

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Form 1

Award No. 12708
Docket No. 12653
94-2-93-2-51

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(INTERNATIONAL ASSOCIATION OF MACHINISTS &
(AEROSPACE WORKERS**
PARTIES TO DISPUTE (
(ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.

STATEMENT OF CLAIM:

- "1. That the Atchison, Topeka, and Santa Fe Railway Company (hereinafter referred to as the "Carrier") violated the controlling agreement, specifically Rule 40, when it wrongfully dismissed Machinist A. Utendahl (hereinafter referred to as "Claimant") from service January 29, 1992, ensuing an investigation at Chicago, Illinois on January 23, 1992.
2. That accordingly, the Carrier reinstate the Claimant to service with his seniority rights unimpaired with the payment of all time lost and all other rights and privileges restored due to his being wrongfully dismissed from service."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all of 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.

On January 7, 1992, Claimant was notified of an investigation, to be held January 14, 1992, concerning Claimant's possible violation of Rules 1000, 1004, and 1007, due to his being absent from work in excess of ten days, specifically from December 6, 1991, until December 17, 1991, without requesting an authorized leave of absence. At the Organization's request, the investigation was held on January 23, 1992, and on January 29, 1992, Claimant was dismissed.

The Organization contends that Claimant's dismissal was arbitrary and capricious. The Organization observes that Claimant's absence was due to swelling in his knee resulting from a prior on-duty injury and that during the period of his absence Claimant called in and advised his supervisor of his incapacity. Claimant expected to return to work on December 16, 1991, but was unable to do so due to continuing pain in the knee. He returned the following day. The Organization argues that Claimant did not act in a willful manner and, when informed of his failure to obtain a leave of absence, apologized. In the Organization's view, Claimant's dismissal was arbitrary and unreasonable, as Claimant should have been given an opportunity to correct his conduct.

Carrier contends that Claimant admitted that he was aware of the need to request a leave of absence and that he failed to do so. Carrier observes that Claimant had previously requested a leave of absence when he was out for more than ten days in August 1991. In Carrier's view the evidence conclusively showed Claimant's neglect of his duty and violation of the rule requiring a leave of absence.

Carrier further argues that its decision to dismiss Claimant was proper. Carrier contends that this was not an isolated incident and that Claimant's prior record, which included four AWOL incidents, dismissal followed by reinstatement, and continued attendance problems, justified the penalty in this case.

The record indicates that Claimant was absent on Friday, December 6, 1991, because of car trouble and that he advised his foreman of the absence. Over the weekend, Claimant's knee, which he had previously injured, began bothering him. On December 8, 1991, Claimant called in to report that he would be out sick on December 9. On December 11, 1991, Claimant again called in and advised that he was under doctor's care. On December 13, 1991, he called in and advised that he would be returning to work on Monday, December 16.

Claimant, however, did not report for work on December 16, 1991. Claimant was aware that he was required to request a leave of absence for absences greater than ten days. Claimant testified that when he realized that he would be unable to work on December 16, 1991, he did not contact his supervisor to secure a leave of absence. There is no evidence in the record that he contacted his supervisor at all after advising him on December 13 that he would report for work on December 16.

Thus, it is clear that Carrier proved Claimant was absent in excess of ten days without obtaining a leave of absence, was aware of the need to obtain a leave of absence and that his failure to secure a leave of absence was the result of Claimant's own negligence. The only remaining issue is the quantum of discipline assessed.

The Board will set aside discipline which is arbitrary, capricious or excessive, but we are not empowered generally to substitute our judgment for that of the Carrier with respect to the quantum of discipline imposed. The record shows that Claimant had a long prior history of attendance problems, including several AWOL incidents and a prior dismissal followed by reinstatement. Despite this record, as recently as October 22, 1991, Claimant was counselled concerning his attendance record. Under these circumstances, we cannot say that Claimant's dismissal was arbitrary, capricious or excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.