

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: ( International Brotherhood of Electrical Workers  
( Southern Railway Company

Dispute: Claim of Employees:

1. That the Southern Railway System dismissed Electrician C. F. Adair from service without just and sufficient cause and deprived him of his right to earnings from July 5, 1978, until such time as he is restored to service.
2. That accordingly, Southern Railway System be ordered to restore Electrician C. F. Adair to service with seniority rights unimpaired and compensated for all wages lost commencing with the date of his discharge July 5, 1978, and continuing thereafter until such time as he is restored 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 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.

The claimant was employed as a student electrician at the time of dismissal with a seniority date of January 29, 1973.

A preliminary investigation was held on June 21, 1978, concerning an alleged failure to protect his job assignment and excessive absenteeism. It was alleged that in the 20 days prior to the preliminary investigation he was absent 20 days and did not report off any of those days. The claimant was dismissed as a result of the preliminary investigation. In accordance with the agreement, the claimant requested a formal investigation. This was held on June 28, 1978.

It was clearly established in the investigation by way of substantial evidence that the claimant had not reported for work since May 16, 1978, and had not reported off during that period. Mr. Adair claimed it was impossible during this period to report off. He testified as follows:

"In reference to the charges being investigated here on my account, uh, my reasoning for being out was of a personal nature and not physical. I had family matters to take care of. I'm currently involved in house buying negotiations. Uh, I did not call in for a period of twenty (20) days as Mr. Watson has priorly stated but due to no uh, fault of my own I was not assessed the opportunity to call in during this period."

At another point, he testified:

"As I stated, I was not physically able or capable--not due to physical imparities but just displacement, I was not able to protect my job or call in."

In reviewing Mr. Adair's excuse for not being able to notify the carrier of his absence during a more than 20 work-day absence, we find absolutely no validity. How being involved in a real estate transaction would prevent anyone from notifying their employer by phone or letter of their alleged inability to fulfill their employment obligation is beyond the stretch of this Board's imagination. Nor are we convinced, even if Mr. Adair had called in, that being involved in buying a house would be valid justification for such a prolonged absence.

Regarding the quantum of discipline, the carrier has properly placed before the Board the claimant's past record which convinces us that there is nothing arbitrary, capricious or excessive about the discharge. The record also reflects that four of six suspensions on his record are directly related to the specific instant charge. The Board also notes they are of a progressive nature. On May 18, 1977, claimant was suspended three days for failure to protect his job, due to excessive absenteeism, tardiness and not reporting off. On August 15, 1979, he was suspended for excessive absenteeism and not reporting off. On December 27, 1977, he was suspended for 10 days for excessive absenteeism and failing to protect his job. On January 19, 1978, he was suspended 30 days for excessive absenteeism and tardiness.

The claimant during the investigation and the organization during the handling of this case before the Board vigorously argued that the disciplinary action against the claimant was discriminatory. It was argued it was discriminatory because, according to Mr. Adair, others, namely Machinist J. K. Jones, was off for allegedly the same reason for 45 days and was not disciplined. The organization, during the handling of the case at the Board contended that in light of Mr. Adair's accusation, the burden was on the company to show the claimant was not discriminated against. This is not the carrier's burden. The carrier's burden is to establish a prima facie case. The carrier had more than established a prima facie case regarding evidence of guilt and the appropriateness of the discipline. At the point a carrier established a prima facie case the burden shifts to the organization to rebut this evidence. If the organization is to argue that the claimant is being unjustly treated when compared to the disciplinary handling of employees the burden is theirs as the asserting party to come forth with such evidence. Evidence in this case could have been in the form of testimony by Mr. Jones or others. The Board endorses the underlying principle of the organization's argument, that employees should be disciplined with reasonable

consistency under reasonably similar circumstances. However, it is up to the organization to show the similarity of circumstances between compared cases including variables such as seriousness of offense and past record. For instance, in this case even assuming it was factual Mr. Jones was off without permission for 45 days with impunity, the organization would have to show their past records of the two employees were also similar. There was no such showing in this case and there is simply not enough evidence to compare the cases.

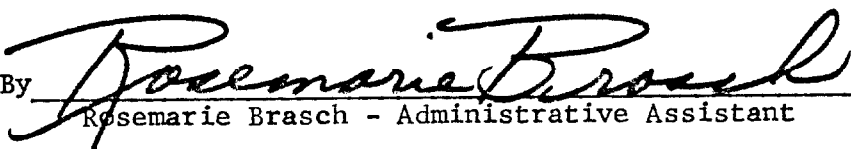
In conclusion, we find that the claimant is guilty as charged. The penalty of discharge is appropriate and not excessive considering the past record of the claimant which included four previous suspensions for identical charges. The claimant was afforded the benefit of progressive discipline with the hope in mind at each stage an increasingly more severe penalty would teach the employee his behavior must change. However, the claimant proved himself totally unresponsive to correction. He had convinced the carrier he was unwilling and/or unable to respond to reasonable efforts to get him to fulfill his employment responsibilities in a consistent manner. As such, it cannot be said the carrier's actions are arbitrary, capricious or excessive.

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 - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of December, 1980.