Award No. 1334
Docket No. 1255
2-SP(PL)-MA-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement Machinist Helper A. O. Osckle was unjustly dismissed from the service at the close of his shift on June 15, 1948, and that accordingly the carrier be ordered to reinstate him to all service rights with pay for all time lost retroactive to said date.

EMPLOYES' STATEMENT OF FACTS: The carrier employed A. O. Osckle, hereinafter referred to as the claimant, January 30, 1946, as a machinist helper at Sacramento, California, and his regularly assigned hours on June 15, 1948, were from 7 A. M. to 3:30 P. M.

The claimant obtained permission from his foreman to be absent from duty after 11 A. M. on March 26, 1948. However, on March 27, 1948, the claimant sent word to his foreman, by another employe, that he could not report for duty due to his involvement in an accident.

The local committee on April 10, 1948, requested the management to grant the claimant a leave of absence, because he was unavoidably detained from reporting for duty, and the management refused to do so. Copy of this transaction from General Foreman Johnson to the claimant's committee is submitted, identified as Exhibit A.

The Carrier preferred charges against the claimant on May 22, 1948, for alleged infraction of Rule 25 of the current agreement on March 26, 1948, and therein set his hearing at 10 A. M. on May 27, 1948. This summoned the claimant to stand trial when he could not be present, and a copy of such transaction from General Foreman Johnson to the claimant is submitted, identified as Exhibit B. This hearing was held, as scheduled, without the claimant being present, and a copy of the hearing record transcript is submitted, identified as Exhibit C.

On June 14, 1948, the claimant reported available for duty the next day, thereby giving his foreman eight hours or more notice prior to reporting for work. Accordingly, on June 15, 1948, the claimant reported for work and was permitted to resume his assignment, but he was dismissed from the service without a hearing at the close of his shift that day, and a copy of this transactiton from Shop Superintendent Vance to the claimant is submitted, identified as Exhibit D.

the power to act, or having the power has not chosen to exercise it. In such cases the rules of law prevail, and as we have stated earnings must be credited against damage. We think the same standard should prevail in all cases, unless some particular contract sets up a different one. We do not believe the contract under considera- does so."

The Division's attention is also directed to Award 1608 of the Third Division wherein that Division considered the carrier's contention that ". . . in the event an award is made in favor of the employes, it should be diminished by any amounts which Miss Allen received from any source during the period the position was discontinued." After setting forth that the carrier's contention found support in Award 5862 of the First Division, the Division quoted certain portions of the said Award and went on to state:

> "The principle announced in the foregoing quotation was applied by the Third Division in Award 1314. The Organization resists this contention of the Carrier upon authority of Cases 85 and 87 of Decision of Railway Adjustment Board No. 1 and Decisions 943 and 1618 of Train Board of Adjustment, Western Division. In those cases it is held that the employe is entitled to recover the amount he would have earned had he not been laid off without deduction of wages actually earned from other sources during the period he is laid off. However sound those decisions may be they have been superseded by the decisions of this Board above mentioned, i.e., Award 5862 of the First Division and Award 1314 of this Division. Under the rule adopted by these awards, claimant is entitled to recover in the amount of her net loss of **wages.** In other words she is entitled to recover the amount she would have received from the Carrier during the period she was laid off less such sum as she **actually earned in other employment** during that period. It appears from the record that Miss Allen earned $10.00 during the time she was laid off." (Emphasis ours.)

The Divisions attention is also directed to the following portion of the court's Oral Opinion and Findings of Fact and Conclusion of Law in the case of **Brotherhood of Maintenance of Way Employes, by Luther E. Rhyne, a member of the said Brotherhood and an officer thereof, being its general chairman of employes of the Quanah, Acme and Pacific Railway v. Quanah, Acme and Pacific Railway Company,** (District Court of the United States, Northern District of Texas, Dallas Division No. 772 Civil):

> "It would not be right to allow him to recover what he would have made from the defendant Railway and also keep in his pocket what he did make with other employers during the time."

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

Conclusion

Having conclusively established that the claim in this docket is entirely without merit, the carrier respectfully submits that it should be denied.

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.

The parties to said dispute were given due notice of hearing thereon.

The notice and hearing procedures adopted and followed by carrier herein are not violative of Rule 39 of the agreement between the parties. We find no express provision in the instant rules, nor can it be inferred from the terms "fair trial," which made the actual presence of the respondent mandatory, provided, as here, adequate notice and opportunity for appearance was provided.

No sufficient reason appears in the record to excuse claimant for his failure to give prompt notice of his detention from work as required by Rule 25. The actions taken by the carrier are found reasonable and represent a proper exercise of discretion.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 9th day of August, 1949.

DISSENT TO AWARD NO. 1334

The undersigned dissent from the majority decision of the Second Division of the National Railroad Adjustment Board Award No. 1334.

The majority in making the findings in the award ignored the following facts:

First, Rule No. 39 of the current agreement provides for a fair hearing and not a fair trial as referred to by the majority.

It also provides for an apprisal in writing of the precise charges made against an employe before said employe is disciplined or dismissed.

The record in the instant case reveals that this was not done.

Machinist Helper A. O. Osckle was not apprised in writing of the precise charges against him, nor was he made aware of the time and date for hearing.

The record shows he never received any such notice.

Second, at the so-called hearing the statutory representatives of the employes, the record discloses, sought in two instances to have the hearing postponed until the claimant could be present.

We contend a hearing is held to develop the facts in connection with the precise charges filed against the employe and such facts cannot be developed without the presence of the defendant to defend himself against such charges.

Third, the carrier was fully aware of the whereabouts of the claimant and knew he could not be present at such a hearing at the time designated.

In connection with the alleged violation of Rule No. 25 the claimant did obtain permission from his foreman to be absent from duty at 11:00 A. M., March 26, 1948, and when he did not come into work on March 27, his foreman was advised through another employe on his behalf that he would not be in to work on that date.

Therefore, we contend the notification was prompt as to his detention from work, which was unavoidable and which is provided for in the rule.

Further, we believe that the majority in making the award ignored the claim entirely that Machinist Helper A. O. Osckle was dismissed from service on June 15, without any hearings as provided for in Rule No. 39 of the current agreement.

This fact is not disputed by the carrier in the record.

Further, the employes cannot subscribe to a hearing procedure that would permit the carrier to hold a hearing when they are aware that the accused employe cannot be present to defend himself against the accusations.

R. W. Blake
A. C. Bowen
T. E. Losey
Edward W. Wiesner
George Wright