

Award No. 3874

Docket No. 3885

2-GN-FO-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O.
(Firemen & Oilers)**

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Car Shop Laborer Mark Mayer, Jr., was unjustly dismissed from the service of the Carrier at its Havre Car Shop, Havre, Montana, on December 22, 1959.
2. That accordingly the Carrier be ordered to restore the aforementioned Car Shop Laborer to service on his former position with all service rights and vacation rights unimpaired and compensate him for all time lost December 22, 1959.

EMPLOYEES' STATEMENT OF FACTS: Mr. Mark Mayer, Jr., hereinafter referred to as the claimant, was first employed by the Great Northern Railway Company, hereinafter referred to as the carrier, as a laborer in the car department of the carrier at Havre, Montana, on April 14, 1955, and continued in employment in that capacity until dismissed from the service of the carrier effective December 22, 1959.

Under date of December 2, 1959, the claimant was served with notice to appear for formal investigation on Wednesday, December 9, 1959. Investigation was held as scheduled, and on December 21, 1959, the claimant was notified that effective at the close of his shift that day, he was dismissed from the service of the carrier.

POSITION OF EMPLOYEES: It is the position of the employees that the claimant was unjustly dealt with, and accordingly this case has been progressed under that part of agreement Rule No. 32(a), which reads as per following:

"Should any employee subject to this agreement believe he was unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken to . . ."

thorized absence to his forman, so long as he claims that he was unavoidably detained, is without merit and obviously contrary to the plain meaning of that rule.

5. The evidence revealed at the investigation in this case and the claimant's poor employment record in the past, fully justified claimant's dismissal.
6. This Board may not reverse the carrier's decision to dismiss the claimant unless it finds that the carrier's action was arbitrary, capricious and an abuse of the discretion invested in management.

For the foregoing reasons, the carrier respectfully requests that the claim of the organization 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.

Parties to said dispute were given due notice of hearing thereon.

Following an investigation, the Claimant was dismissed from the Carrier's service on the ground that he was absent without permission from November 22, 1959, to December 2, 1959. He claims that he was unjustly dismissed and requests reinstatement to his former position with compensation for all time lost. For the reasons hereinafter stated, we are of the opinion that his claim is without merit.

1. The Claimant argues that he was neither charged with any violation of the applicable Labor Agreement or any other pertinent rule nor apprised of the precise charge prior to the investigation hearing. The available evidence does not sustain said arguments. Rule 16 of the Agreement provides, among other things, that an employe, who is unavoidably detained from work, must notify the foreman as quickly as possible and that failure to do so will be considered cause for discipline. The Carrier's investigation notice, dated December 2, 1959, clearly informed the Claimant that he was charged with continued absence from work since November 22, 1959, without notifying his supervisor as to the cause thereof. Moreover, the Carrier's dismissal notice, dated December 21, 1959, unambiguously stated that he was dismissed because of his absence from work without permission from November 22, 1959, to December 2, 1959. These charges were sufficiently precise and, thus, met the requirements of Rule 32 (e).

2. The Claimant contends that he was not afforded a fair and just hearing. Yet, at the close of the investigation held on December 9, 1959, he and his representative explicitly acknowledged that the investigation was held in a fair and impartial manner and that they had no objection to the method of procedure. As a result, the Claimant is now foreclosed from objecting to the form and manner in which the investigation was conducted as well as to the method of procedure. See: Award 3668 of the Second Division.

3. The Claimant asserts that he was unavoidably detained from work during the period under consideration because he was suffering from flu and

measles. The evidence before us raises serious doubts as to the correctness of such assertion and also leaves unexplained why he did not actually notify the foreman until the evening of December 3, 1959.

At the investigation, the Claimant pretended that he was under doctor's care during the period of his illness. Contrary thereto, the record reveals that he was not medically treated at all during said period and did not visit his doctor until after the investigation, namely, in the afternoon of December 9, 1959. In addition, the Claimant called on Foreman Cech in the evening of December 3, 1959, and, upon being asked why he had been absent since November 22, 1959, merely stated he "didn't feel very good" without mentioning that he had suffered from flu and measles. No satisfactory explanation has been offered by the Claimant why he concealed the nature of his alleged illness from the foreman.

Finally, the Claimant contends that he unsuccessfully called the repair track on Sunday, November 22, 1959, to give notice of his illness. He admits, however, that he made no further attempt to notify the foreman until December 1, 1959. Since it is undisputed that a telephone was in the house where he lived, we can detect no justifiable excuse for his continued and prolonged failure to notify the foreman as quickly as possible, although he was admittedly aware of his contractual obligation to do so.

In summary, the evidence on the record considered as a whole does not permit a finding to the effect that the Claimant was unavoidably detained from work because of serious illness during the period in question nor does it disclose any reasonable justification for his failure to notify the foreman as quickly as possible as required under Rule 16.

4. The Carrier's right to take disciplinary action against the Claimant under such circumstances cannot be doubted. Since the determination of a disciplinary penalty imposed upon an employe who has been found guilty of a wrongdoing necessarily involves managerial discretion, we have been reluctant to substitute our judgment for that of the Carrier's and, therefore, have consistently held that the Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious or fraught with bad faith. See Second Division Awards 1323, 1575, 2996 and 3081. The record in the instant case does not show that the Claimant's dismissal was influenced by such unreasonable or illogical considerations on the part of the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1961.