

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

Parties to Dispute: { System Federation No. 2, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Electrical Workers)
 { Missouri Pacific Railroad Company

Dispute: Claim of Employee:

1. That the Missouri Pacific Railroad Company is violative of Rule 32 (a) and (b) and has unjustly dealt with and damaged Electrician D. F. Pilcher when they denied him the right to a fair and impartial hearing on August 31, 1976, subsequently dismissing him from service of the Carrier by Notice number 793 dated September 9, 1976.
2. That, accordingly, the Missouri Pacific Railroad Company be ordered to compensate Mr. D. F. Pilcher, as follows:
 - (a) Compensate for all time lost plus 6% annual interest;
 - (b) Return to service with seniority rights unimpaired;
 - (c) Made whole for all vacation rights;
 - (d) Made whole for all health and welfare and insurance benefits;
 - (e) Made whole for pension benefits including Railroad Retirement and Unemployment Insurance;
 - (f) Made whole for any other benefits that he would have earned during the time withheld from service;

and, further, any record of this disciplinary action be removed from his personal record.

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 was charged with failure to report to work at the expiration of his ninety (90) day actual suspension, thereby being absent without proper authority. Following a formal investigation held on August 31, 1976, Claimant was adjudged guilty as charged and dismissed from the service of the Carrier effective September 9, 1976.

Prior to August 10, 1976, Claimant had been subject to a ninety (90) day disciplinary suspension for being absent without proper authority; said suspension became effective 12:00 Noon, May 12, 1976 and ended 12:00 Noon, August 10, 1976. Stated on the discipline notice issued to Claimant regarding the aforementioned ninety (90) day suspension, was the following advisory; "You will be expected to be available for service after 12:00 Noon, August 10, 1976."

The undisputed facts in the instant case, reflect that Claimant did not report to work at 12:00 Noon on August 10, 1976 and that on August 11, 1976, Claimant contacted his acting local chairman at approximately 1:50 P.M. by telephone to report that he was under doctor's care due to headaches and an extreme nervous condition and therefore, would not be able to return to work for another week or two. Immediately following this telephone conversation, the acting local chairman attempted to apprise Claimant's foreman, that Claimant was ill and would not be reporting to work. As the foreman was not in his office at the time, the acting local chairman left a note containing this information with the personnel clerk who was to forward the information to the foreman. Later that afternoon however, the acting local chairman did personally contact the foreman and related the information about Claimant first hand. Not having been informed directly by the Claimant regarding his absence from work, the Carrier on August 12, 1976 cited Claimant for formal investigation.

The Organization asserts that Carrier failed to specifically charge the Claimant with an offense as contemplated under Rule 32 as set forth below as follows:

"DISCIPLINE--INVESTIGATIONS: RULE 32. (a) An employee covered by this agreement who has been in service more than 30 days, or whose application has been formally approved, shall not be disciplined or dismissed without first being given a fair and impartial investigation by an officer of the railroad. He may, however, in proper cases, be held out of service pending such investigation which shall be promptly be held.

(b) At a reasonable time prior to the investigation, the employe will be apprized of the precise charge against him and the time, date and place set for the investigation. The employe shall have a reasonable opportunity by this notice to secure the presence of necessary witnesses, and representation if he so desires. A copy of the notice directing the employe to report for investigation shall be

"furnished to the local chairman of the craft involved, but failure to furnish the local chairman with copy of the notice shall not constitute a violation of this agreement or provide any basis for a contention that the notice to the employe to report for investigation was defective.

(c) An employe under investigation may be represented at the investigation by the duly authorized local committee who may be assisted by an officer and/or officers of the System Federation or International Organization. (Attorneys for the Federation excluded.) If the employe does not desire the duly authorized local committee to represent him, the employe may act as representative and will be permitted to examine witnesses. In event the employe elects to represent himself, the local committee will be permitted to be present at the investigation and be present at any conferences in connection with an appeal by the employe to the officer administering discipline if discipline is assessed. Copy of each statement made a matter of record at the investigation will be furnished to the employe and the local committee.

(d) If it is found that the charges against the employe are not sustained, the record of the employe shall be cleared of the discipline; if suspended or dismissed, the employe shall be reinstated to his former position, unless otherwise mutually agreed, and shall be compensated for the wage loss, if any suffered.

(e) Nothing herein shall abridge the right of the Carrier to reinstate, with original seniority status, an employe who may have been dismissed for reason other than prescribed in the Union Stop Agreement dated January 12, 1953. No employe will be reinstated under this paragraph (e) who has been out of service for more than one year without the concurrence of the General Chairman."

The Organization maintains Claimant was unjustly dealt with and damaged when dismissed from service on September 9, 1976, as Carrier was fully aware of the reasons why the Claimant was not available to work following his ninety (90) day suspension. The Organization contends that Carrier was cognizant of the fact that Claimant was under doctor's care when the ninety (90) day suspension was issued and reasons therefore, that Carrier should have been aware of the possibility of Claimant's being under continued care at the end of the suspension period. The Organization argues that Carrier's citation in both the Notice and Caption of investigation is unfounded, as it is their position that the suspension notice of May 12, 1976 only required the Claimant to be "available for service after 12:00 Noon, August 10, 1976." The Organization takes the position that the above quoted portion of the

suspension notice can only be interpreted to mean that the Carrier desired Claimant simply to be available for service after 12:00 Noon on August 10, 1976 and would then notify him following his suspension of the exact time to report back to work. Further, the Organization asserts that two notices both dealing with absence and lateness by employees, the first notice issued by the Carrier originally on January 15, 1973 and reissued on November 14, 1973 and again on June 9, 1975 and the second notice issued on November 21, 1974, are not consistent with one another nor is either notice in keeping with Rule 17, set forth below, as follows:

"ABSENCE FROM WORK WITHOUT LEAVE: Rule 17. Employes shall not lay off without first obtaining permission from their foreman to do so, except in cases of sickness or other good cause of which the foreman shall be promptly advised."

The Organization describes Rule 17 as being plain and simple as to what is required, contending there is nothing in the rule which implies that an employee must personally request permission in a case of sickness. Furthermore, Rule 17, the Organization maintains, does not prohibit an employee from seeking the assistance of his union representative or others to advise the Carrier of his illness, nor does the rule restrict another Carrier officer from transmitting to the employee's foreman, information regarding said employee's lay off from work due to sickness.

Finally, it is the position of the Organization that Claimant did not receive a fair and impartial hearing and accuses the Carrier of omitting correspondence in their submission, which originated on the property in the course of handling the instant claim. Such omission the Organization asserts, is not in keeping with the requirements of Circular Number 1.

The Carrier contends that the procedural requirements of Rule 32 were complied with based on the following; Claimant was properly notified of the formal investigation; Claimant acknowledged his readiness to proceed at the August 31, 1976 hearing; and Claimant had secured union representation and witnesses as permitted him under the rule. The Carrier maintains the notice of investigation was sufficiently informative as to the charge against Claimant as well as to the time and location of the investigation, thereby meeting the requirements set forth in section (b) of Rule 32. Carrier takes the position, that Claimant had a fair and impartial hearing, as Claimant was permitted to introduce all statements and evidence which he desired to make and enter in his own behalf and was permitted, through his representative to examine and cross-examine all witnesses. It is the Carrier's position that since the Organization took no specific exceptions to the procedure, in the subsequent handling of the claim on the property, the Organization is thus precluded from raising such procedural questions for the first time before the Board.

The Carrier maintains that from the testimony offered by the Claimant himself and the fact that Claimant had been in the service of Carrier for over twelve (12) years and that Claimant had been disciplined for the very

same offense prior to being dismissed, Claimant was well aware of his responsibility to report or to seek permission to be absent from his supervisors rather than from his local union representative. In fact states the Carrier, the Claimant should have been even more aware of his responsibilities regarding laying off from work than most other employees, since he had been personally counseled concerning these responsibilities by his General Foreman.

Carrier states that Claimant did not meet his responsibilities with regard to securing permission from the proper authorities to be absent and as a result he improperly failed to report for duty and was thereafter absent without authority. The Carrier points out furthermore that Claimant's being absent without authority in the instant case, is not an isolated incident, but rather fits well a pattern of poor attendance which began in the year 1972 and continued up to the time Claimant was dismissed. During these years, (1972 through 1976), Carrier states it made several attempts by several different means to correct Claimant's poor attendance record but to no avail, as Claimant persisted in working only when he wished to and not securing anyone's permission when he chose not to work.

As to Carrier's instructions regarding the proper procedure to follow in making notification when laying off from work, the Carrier notes the two instruction notices issued to employees were operative at different times and that Claimant had only to comply with the notice bearing the latest date of issue in order to have met his responsibilities. Carrier notes that when instructions are issued, an employee has no recourse but to obey the instructions and grieve afterwards if he feels they are improper. In any event, the Carrier states, that had Claimant complied with even the outdated instruction, he would not have been disciplined. Finally, the Carrier argues, compliance with Rule 17 can only be achieved when the employee himself advises the foreman when he must be off account sickness or to personally request permission to be off from that foreman. It matters not, contends Carrier, whether either or both its instructions regarding laying off of work are in conflict with Rule 17 as Claimant was not in compliance with either Carrier's instructions or Rule 17.

In reviewing the record, the Board rejects the Organization's contention that Carrier violated the provisions of Rule 32 and dismisses the notion that Claimant did not receive a fair and impartial hearing. Furthermore, the Board finds no substance in the charge that the Carrier violated any requirements set forth in Circular Number 1. The Board finds persuasive Carrier's contentions regarding Claimant's knowledge of his responsibilities vis-a-vis those required in reporting laying off of work. By Claimant's own statements at the August 31, 1976 hearing, Claimant acknowledged his familiarity with both instructions issued by Carrier relating to the proper reporting procedures to be followed when laying off from work. Further, the Board rejects the Organization's interpretation of Rule 17 and agrees with the Carrier's position that the employee himself and not a representative

must either notify or seek permission from a supervisor when in lay off status. The Board agrees with Carrier's position in the instant case, that if Claimant was well enough to telephone the acting local chairman to make notification he would not be reporting to work, that Claimant could just as well have telephoned either the foreman or the general foreman to make said notification.

The Board finds ambiguous to some extent, the advisory issued Claimant in his ninety (90) day suspension notice that he was to be available for work after 12:00 Noon, August 10, 1976. The Board believes a reasonable presumption can be drawn that the phrase, "the Claimant will be available to work after 12:00 Noon, August 10, 1976", meant Claimant would, in fact, report back to work at that time and on that date. However, the Board concludes, it is possible to interpret this advisory in other ways and believes that the Organization's interpretation is, in fact, one of those other ways. That is, Claimant's availability to work after 12:00 Noon, August 10, 1976, could mean Claimant to be in standby status awaiting notification by Carrier of the exact date he was to return to work. Under this interpretation, Claimant would of course be under no obligation to notify supervision regarding his laying off of work. Acceptance of this interpretation however, is somewhat strained, in view of the fact Claimant contacted his acting local chairman on August 11, 1976 to report he was still under doctor's care and would not be able to return to work for another week or two. Nevertheless, the Board believes the advisory to Claimant should have been more clearly formulated and that the Carrier should have specifically directed the Claimant to return to work at 12:00 Noon on August 10, 1976.

The Board further observes that on previous occasions, over past years, Claimant has had others, primarily his wife, notify Carrier he would not be reporting to work. Carrier accepted these notifications as valid, even though such notifications neither conformed with either of the two aforementioned instructions notices regarding reporting procedures for laying off of work nor with Rule 17.

The Board therefore rules, that since neither one or both of the two instruction notices issued by Carrier dealing with laying off of work reporting procedures nor Rule 17 were enforced with uniformity and further that the advisory to Claimant concerning his return to work following his ninety (90) day suspension was ambiguous, that Claimant be reinstated without back wages or other monetary or non-monetary benefits.

In so ruling, the Board directs the following remarks to Claimant:

- (1) The Board finds Claimant's past record relating to lateness and absenteeism appalling and strongly advises Claimant to dedicate himself to the task of reversing this pattern of behavior;
- (2) The Board further advises Claimant to become thoroughly familiar and knowledgeable with all rules and regulations, to understand well his responsibilities and obligations in meeting said rules and regulations, and to strictly adhere to the rules and regulations.

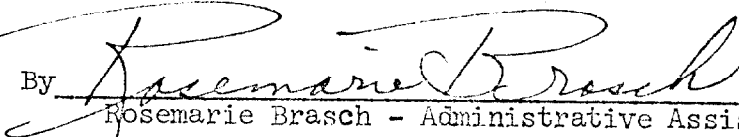
A W A R D

Claim sustained to the extent indicated in the findings.

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 16th day of May, 1979.