter referred to as the "Claimant") from service.

2. That accordingly the Carrier be ordered to

- (a) Immediately restore Claimant to service.
- (b) Restore unto Claimant all vacation and seniority rights, and
- (c) Remove from Claimant's personal record all reference to the investigation charge and discipline as imposed.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

Claimant had been employed as a Machinist on Job 013 with hours 3:30 P.M. to midnight. On November 16, 1989 the Shop Foreman notified Claimant that he should be available to protect an MIC vacancy starting November 17, 1989. Shortly thereafter Claimant put in a vacation request to start vacation commencing November 17 for three weeks. However, Claimant had already used

all of his vacation allowance for 1989. On the afternoon of November 17, the Shop Foreman told Claimant his vacation request was not approved. The Shop Foreman further instructed Claimant that he was to cover the vacancy of MIC D. Sandusky from November 17 to November 24. The Claimant informed the Foreman that he was on vacation as far as he was concerned and he was not coming in. Under date of November 22, Claimant was directed in writing by the General Superintendent Motive Power that he was to return to work no later than November 29, 1989. This notice informed Claimant that failure to return to work as instructed would be considered as insubordination. Claimant received the letter on or about November 27, 1989, however, he did not report for work until December 8, 1989.

Under date of December 19, 1989 Claimant was directed to appear for formal Investigation on December 28, 1989. Charge was, as follows:

"Your responsibility in connection with failure to protect your assignment on November 17, 20, 21, 22, 27, 28, 29, 30, December 01, 04, 05, 06, 07, 1989, and insubordination when you failed to promptly respond to my letter of November 22, 1989, directing you to report for duty on November 29, 1989, while assigned as Machinist, Job #013, at the Harrison Street Diesel Shop."

The Investigation was completed on January 16, 1990. Under date of January 23, 1990 the Claimant was notified he was dismissed.

The facts in this case do not appear to be in dispute. The Organization mainly argues that the Claimant did not receive a fair and impartial Investigation and that Carrier violated the time limit provisions of Rule 35.

Paragraphs (c) and (m) of Rule 35 read as follows:

"(c) Such hearing will be held within thirty (30) calendar days from the date of the occurrence to be investigated or not later than thirty (30) days from the date the supervising officer would have knowledge of the alleged offense."

"(m) If investigation is not held or decision rendered within the time limits specified herein, as such time limits are extended by agreement or postponement, the charges against the employe shall be considered as having been dismissed."

We have reviewed the Investigation testimony and find that the Claimant received a fair and impartial Investigation. While the Claimant's Representative at the outset objected to proceeding with the Investigation, alleging a violation of the time limit provisions of Rule 35, no objections were raised regarding the conducting officer's actual handling of the Investigation.

With regard to the Employees argument that the Carrier violated the time limit provisions of Rule 35 we find there was a partial violation of the rule. During the course of the Investigation one of Carrier's Foremen testified that Claimant's absence from November 17 through December 7, 1989 would, under Carrier's Absenteeism Policy, be treated as one occurrence. The absenteeism occurrence, which was only part of the Investigation notice, began on November 17 therefore, when the Investigation was not held by December 17 with respect to the absenteeism part of the notice such charges under Rule 35 (m), have to be considered as having been dismissed.

However, we do not hold that because a portion of the charges had to be dismissed that all charges in the notice must be dismissed. The notice contained two charges, one related to Claimant's failure to protect his assignment, the other related to a charge of insubordination when Claimant did not report for work on November 29, as directed in letter dated November 22. Because the Investigation was scheduled for December 28, we find that the portion of the Investigation notice pertaining to the November 29 insubordination was timely and not subject to dismissal under Rule 35 (m).

Claimant admitted receiving the November 22 letter prior to November 29. Claimant further admitted that he understood that failure to comply with the instructions to report would be considered insubordination. Claimant contended that the November 22 letter confused him, however, he never bothered to contact the Carrier to clarify any confusion on his part. Claimant had at one time been a union grievance man, therefore, should have been well aware of the serious consequences of being insubordinate.

Upon carefully reviewing the facts in this case we conclude that Claimant's insubordination was not something done in the heat of the moment but rather was a conscious deliberate premeditated decision on his part. Under these circumstances we will not disturb the discipline assessed in this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 19th day of February 1992.