

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 Firemen & Oilers
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(Western Pacific Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current agreement Firemen and Oiler Michael C. Dwyer was unjustly dismissed from the service of the Carrier on November 20, 1978, following a hearing held on November 14, 1978.
2. That accordingly, the Carrier be ordered to make the aforementioned Michael C. Dwyer, whole by restoring him to Carrier's service with seniority rights unimpaired, plus restoration of all holiday, vacation, health and welfare benefits, pass privileges and all other rights, benefits and/or privileges that he is entitled to under rules, agreements, custom or law and compensated for all lost wages. In addition to money claimed herein, the Carrier shall pay the Claimant an additional amount of 6% per annum compounded on the anniversary date of 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.

At the time of dismissal, claimant was employed as a Laborer at Stockton, California, and had a seniority date of December 21, 1977.

On December 8, 1978, the carrier instructed claimant to appear at a formal investigation held November 14 in connection with his alleged absence from duty without proper authority from May 4, 1978, to November 7, 1978.

In reviewing the transcript, it is the Board's conclusion that there exists in the record substantial evidence to support the carrier's charge.

The claimant doesn't dispute that he was absent during the period in question. He does contend that his absence was excusable in that he was physically disabled during the entire period of his absence. In this regard, claimant indicates that

on May 4 he suffered a groin injury. He further testified that on approximately May 11 his injury had healed to an extent that he was going to come back to work, when he was injured in a car accident. He indicated that he notified the carrier to this effect shortly after the accident. In support of his contention that he was physically unable to report for work, claimant referred to a letter from Dr. Willard B. Smith, Chiropractor. The letter was dated November 8, 1978, and it was read into the transcript record. The letter stated that claimant was under Dr. Smith's care from May 17 to October 23, 1978, and "was totally incapacitated for the performance of duties during this time". The letter further indicated the claimant could return to work October 27, 1978.

The hearing officer did not find Mr. Dwyer's defense of total physical incapacitation credible. This conclusion is supported by substantial evidence in the record. The carrier introduced a letter into the record from the Department of Forestry (State of California) that verified that "Michael C. Dwyer worked for the Department of Forestry as a Seasonal Fire Fighter from June 15, 1978, through October 18, 1978". The carrier argues convincingly that in light of the letter from the State it is hard to believe that claimant was incapacitated. They also point out a fire fighter's job is at least as rigorous as his position at the railroad and if he was suitable for firefighting he was suitable to fulfill his employment obligation to the railroad.

The claimant admitted he was employed by the State as a fire fighter as stated in the letter mentioned above. However, he had nothing of relevance to say about the obvious contradiction between the letter from the State and Dr. Smith's letter.

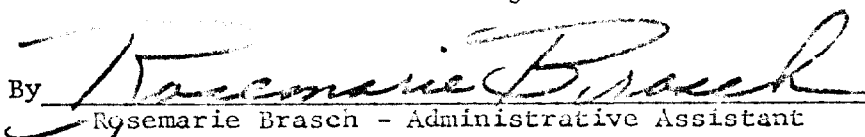
Regarding the degree of discipline, the Board does not find that in light of the seriousness of the offense and the brief period of claimant's employment with the carrier that dismissal is arbitrary or capricious.

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 7th day of January, 1981.