

Award No. 2590

Docket No. 2371

2-ACL-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

(a) That the controlling agreement, and specifically Rule 13, paragraph (a) thereof, does not require an employe to obtain permission before being absent account of sickness or for any other good cause.

(b) That the investigation conducted in absentia of A. A. Justice, Engine Carpenter, does not constitute a fair and impartial investigation within the meaning and intent of Rule 21.

(c) That the discipline assessed was unjust, excessive and not commensurate with the offense with which charged and,

(d) That Justice be restored to service with seniority unimpaired and compensated for all time lost subsequent to September 7, 1955.

EMPLOYEES' STATEMENT OF FACTS: A. A. Justice, while working as engine carpenter at Jacksonville Shops, Jacksonville, Florida, asked for and was granted permission to be off duty after 11:30 A.M. February 10, 1955. He left the shops and reported to the County Court of Nassau County, Fernandina, Florida for trial where he had been charged with "Wilful and intentional burning of woods". Because of certain extenuating circumstances, Justice offered no defense, instead he pled guilty as charged. He was sentenced to one year in the State Prison at Raiford, Florida.

Justice was unable to report for duty on the morning of February 11 or to advise his immediate foreman or his local chairman of his whereabouts and his predicament; however, contact was made during the day and, on the morning of February 12, the local chairman cooperated with the master

"Claimant here is not in position to complain. He wilfully refused to attend investigation, an act which is itself a violation of agreement rules. By his own negligence and indifference he not only failed to attend investigation but he failed to secure a representative or to ask for a continuance on the grounds that he now asserts entitled him to it."

See also Third Division Award 4521 with Referee Francis J. Robertson wherein it was stated in part as follows:

"Were we to hold that under Rule 25 an employe could not be disciplined or discharged without his actual presence at a hearing, that would lead to the absurd result that an employe, by wilfully absenting himself from a hearing, could avoid discipline. No such result is contemplated by the rule."

The same situation was involved in Third Division Award 6615 with Referee Norris C. Bakke. Proper notice was extended the employe in advance of date scheduled for the investigation. Hearing was rescheduled to a later date upon request of employe representative. Investigation was held, employe found guilty and discipline applied. Neither the employe or his representative attended the investigation. The Board, in denying the claim, stated there was no violation of rules as contended by the employes.

It is submitted that Mr. Justice wilfully and intentionally absented himself from his duties well knowing that he had been charged with a criminal offense and would be absent, in all probability, for a considerable period. Notwithstanding these circumstances, the claimant made no request for a leave of absence and, after the court trial, made no effort to notify or inform carrier as to the reasons for being absent for an extended period. Carrier scheduled an investigation which was postponed once at the request of the employe representative. When the investigation was held, the employe representative appeared without further request for postponement. The evidence brought out at the investigation was more than adequate to sustain the charges and, accordingly, the claimant was dismissed.

The employes claim that the discipline assessed was unjust, excessive and not commensurate with the offense. This claim is unsupported. The facts and circumstances amply justify the action taken by the carrier and it is respectfully requested that the claim 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.

This discipline case requesting reinstatement and compensation for all time lost arises on peculiar facts. Claimant informed his foreman he had to be off after 11:30 a.m., February 10, 1955. He apparently was granted or at any rate was not refused permission, whereupon he went to court, plead guilty to a charge of burning woods, a felony, and was sentenced to one (1) year in prison. The next day his chairman and foreman filled his vacancy and the carrier ordered an investigation for February 25 which was postponed at the organization's request and was held March 11. The claimant

was not present, the chairman protested the fairness of the hearing, the conviction was proven, and April 5 the claimant was dismissed, "for being absent from your job without permission, commencing February 11, 1955."

It is the duty of this Division to determine whether the agreement rules of the parties have been violated. In discipline cases the rule requires a fair and impartial investigation. We have examined the entire record and the awards cited by the parties and, while we may wish that there were more complete details touching on mitigation or aggravation such as must have been before the trial court and the state parole board, we are required to decide in their absence.

A plea of guilty is a judicial confession, and as long as it stands is conclusive of the facts. In general, after a plea of guilty, an appellate court is not permitted to review the record in search of error that may have been committed by the trial court. The claimant has confessed a felony. The employer has investigated and has considered the court transcript wherein the claimant admitted his wrong-doing. It would be unwise for this Division to upset those well reasoned awards of this Board holding that we are not to be triers of the facts.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August, 1957.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2590

The majority admits that the claimant was not present at a so-called investigation held on March 11 and states that "the chairman protested the fairness of the hearing." It is assumed the majority meant the "unfairness" of the hearing. However, that is not of paramount importance since what actually occurred is that the Local Chairman protested the holding of any investigation without the claimant being present.

In spite of the fact that the carrier insisted on holding an investigation without claimant being present, and in spite of the fact that the claimant was disciplined without a fair hearing in violation of Rule 21, the majority upheld his dismissal.

We are constrained to dissent for the reason that claimant was deprived of fundamental rights granted him under the controlling agreement.

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner

James B. Zink