

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers, AFL-CIO, District Lodge No. 19
(
(Southern Pacific Transportation Company (Pacific Lines)

Dispute: Claim of Employees:

1. That under the current Agreement the Carrier improperly dismissed Machinist L. L. Lipari (hereinafter referred to as Claimant) from service on May 14, 1974.
2. That, accordingly, Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired, including vacation and insurance benefits and with compensation for all time lost from date of dismissal to date of restoration to service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 was employed by Carrier as Machinist at Sacramento General Shops, with regularly assigned hours 7:00 A.M. to 3:30 P.M. Monday through Friday. By letter dated May 14, 1974 Claimant was dismissed from the service of Carrier as follows:

"Evidence adduced at formal hearing conducted at Sacramento Locomotive Heavy Maintenance Plant May 1st and May 2nd, 1974, established your responsibility in connection with your being absent from duty in whole or in part March 8, 13, 14, 15, 18, 25, and 29, April 1, 5 and 10, 1974, in violation of Rule 810 of the General Rules and Regulations, that part reading:

Rule 810: 'Employee must report for duty
at the prescribed time and place,

'-----'. Continued failure by employees to protect their employment shall be sufficient cause for dismissal.'

For reasons stated, you are hereby dismissed from the services of the Southern Pacific Transportation Company."

Thereafter appeal procedures were exhausted on the property and the Carrier declined to reinstate Claimant with back pay and other benefits.

The record is clear that Claimant was either tardy or absent on each of the ten (10) workdays in March and April 1974. It is uncontroverted that Claimant was late five (5) of the days cited and that he did not work at all on the other five days. On four of the tardy days in question Claimant called in to his shop and spoke either to other employees or his foremen. Claimant cannot recall if he gave a reason for his tardiness but testified that if he had he would have mentioned his "kidney troubles" on two of those dates and his wife's false labor on another. The foremen and other employees recall that Claimant stated in words or substance he would be late on those dates because of oversleeping. On one date Claimant did not call in but reported at 8:30 A.M. The record shows he stated his reason for tardiness as oversleeping.

It is also uncontroverted that Claimant did not report for work at all on five (5) of the days in question. On one of those dates, April 1, 1974, Claimant had his father, who worked for the same foremen, inform the latter at 6:50 A.M. that his son would not be in because he had been awake most of the night while his wife gave birth. On the four other absence dates March 13, 14, 15 and 18, 1974 Claimant called in each morning, either minutes before or after his starting time of 7:00 A.M., and left word he would be absent that day because he had "personal business to take care of". The record shows that the personal business was his trial in a criminal proceeding in which Claimant was indicted, convicted on pleas of guilty and subsequently incarcerated in a California State Correctional Facility.

Rule 810 of Carriers General Rules and Regulations is not unreasonable on its face and is not, as the Organization suggests, inherently in conflict with Rule 25 of the controlling Agreement as examination of the cited provisions demonstrates:

"Rule 25. (a) An employe detained from work account sickness or for other cause, shall notify his foreman as early as possible. When returning to work he shall given the foreman in charge sufficient notice (at least 8 hours) so that proper arrangements may be made. (b) If an employe is unavoidably kept from work, he will not be unjustly discriminated against."

* * * * *

"Rule 810:

Employees must report for duty at the prescribed time and place. . . . Continued failure by employees protect their employment shall be sufficient cause for dismissal."

It is clear that rules of reason and of contract construction require that these provisions be read and applied together in determining the validity of the instant claim. Such reading convinces us that the employee has the obligation of regular and timely work attendance and the burden of providing whenever possible advance notice of an anticipated tardiness or absence. But as we read the rules says notice is not alone sufficient. The employee also has the burden of persuasion that the reason for absence or tardiness was unavoidable e.g. sickness or other such cause. If the employee gives advance notice and demonstrates that he was unavoidably kept from work he may not be disciplined under Rule 25. Conversely, if he fails to give adequate notice and does not show that failure was unavoidable; or, if he gives notice but fails to show that the reason for his absence or tardiness was unavoidable, then he is subject to discipline. The quantum of discipline clearly could range up to dismissal depending upon the circumstances, including the timing and quantity of failures to report for duty and the past record of the employee.

Applying these standards to the instant claim we find that Claimant was tardy on at least four occasions because he overslept. Apparently he gave notice each time but oversleeping is not an unavoidable reason for tardiness especially where a pattern is shown as herein. On one of the days of absence Claimant did not give advance notice but the record shows that his wife entered labor and he took her to the hospital where she underwent Caesarean section that day for delivery of their child. In our judgment such a reason falls within the ambit of "sickness or other cause" such as to constitute unavoidability under Rule 25 (b). But, the remaining four days of absence were because of participation in criminal trials in which he was the defendant. The Awards of several divisions of this Board are unanimous that such an excuse is not justification for absence from work. See Awards 12993, 18816 19568 (Third) and 4689 (Second). Those Awards stand essentially for the proposition that detention and incarceration for criminal activity is not unavoidable but is rather the consequence of one's actions. We are convinced that Court appearances in connection with such criminal charges, while compulsory on pain of contempt of court and arrest, similarly are not "unavoidable" as that term is used in Rule 25 (b). It is clear from all of the foregoing that Claimant's tardiness on four occasions and his absence on four occasions were not unavoidable. There can be no doubt that these absences and tardiness in a four-week period were excessive and subject to discipline. Nor can we conclude in all of the circumstances and upon consideration Claimant's past discipline record for excessive tardiness, including dismissal and reinstatement on a leniency basis, that dismissal in this particular case was unreasonable, arbitrary or capricious. The claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 11th day of June, 1976.