

Award No. 4854
Docket No. 4776
2-CB&Q-FO-'66

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Firemen & Oilers)**

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. - That under the current agreement Joseph J. Hernandez was unjustly dismissed from service on July 10, 1963.

2. - That accordingly Carrier be ordered to restore Joseph J. Hernandez to service with all rights and compensation for time lost.

EMPLOYES' STATEMENT OF FACTS: Joseph J. Hernandez, herein-after referred to as the claimant, was employed by the Chicago, Burlington and Quincy Railroad Company, hereinafter referred to as the carrier.

In letter dated July 15, 1963, Supt. Recl. and Scrap, R. E. Begitske advised that he was dismissed from service as of July 10, 1963.

Hearing was requested by Local Chairman Jenaro Cisneros in behalf of claimant; said hearing held on July 26, 1963.

A letter was directed to the claimant dated August 9, 1963 by Supt. Recl. and Scrap, R. E. Begitske, sustaining the action of dismissal set forth in letter dated July 15, 1963.

The dispute was handled with carrier officials designated to handle such affairs, who all declined to adjust the matter.

The agreement effective July 1, 1961, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that the carrier unjustly dealt with the claimant and said hearing transcript does not support the carrier's action in dismissing this claimant with almost 16 years' service for life from the service of this carrier.

able employees. Every consideration has been extended toward Mr. Hernandez, largely because of his personal problems. However, he has exceeded all bounds of propriety in this case, and his conduct has required that affirmative action be taken to remove him from the service.

In the light of this evidence, the Board must conclude that his offense of excessive absenteeism was clearly proved by the record.

In view of his record, dismissal from the service cannot possibly be construed as excessive discipline. The Board will note that he resigned from the service of this company on four separate occasions before his employment as a scrap sorter at the Eola Reclamation Plant December 11, 1956. This is not the record of a stable employe.

SUMMARY

It is the primary position of this carrier that the claim has been appealed by the organization to the wrong division of the National Railroad Adjustment Board. The Second Division does not have jurisdiction over store employes, and it cannot bestow upon itself such jurisdiction, not granted by the statute.

The carrier also feels very strongly that the procedural defects, failure to reject the declination of the foreman and the declination of Superintendent Begitske positively compel a dismissal award. Rule 15 is a mandatory requirement, and failure to follow the procedures set forth therein act as a bar to a claim before this Board.

Should the merits of this claim be reached the Board must find —

1. Claimant was absent without leave from July 5 to July 10, 1963, and he did not notify anyone of his absence.
2. Claimant was guilty of excessive absenteeism amounting to approximately 38 per cent of the available time during the 18 months preceding his dismissal. This alone would justify his dismissal.
3. In view of his record with this Company dismissal was not an excessive punishment. He has exhibited tendencies of an employe who does not want to work, and the only remedy is a complete separation from service.

In view of this record the Board must either dismiss this claim for lack of jurisdiction or deny it on the merits.

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.

It is contended by Carrier that the 60 day time limit for appeals from rejections of the Claim during its progress on the property was not observed by the Claimant and that, therefore, the Claim should be barred from consideration by this Board. However, Carrier is estopped from raising the question due to the fact that it was raised for the first time in Carrier's submission and was not raised on the property.

Claimant charges that, by a letter dated July 15, 1963, Carrier advised him that he was dismissed and his service for the Carrier terminated as of July 10, 1963, due to his excessive absenteeism prior to that time and, further, that on July 3, 1963, he was ordered by the Superintendent to report for duty on the morning of July 5, 1963, and to the date of the letter he had not reported nor informed Carrier of any condition that made it impossible for him to be on the job.

It appears from the testimony adduced at the hearing on June 29, 1963 that Claimant had an "off duty" accident and injured one of his fingers; that on June 2, 1963, Claimant reported to the Company physician for a release to return to his work and was told to report on his morning shift at 7:00 A. M. Claimant attempted to report back to work at 12:30 P. M., July 3, but was told by Carrier that he would have to report at the beginning of his shift on July 5, 1963 (Claimant admitted that his reason for not reporting earlier on July 3 was that he had overslept). Claimant admits that he didn't report to the Foreman after July 3. As Claimant didn't report as required by Rule 14 of the Agreement, on July 15 the Superintendent notified the Claimant that his services had been terminated.

Rule 14 provides, as follows:

"(a) In case an employe is unavoidably kept from work he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible.

(b) An employe returning to work shall report during working hours of his regular shift the day previous to return."

During the hearing the frequent absences from work of the Claimant were brought to his attention but his answers and attempted explanations of his absences were very general, evasive, and not convincing.

As has been universally held, the Carrier has the burden of proving a charge made against an employe in a discipline case.

From a careful and fair examination and analysis of the testimony at the hearing held we can only reach the inevitable conclusion that Claimant was absent without leave from July 5, 1963, to July 10, 1963, and that the charge of excessive absenteeism was adequately established by the record.

In addition to the foregoing, Claimant has charged that the punishment of dismissal of Claimant from Carrier's service by the Carrier was unjust, arbitrary and capricious and has cited Award 3905 (Doyle) in support of his contention.

The immediate case can be clearly distinguished from that contained in Award 3905. In that case the time of absence involved is quite minimal as compared to the large amount of absenteeism in the instant case; secondly, it appears from the record, that prior to October 1963, Claimant had been cautioned repeatedly on his frequent absences and on October 1, 1962, was warned again of his absenteeism and reminded that a failure to correct this condition might lead to his dismissal. Under the foregoing undisputed testimony, it cannot be said this dismissal was either an unjust, arbitrary or capricious action on the part of the Carrier.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Charles C. McCarthy
Executive Secretary**

Dated at Chicago, Illinois, this 13th day of April, 1966.