

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

Parties to Dispute: (System Federation No. 117, Railway Employees'
(Department, A. F. of L. - C. I. O.
(Carmen)
(Western Pacific Railroad Company

Dispute: Claim of Employees:

That on January 27, 1972, Carman S. Reyes was improperly dismissed from the service of the Western Pacific Railroad Company.

That Carman S. Reyes be reinstated with his seniority rights unimpaired and compensated for all time lost.

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.

Claimant, a Carman, was employed by Carrier on March 18, 1970. On January 14, 15, 16, 17, 21, 22, 23 and 24, 1972, Claimant's regular work days, he did not report for duty. There was no record that he had phoned the Carrier seeking permission to be absent. On January 27, 1972 Claimant reported for work and was questioned about his absence, by the Shop Superintendent. He indicated he had been ill and was then requested to secure a release from the physician who had been treating him. Claimant secured a release from the doctor that day and the Shop Superintendent contacted the doctor's office and was informed that Claimant had not been treated prior to that day (January 27th). Claimant was then removed from service pending formal investigation.

Subsequently Claimant was charged with unauthorized absence and with making false statements to his supervisors in connection with the absence. The investigation was held on February 1 and 2, 1972 and on February 17th Claimant was dismissed from service.

Petitioner contends that Claimant was improperly removed from service in violation of Rule 36, that he did not receive a fair hearing and that the penalty imposed was excessive particularly in view of more lenient treatment for other similar infractions. Rule 36 provides:

"An employee who has been in the service of the Railroad more than thirty (30) days shall not be disciplined without a fair hearing by the carrier. Suspension in proper cases (the proper case is one where leaving the man in service pending an investigation would endanger the employee or his fellow employees) pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and the duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for net wage loss, if any, resulting from said suspension or dismissal."

Carrier argues that the evidence produced at the investigation supported the conclusion of guilt; in fact Claimant never denied being improperly absent and making false statements on January 27th. Further it is contended that the investigation afforded Claimant a fair and proper trial. Carrier asserts that it properly considered Claimant's past record in assessing the discipline and that he had repeatedly been warned on absenteeism and tardiness in his relatively short tenure with the company.

The record of the investigation reveals no denial of due process to Claimant; he and his representative were given ample opportunity to examine Carrier's witnesses and produce evidence in support of their position. Claimant did not produce any evidence that his wife or other persons had telephoned in his behalf to report his absence nor did he produce evidence that other employees with similar absentee records were treated with greater leniency. Assertions alone do not constitute evidence of discrimination. For these reasons we must conclude that the investigation substantiated Carrier's conclusion that Claimant was guilty of the

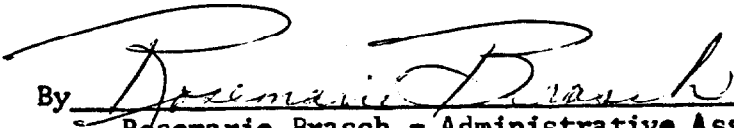
charges. Further, in view of Claimant's past record which contained a number of written warnings relating to the same infraction, the penalty may not be classed as an abuse of management's discretion. However, we view the Carrier's action in removing Claimant from service on January 27th pending the formal investigation as quite another matter. The clear language of Rule 36 quoted above provides that an employee may be suspended from service pending a hearing only in cases when ".... leaving the man in service pending an investigation would endanger the employee or his fellow employees...." There is absolutely no evidence in this dispute which would justify a suspension pending the investigation. We conclude, therefore, that this action by Carrier was a violation of the Agreement, specifically Rule 36 and Claimant should not have been prevented from working until the final determination was reached on February 17th.

A W A R D

Claimant shall be compensated for all time lost between January 27 and February 17, 1972; the remainder of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 17th day of April, 1974.