

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation be ordered to restore Machinist Kevin L. Adams to service and compensate him for all pay lost up to time of restoration to service at the prevailing Machinist rate of pay.
2. That Machinist Keven L. Adams be compensated for all insurance benefits, vacation benefits, holiday benefits, and any other benefits that may have accrued and was lost during this period, in accordance with Rule J-1 (e) of the prevailing Agreement which was effective April 1, 1976.

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 employees 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 dismissed for excessive absenteeism pursuant to a notice of May 8, 1979. On April 9, 1979, in a notice, the delivery of which was receipted for by Claimant, the latter was charged with excessive absenteeism regarding the period February 14 - April 2, 1979. Claimant was charged with 8 absences, 8 latenesses and 3 "out-earlys" during this period. On April 25, 1979, in a notice, the delivery of which was receipted for by Claimant, he was charged, respecting the month of April, 1979, up to that point, with being absent on 8 occasions, late once, and with having left early once. When the two charges are combined Claimant was charged with being absent on 16 dates and either having been late or having left early 13 times. (At least some of the absences charged allegedly occurred subsequent to Claimant having received the first of the two charges of excessive absenteeism above detailed.)

The trial relating to the first set of charges, originally scheduled for April 23, 1979, was postponed, to May 2, 1979, due to the Claimant not having made himself available for trial on April 23, 1975. A further postponement was granted on May 2, 1979 due, apparently, to the Claimant's Organization representative having a conflicting responsibility on that date. (In any event, Claimant

was again apparently unavailable on this date.) On May 4, 1979 investigative hearings respecting both sets of charges mentioned above were held. Claimant was not present at these hearings, with both Carrier and Organization representatives apparently unable to ascertain his whereabouts. The May 8th notice of dismissal was issued pursuant to the results of these hearings.

At one of the hearings a Foreman testified that on many occasions Claimant had left work early without an excuse and without an indication that he wished to explain or justify such early departures in any way. The Foreman further testified that on one occasion when the Claimant left early he said he had family problems but on other occasions provided no real excuse, simply saying he had to leave. This Foreman indicated that even absent adequate excuses he let Claimant leave since it would not have been appropriate to attempt to physically restrain him. Documentation as to Claimant's alleged absences, latenesses and "out-earlys" was also referred to, based on Department time-books.

The Organization contends the investigative trials were not fair and impartial since a request for their postponement, because of Claimant's absence from them, was denied. It asserts that Claimant was not present to defend himself and that Carrier knew that he could not be present since Claimant was marked off as ill at his place of work on that day. The Organization contended that it could not properly represent Claimant, since its representatives had not been able to contact Claimant, and that the Carrier holding two separate investigations, back to back, on the same date, when Claimant could not be at such hearings, represented a deliberate effort to pile up evidence against Claimant at a time when he could not defend himself. The Organization asserts a further procedural impropriety in that the notice of dismissal sent to Claimant did not specify whether the dismissal was based on the investigative hearing relating to the first set of charges or respecting the one pertaining to the second set of charges.

In the first place, it must be remarked that at the investigative hearings themselves no actual evidence was presented that Claimant had advised anyone that he was sick or that he was, in fact, ill and, therefore, unable to attend the trials. There was simply an allusion to the fact that he was marked off sick, at his place of work, on the date of the hearings. But such notation is not conclusive respecting his actual state of health or the date in question; it may merely have been one in a series of perfunctory entries made to indicate Claimant's absences from work. In any event, no concrete evidence whatsoever of Claimant's being ill on May 4, 1979 was presented.

The basic pattern here is that of a Claimant charged and advised to appear at an investigative hearing, respecting such charge, the hearing being postponed several times because of the Claimant being absent on the originally scheduled dates (also, on one of such dates Claimant's representative had a conflicting obligation) and the Claimant's representatives requesting yet a third postponement, on the date the hearing was actually held, because Claimant was again not present. All the while Claimant was apparently completely unavailable, with his whereabouts ascertainable by neither Organization nor Carrier representatives. In such a context it is well established that Claimant may not frustrate the holding of investigative hearings, respecting his alleged improper conduct, by

simply continuing to fail to appear at repeatedly rescheduled hearings and being unavailable to communicate with Organization or Carrier representatives who might seek to get Claimant to commit himself as to exactly when he would be able to attend an investigative hearing. This must especially represent the Board's feeling when no tangible evidence, whatsoever, as to why Claimant has failed to attend scheduled hearing is presented.

To this effect is Award No. 22408, Third Division, which stated:

"An employee cannot prevent the holding of a fair and impartial hearing by the simple expedient of staying away after due notice has been made without proof that the absence was justified."

Similarly, Award No. 7844, Second Division, found:

"Although notified, Claimant failed to attend the hearing. We find that Carrier properly conducted the hearing in this case and that Claimant's failure to attend his own hearing was done at his own peril."

The point is enunciated ~~extremely~~ decisively in Award No. 8225, Second Division:

"... we find nothing improper with regard to Carrier having conducted the investigation with Claimant in absentia. Claimant was given proper notification of the hearing as to the date, time, and place and was advised of his rights regarding witnesses and representation. For whatever reasons, Claimant chose not to attend the hearing nor to advise either the Organization or the Carrier in advance of the scheduled hearing date that he would be unable to attend. We believe, therefore, the Claimant received a fair and impartial investigation."

In Award No. 7857, the facts might be considered as much more favorable to Claimant's position than they are here. For although, Claimant had requested a hearing postponement and then had failed to attend the rescheduled hearing he was represented by an Organization official who presented a physician's letter attesting that Claimant would not be present at the rescheduled hearing. Nevertheless, the Board upheld the conduct of the hearing in absentia, saying:

"... the Organization was not apprised of the Claimant's position, even though representing him at the hearing ... The hearing was rescheduled at the Claimant's request. It is well established that such deliberations cannot be successfully thwarted by the disinclination of the Claimant to appear..."

While it is true that the May 8th notice of dismissal failed to state whether Claimant's dismissal was based on the first, second or both of the

hearings conducted on May 4th, this cannot be considered prejudicing any of Claimant's rights in these premises. The charges of excessive absenteeism pertaining to either of the two hearings could be considered warranting the discipline Carrier here assessed Claimant. There is plentiful authority supporting such a position. For example, in Award No. 6710, Second Division, it was stated:

"Every employee has an obligation and a duty to report on time and work his scheduled hours, unless he has good and sufficient reason to be late, to be absent, or to leave early. Those reasons must be supported by competent and acceptable evidence. No employee may report when he likes or choose when to work. No railroad can be efficiently operated for long if voluntary absences are condoned."

In similar vein is Award No. 8564, Second Division, which observed:

"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 Carrier can't be expected to tolerate such unreliability -- excused or unexcused."

Additionally, the point was most forcefully stated in Award No. 7348, Second Division where the Board commented:

"When an employee is so consistently and habitually absent over a long period of time that his employment becomes a serious liability rather than an asset, Carrier is entitled to terminate his services.

An employee may be absent from his work so much of the time as to become, in effect, a part time employee. Carrier is entitled to insist on reasonable attendance.... The interests of the other employees and the Carrier must outweigh the personal interests of Claimant.

It is obvious that if all employees were so unfortunate as to be unable to work for the same extent as Claimant, the Carrier could not continue operation, and the economic well being of all concerned would be defeated...."

In any event, the charges of excessive absenteeism were documented in both the hearings conducted on May 4th and it may be reasonably inferred that the dismissal letter of May 8th was based on the totality of these hearings.

The appropriateness of the discipline assessed by Carrier, while as indicated, strongly upheld, by past authority, simply on the basis of the May 4th hearing, seems especially warranted in view of Claimant's past record relating to excessive absenteeism and lateness. In the past, Claimant had incurred 1) a seven day suspension for being absent from assignment for 10 days and either in late or out early on another 10 days; 2) a seven day suspension regarding being absent from his assignment for seven days; 3) a thirty day suspension for being absent from his assignment on 33 days and coming in late or leaving early on another 11 days.

The Carrier points out that it was hoped such discipline would have had a remedial effect on Claimant's work performance but that it apparently failed to achieve such purpose. This seems a sound conclusion in the context of the facts here outlined and thus particularly in view of Claimant's most spotty record on excessive absenteeism, in the past, the discipline here assessed was well founded and proper.

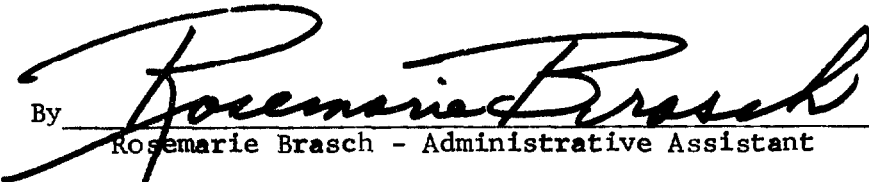
A W A R D

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 10th day of February, 1982.