

Award No. 3884

Docket No. 3246

2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O.
(Carmen)**

MISSOURI PACIFIC RAILROAD COMPANY — GULF DISTRICT

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated Article V, 1(a) of the Agreement of August 21, 1954, and accordingly this claim or grievance must be allowed as presented.
2. That under the current Agreement Carmen T. G. Stewart and J. M. Solis were unjustly dealt with when they were dismissed from service of the Carrier on March 1, 1958.
3. That the Missouri Pacific Railroad Company be ordered to reinstate Carmen T. G. Stewart and J. M. Solis with all service rights, vacation rights and all other rights fully restored, including vacation earned or that would have been earned; and further, that they be paid for all time lost since March 1, 1958.

EMPLOYEES' STATEMENT OF FACTS: Prior to March 1, 1958, Carmen T. G. Stewart and J. M. Solis, hereinafter referred to as claimants, were employed by the Missouri Pacific Railroad Company, hereinafter referred to as carrier, as car inspectors at Crystal City, Texas.

On March 3, 1958, Master Mechanic S. P. Byrnes addressed a letter to claimants advising them that they were being held out of service as of March 1, 1958 pending formal investigation.

Vice-General Chairman Roe, upon receiving copy of Mr. Byrnes' letter, made formal request that the investigation be rescheduled for a later date, i.e., March 14, 1958, account of the short notice given and his being unable to attend the investigation as representative of claimants before that date.

Vice-General Chairman's letter requesting postponement of investigation was ignored even though it was received prior to the holding of the investi-

"If it is found that an employe has been unjustly suspended or dismissed from the service such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Attention is specifically directed to that part of the rule reading: " * * * and compensated for the wage loss, if any * * * ." Your Board has, as evidenced by the foregoing citations, distinguished between rules such as this one and those reading: "pay for all time lost" and has recognized that any "wage loss" can only be the difference between what could have been earned and that which was earned during the period of dismissal.

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.

Claimants Stewart and Solis were discharged after investigation on the charge of sleeping while on duty on March 1, 1958 and thereby causing a delay of one hour and forty minutes to Train 256 at Crystal City, Texas.

The employes rely on two grounds in seeking reinstatement with pay for all time lost, viz., (1) that the carrier violated the provisions of Article V, 1 (a) of the August 21, 1954 agreement; and (2) that the claimants were unjustly dealt with because not given sufficient notice of the investigation to enable them to secure the representative of their choice and to obtain witnesses.

Article V Section 1 (a) provides that claims or grievances be presented in writing to the proper carrier officer within 60 days from the date of the occurrence on which based, and should such claim or grievance be disallowed, the carrier shall within 60 days from the date filed, notify the filing claimant in writing of the reasons for disallowance, otherwise the claim or grievance shall be allowed as presented.

The organization maintains that the carrier failed to give 60 days' written notice of disallowance as called for by said Agreement and that consequently the claim must be sustained. A chronological review of the pertinent steps taken in the course of progressing this dispute seems necessary.

Under date of March 3, 1958 the Master Mechanic wrote claimants they were held out of service as of March 1, pending investigation to be held at Crystal City on March 7 at 10 A. M. A copy of this letter was sent to Vice General Chairman Roe at Kingsville, Texas and to Local Chairman Miller.

On March 5, 1958 Mr. Roe wrote Master Mechanic Byrnes, air mail special delivery at his San Antonio office, requesting postponement of the hearing to March 14, in order that Mr. Roe could be present to represent the claimants. This letter was not received at Mr. Byrnes's office in San Antonio until shortly before 10 A. M. on March 7, at which time Mr. Byrnes was in

Crystal City about to begin the hearing scheduled for that hour and date. The letter was read to Mr. Byrne over the telephone. At the opening of the hearing Mr. Byrne announced receipt at his San Antonio office of Mr. Roe's letter and the contents thereof, and asked the claimants and the Local Chairman if they were agreeable to proceeding with the hearing as scheduled, inasmuch as witnesses were present. Each of the claimants stated he was ready to proceed, and that the representative of their choice was Local Chairman Miller. Mr. Miller was present and made no objection to the investigation being held. He participated in the hearing, examined witnesses, and at the close of the proceeding stated he was satisfied with the manner in which the hearing was conducted.

On March 19, 1958 Superintendent Morris wrote Local Chairman Miller enclosing a copy of the transcript of the investigation and informed him that Carmen Stewart and Solis had been dismissed from service. On April 25, Vice General Chairman Roe wrote Master Mechanic Byrnes protesting the holding of the investigation without his presence, asserting that the discharges were unjustified, and requesting that claimants be returned to service with pay for time lost and reinstatement of all other rights. Master Mechanic Byrnes answered Mr. Roe's letter on April 30, explaining the circumstances of conducting the hearing without his presence, and informed Mr. Roe that he disagreed with him. Under date of June 30 Mr. Roe appealed to the Mechanical Superintendent and contended that in his letter of April 30 Mr. Byrne did not allow or disallow Roe's claim of April 25 within the meaning of Article V of the Agreement of August 21, 1954.

On the facts and circumstances shown of record we think the employees have misinterpreted the meaning of Article V. When the Vice General Chairman wrote Master Mechanic Byrne on April 25, he had complete knowledge of the evidence and the reasons for the carrier's action in respect of the claimants. He knew the contents of the transcript of the investigation which was the sole basis for the discharges. His letter clearly disclosed such knowledge. Under the circumstances, the plain meaning of Mr. Byrne's letter of April 30 is that he disagreed with Mr. Roe's position about the sufficiency of the evidence to sustain the discharges, and the propriety of holding the hearing at the time and place mentioned. The situation did not require a categorical denial of Mr. Roe's claim because that position on the part of Mr. Byrne was implicit in the letter. We think the requirement of Article V was sufficiently satisfied and accordingly hold that the employees' claim in this respect lacks merit.

We are of the opinion that the Vice Chairman's request for a postponement of the hearing date was not wrongfully refused under the circumstances. He knew that the hearing was scheduled for Crystal City on March 7, whereas his letter request of March 5 was addressed to Mr. Byrne at San Antonio. Why his request for postponement was not conveyed by telephone or telegraph is not explained. The reference to unnamed witnesses in his letter of April 25 to Mr. Byrne is without documentation. Neither the claimants nor their representative in the person of the Local Chairman at the investigation made any mention of unavailable witnesses. We are satisfied from a careful examination of the transcript that the claimants were well represented, that their interests were adequately safeguarded and that the hearing was fair and just.

Finally we are satisfied that the carrier's action was amply supported by the weight of the evidence. The claimant's themselves admitted that they had fallen asleep during the time they were required to be on duty. We find no substantial basis for disturbing the carrier's action in this case.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1961.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3884

There is nothing in the record to show that the carrier ever gave notice that the instant grievance was disallowed.

General Chairman Roe's letter of April 25 was seasonably and properly presented to Mr. Byrne but all Mr. Byrne's reply did was to state his reasons for holding the investigation without General Chairman Roe being present. Contrary to the finding of the majority, Mr. Byrne's letter did not satisfy the purpose and intent of Article V. The carrier did not meet its burden of proof. Implication is not enough to satisfy the requirement of Article V 1 (a); it requires that if the individual filing the claim is not notified as prescribed therein "the claim or grievance shall be allowed as presented . . ." In view of the clear mandate of this provision the present claim should have been sustained.

/s/ **Edward W. Wiesner**
Edward W. Wiesner

/s/ **C. E. Bagwell**
C. E. Bagwell

/s/ **T. E. Losey**
T. E. Losey

/s/ **E. J. McDermott**
E. J. McDermott

/s/ **James B. Zink**
James B. Zink