Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8564
Docket No. 8531
2-ICG-MA-'81

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

Parties to Dispute: International Association of Machnists and Aerospace Workers

Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. That the Illinois Central Gulf Railroad violated Rule 39 of the schedule "A" agreement made between the Illinois Central Gulf Railroad and the International Association of Machinists, AFL - CIO, when they discharged G. M. Farmer from duty on August 10, 1978.

2. That accordingly the Carrier be ordered to reinstate Mr. Farmer to service, seniority rights unimpaired and pay him for all wages lost as a result of his dismissal.

3. Compensate the claimant for all overtime losses.

4. Make claimant whole for all holiday and vacation rights.

5. Pay premiums on Travelers Policy GA-23000, Illinois Central Gulf Hospital Association, Provident Insurance Policy R-5000, Aetna Policy GD-12000.

6. Pay interest of six (6) percent on all lost wages.

7. Make claimant whole for all losses.

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 Machinist. He had been employed by the carrier fourteen and one-half years.

On July 11, 1978, claimant was directed by the carrier to attend a formal investigation "for the purpose of determining whether you have been excessively absent from work during the period February 1, 1978, to the present time".

The hearing was held and as a result he was dismissed by letter dated August 10, 1978.

From the outset, the organization argues that the discipline should be overturned on a procedural defect. They argue the carrier's procedure was defective because the carrier failed to apprise the claimant of the precise charge as guaranteed by the agreement. Rule 39 of the contract reads in part:

> "No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases 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 will be apprised of the precise charge against him."

The organization argues that the phrase "excessively absent" is vague and imprecise and remains undefined. A fair hearing is argued to be denied because the lack of precision in the charge prevented the claimant from preparing an adequate defense. A charge of being excessively absent standing alone would usually be considered imprecise because it would prevent the claimant from preparing an adequate defense. The claimant would have no idea of the dates he was supposedly absent and as a result would not be in a position to prepare a defense that those charges were unjustified or inaccurate or whatever the case might be. However, the charge in this case does not stand alone. The claimant and his representative requested and received prior to the investigation a copy of the claimant's attendance record. The representative's request read as follows in pertinent part:

> "Would you please furnish me a copy of machinist B. M. Farmer's time record from February 1, 1978, to July 12, 1978.
>
> This information is necessary to ensure that Mr. Farmer may receive an opportunity to properly prepare himself for the investigation you have scheduled at 9:00 a.m. on Thursday, July 20, 1978, to determine if he has been excessively absent during the period of time referred to."

The record indicates the carrier fully complied with this request on July 14 and as such the Board cannot conclude there is any merit to the organization's objection. A reasonable mind can only conclude that with a copy of the claimant's attendance record for the period in question, the claimant had enough information regarding the charge to adequately prepare a defense.

The organization also argues extensively that the claimant effectively cannot be charged with "excessive absenteeism" and further that the proper criteria governing absenteeism is Rule 23. Rule 23 reads:

> "No employee shall absent himself from work for any cause without first obtaining permission from his foreman if possible, except in case os sickness, when he shall notify his foreman as soon as possible. 'Personal

"'business' will be sufficient reason to request leave of absence without detailed explanation thereof."

They argue he can only be charged with being absent without permission. They argue that under Rule 23 the only absences that can count against the claimant are those for which he did not have permission. We disagree. It is common and acceptable, unless expressly prohibited by the contract, for a carrier to charge an employee with excessive absences even where some of those absences are excused such as absences due to illness. A carrier in general has the right to expect reasonably regular attendance by its employees. A carrier is not obligated to keep in its employment an employee who cannot effectively work more than part time. The charge before the Board is a proper one and our task is to determine if it is supported by substantial evidence.

In reviewing the record, the Board concludes that the claimant was excessively absent during the period in question. There is no fixed or concrete measure of what is excessive. The point at which absences become excessive is determined by the facts and circumstances of each case and will be affected by the number of absences, the amount of time involved and the likelihood of future absences. In considering the evidence, it was established that the claimant missed approximately 16% of all scheduled hours due to absences, tardiness or early quits. He had one of these forms of absenteeism on approximately 34% of his work days. This means that on the average the claimant failed to work a complete shift one out of every three days. Any reasonable mind would conclude that the extent of the claimant's absenteeism would have to be considered excessive when the norm for employees at Paducah was 5.75%. The carrier can't be expected to tolerate such unreliability--excused or unexcused. The Board notes that even when excused absences are discounted the claimant's total absenteeism is approximately two times that of the norm.

While the Board believes the charges are supported by substantial evidence, we also believe that dismissal is an excessive penalty. The degree of discipline is mitigated by several factors. First, the claimant's considerable seniority with the company plus the fact that during the vast majority of those years he was without disciplinary problems leads us to believe he is deserving of another chance. Second, we see the company had some responsibility in the claimant's behavior. Although this responsibility is small, it is enough to make us believe the claimant deserves a chance to show he has learned the seriousness of the carrier's desire to have him to attend work on a regular basis. In this respect, we agree with the organization when they argued that "management actually condoned Mr. Farmer's absenteeism as evidenced by their never having charged the claimant with a violation of Rule 23 of the schedule 'A' agreement by absenting himself from work without permission." It has been noted that many of the claimant's absences during this six-month period were without permission. During this period the claimant was never subjected to discipline any more severe than one written reprimand. If, during this long period the carrier had issued a disciplinary suspension and demonstrated unequivocally to the claimant the seriousness of the situation, we believe he might have corrected his ways. We believe that for a charge of this nature the claimant should have the benefit of a lengthy suspension and as such dismissal is excessive. We will therefore direct his reinstatement without back pay. We are also compelled to say that if the claimant is shown in

the future to have failed to learn his lesson if we were asked to reconsider another claim for reinstatement, we would say he is not deserving of it.

A W A R D

Discipline modified 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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 7th day of January, 1981.