

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company did improperly and unjustly terminate Carman G. D. Schwister from the service of the Carrier on March 3, 1978 in violation of the controlling Agreement.
2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to restore Carman Schwister to the service of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company with seniority rights unimpaired.
3. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to compensate Mr. Schwister in the amount of eight hours pay for every day from March 3, 1978 until he is restored to service.
4. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to make Mr. Schwister whole for all benefits that are a condition of employment such as, but not limited to, vacation rights, medical, dental and group life insurance benefits for all time as Mr. Schwister is held out of service.
5. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to pay Mr. Schwister interest at the 6% rate per annum for any monies he may receive as result 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.

On February 8, 1978, claimant was notified to appear for a hearing on February 22, 1978, on the following charges:

- "1. Failure to protect your assignment on January 8 and January 21, during your regular scheduled working hours.
2. Failure to notify your foreman as early as possible that you would be detained from work on January 8 and January 21, in violation of Rule 23 of the schedule agreement.
3. Partaking in an unauthorized leave of absence on January 8 and January 21, 1978."

The hearing was held as scheduled and a copy of the transcript has been made a part of the record. Claimant was dismissed from service at the close of his shift, 3:00 P.M., March 3, 1978.

It is so well settled as to require no citation that in discipline cases the burden of proof is on the Carrier.

Rule 23 of the schedule agreement provides:

"An employe detained from work on account of sickness or for any other good cause, shall notify his foreman as early as possible."

In the investigation, the claimant stated that he attempted to call his foreman to notify him that he would be detained from work on January 8 and January 21, 1978, but no one answered the telephone. The claimant stated that he attempted to call repeatedly, but was unable to complete the call, and that in each instance he notified the foreman upon reporting for work as to why he had missed work on the previous day.

It was established in the investigation that the foreman, who is the proper officer to receive such calls, was frequently out of his office for extended periods of time, and when he was out of the office no one was available to answer the telephone. It was also established that there was no direct telephone line to the foreman's office.

In disciplinary cases all parties, including the Board are restricted to the evidence adduced at the investigation in determining whether the charge or charges against the employe are supported. Based upon our careful study of the transcript of the investigation, or hearing, in this dispute, we are forced to the conclusion that the Carrier did not meet its required burden of proof.

As to the remedy, it appears that claimant's prior attendance record was not good. Therefore, we do not feel justified in awarding him compensation for each day out of service. We will award that his compensation be computed on the basis of his average work record for the two year period prior to his removal from the service excluding such times that he may have been on disciplinary suspension and from such amount the Carrier shall be permitted to make deductions as authorized in Rule 34(h) of the Agreement.

The Organization has submitted no agreement support for Parts (4) and (5) of the claim, and they are dismissed.

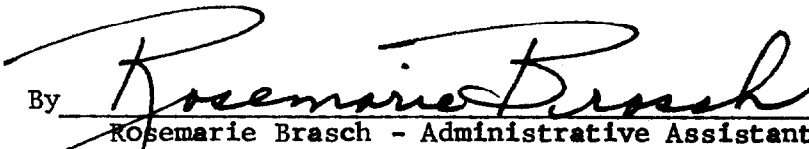
A W A R D

Claim sustained to the extent indicated in 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 4th day of March, 1981.