



Award No. 5815

Docket No. 5697

2-NOPB-CM- '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Arthur Stark when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, AFL — CIO
(Carmen)**

NEW ORLEANS PUBLIC BELT RAILROAD

DISPUTE: CLAIM OF PETITIONER:

1. That under the current agreement, Rule 16 was violated when Carman M. P. Friedman was taken out of service for a period of ten (10) working days, from May 29, 1967 to June 10, 1967.
2. That accordingly the Carrier be ordered to compensate Carman Friedman eight (8) hours pay at the pro rata rate for May 29, 31, 1967 and June 1, 2, 3, 5, 7, 8, 9, and 10, 1967, with all rights unimpaired including vacation rights, health and welfare and life insurance benefits.

EMPLOYEES' STATEMENT OF FACTS: M. P. Friedman, hereinafter called the claimant, was employed as a car inspector by the New Orleans Public Belt Railroad Company, hereinafter called the carrier. On May 6, 1967, the claimant was returning to New Orleans to report for work on the 3:00 P.M. shift; however, he had car trouble at Waveland, Mississippi. Realizing that his car could not be repaired in time so that he could get to work by 3:00 P.M., he made a long distance telephone call to his mother in New Orleans and asked her to report to the office the trouble he was having and advise that he would not be able to get to work. It is the practice to call the office in cases where carmen are detained from work under circumstances such as is involved in the instant case. His mother made repeated calls to the office but there was no response. Finally, at approximately 5:00 P.M. the assistant superintendent of transportation called the claimant's mother at which time he was advised by her that the claimant's car had broken down and that he was detained from work. She further advised him that she had called to report this four or five times but that no one answered the phone at the carrier's office. The claimant at the time of this occurrence had been employed by the carrier for nine years. He testified that he had never had anything like this happen before, that he personally had never had occasion to call the office after 12:00 and did not know that the carrier would not have anyone in the office after 12:00 to answer the telephone. His record is clear in the nine years that he has been employed with the carrier.

discipline assessed did not violate the agreement; therefore, carrier respectfully requests your Honorable Board to decline this claim.

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 waived right of appearance at hearing thereon.

On May 15, 1967 Car Inspector Michael P. Friedman was charged with "failing to report for duty at 3:00 P.M. Saturday, May 6, 1967". Following an investigation-hearing, Mr. Friedman was found "guilty as charged" and suspended for ten working days. Petitioner claims that Claimant was unjustly dealt with since (1) The same Carrier official filed the charges, conducted the investigation, testified as a witness, judged the evidence, and assessed the penalty; (2) Claimant was not guilty of any rule violation; (3) Carrier's action was arbitrary and capricious.

With respect to Petitioner's procedural argument, the record shows that Master Car Builder J. R. Coates (1) signed the May 15 charges against Claimant; (2) conducted the May 22 investigation; (3) introducing copy of a notice containing his own telephone number into evidence at the hearing and explained its purpose; (4) issued the May 26 ruling finding Claimant guilty and assessing the ten-day penalty.

The introduction of a posted notice by the hearing officer did not, in our judgment, constitute a violation of due process or an abridgement of Claimant's Rule 28 right to "a fair hearing". However, there is considerable doubt whether the Master Car Builder was a disinterested party to the proceeding, as a hearing officer should be under Rule 28. Note that Mr. Coates (1) was the person to whom Claimant allegedly should have reported his absence; (2) testified at the hearing concerning the reason for posting a bulletin about reporting ("the reason for putting out this notice when I was first placed in this position was in the event I couldn't be located anywhere else, I could always be reached by calling my home"); (3) testified on other relevant matters ("This office has been closed at 12:00 o'clock on Saturdays for the last 2 1/2 years, and I think everyone on this railroad is aware of that fact") and, in fact, his testimony was controverted by the Claimant ("If I had known nobody was at the office, I would have naturally given her another number. I didn't know nobody was here.").

In light of these facts Petitioner's procedural argument might well be sustained, were it not for the fact that this claim was not timely filed. The record shows that the due process allegation was made for the first time in Petitioner's submission to this Board. Since it was not presented to Carrier during the handling of the dispute on the property, although all the facts were then known, the claim cannot now be granted.

What, then, of the merits? The facts of the case may be summarized as follows: Claimant was scheduled to work the 3 P.M. shift on Saturday, May 6. He was in Waveland, Mississippi, on his way back to New Orleans, when his car broke down at 1:30 P.M. At 1:45 P.M. he telephoned his mother in New Orleans and asked her to report to the office that he would be unable to

report for duty. Mrs. Friedman made several attempts to call the office, but no-one answered. At 5 P.M. Assistant Superintendent of Transportation J. Laigast observed that the Car-Inspector from the previous shift was still at work. Mr. Laigast telephoned Claimant's home and was informed by Claimant's mother of the car breakdown and the fact that he could not be in. Laigast then notified Master Car Builder Coates who, in turn, arranged for the Car Inspector to be relieved.

As noted earlier, Claimant was given a ten-day suspension for "failing to report for duty" on May 6. But he was not AWOL in the normal sense of that term. He did make a timely effort to have his superiors notified that he could not be in. Had May 6 been a week-day, the notification would have been promptly received. However, Claimant forgot that the office closed at noon on Saturdays and his mother was unaware of that fact. True, he should have telephoned Carrier directly, rather than rely on an intermediary. Had he done so, and received no reply, he could have called another number of phoned Mr. Coates at home. But a ten-day suspension for this minor laxity was unnecessarily harsh, particularly in light of Claimant's nine years of unblemished service. Under the circumstances, we shall order the penalty reduced to a one-day suspension. Claimant should be reimbursed for the remaining nine days.

A W A R D

The ten-day suspension of Michael F. Friedman shall be reduced to a one-day suspension (May 29, 1967) and Claimant reimbursed, at the pro rata rate, for the remaining nine days (May 31, June 1, 2, 3, 5, 7, 8, 9 and 10, 1967), with all other rights unimpaired.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December, 1969.