Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8946
Docket No. 8859
2-SPT-CM-'82

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

Parties to Dispute: Brotherhood Railway Carmen of the United States and Canada

Southern Pacific Transportation Company

Dispute: Claim of Employes:

1. That the Southern Pacific Transportation Company (Texas and Louisiana Lines) violated the controlling agreement, particularly Rules 19 and 34, when Temporary Promoted Carman J. E. Underwood was unjustly suspended from Carrier's service following investigation held on August 29, 1979.

2. That accordingly, the Southern Pacific Transportation Company (Texas and Louisiana Lines) be ordered to compensate Temporary Promoted Carman Underwood in the amount of ninety-six hours (96') at passenger car welder's rate of $9.33 per hour commencing September 4, 1979, and continuing through September 19, 1979 and that this unjust suspension be striken from Carman Underwood's personal record and that he be allowed these twelve (12) days toward his apprenticeship.

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.

In this case Claimant was, pursuant to letter dated August 23, 1979, charged with being absent from his assignment on July 18, 1979, August 20, 1979, August 22, 1979 and August 23, 1979 in possible violation of Rule 810 of the General Rules and Regulations: "(Employes) must not absent themselves from their employment without proper authority". This letter of charges, sent by certified mail, was receipted for by Claimant's wife on August 24, 1979. It advised that an investigative hearing would take place on August 29, 1979. Claimant did not attend this hearing and it was held in his absence, on that date, over the protest of the Organization representative that the hearing was not a fair one, as required by Rule 34, since Claimant was not present to defend himself against the charges made. Pursuant to the results of this hearing Claimant was advised, by letter dated September 6, 1979, that he was being suspended from service for 15 working days.

As indicated, one of Organization's arguments in this matter is that the fair hearing mandated by Rule 34 was not accorded Claimant since he was not present at the hearing to defend himself and confront his accusers but despite these facts, the request for postponement of the hearing, made by the Organization representative , at the August 29th hearing, was not granted. The Organization contends that Claimant was ill on August 29th and that is the reason he was not in attendance at the hearing. As evidence to this effect, it points out that Claimant was marked off sick on August 27th and August 28th (as well as having been off from work on August 20th, 22nd, and 23rd, with someone calling in, on his behalf on August 21st and August 24th and August 27th, to report Claimant was ill) and points to a physician's note, dated August 31st, 1979 reading: "(Claimant) has been under my care and remains (sic) up to the present time."

There are two problems with this note; one procedural, the other substantive. The first relates to its admissibility for consideration, by this Board, at this stage of the proceedings, since this note is not a piece of evidence that was presented at the hearing. It was not presented to Carrier representatives until Claimant brought it to work on a morning several days subsequent to the date on which the hearing transpired. Carrier's natural contention is that such material, is not something which may be taken into account by this Board in its appellate capacity as we should be confined, strictly, to evidence contained in the record of the hearing, itself. It is unnecessary to pass on this procedural point because, substantively, the note will not stand for or establish the position urged by Claimant in reliance on it. This is because the note says, as such, absolutely nothing about Claimant's ability to have appeared at an investigative hearing on August 29th. Indeed, other medical documents suggest that Claimant was ambulatory in that visits to the office of the physician who wrote the note, on August 27th, August 28th, August 30th and August 31st, for diagnostic tests, are indicated. It is especially curious that if the Claimant sought a testimonial from his physician designed to support his failure to attend the August 29th hearing specific reference to his indisposition on August 29th, which would disable Claimant from attending a short hearing would seem to be accountable for only on the grounds that the physician, stating things accurately could not aver that Claimant was not sufficiently ambulatory, on August 29th, to have conveniently attended a hearing. Hence, the somewhat vague language about Claimant being "under my care up to the present time". Being under a physician's care is quite consistent with an individual carrying on all other normal activities, over an extended period of time, while he periodically visits a physician's office for analysis checking, diagnosis, etc., in regard to a given problem or condition.

In any event, neither Claimant nor his representative requested a postponement of the hearing prior to the latter actually commencing. Given the facts of the situation this must certainly be considered irresponsible behavior on Claimant's part. There is no indication from the record of the hearing that Claimant, even in the slightest way, indicated to his representatives, prior to the hearing date, that he should appreciate a postponement. (A Carrier official asserted, in a post-hearing letter, that had a postponement been requested it would have been granted.) Only at the hearing, itself, once Claimant's Organization representatives saw that Claimant was not going to be present, was a request for postponement voiced. Thus we have a Claimant who, receiving notice on August 24th that he was being charged with unauthorized absences from his assignment on July 18th, August 20th, August 22nd and August 23rd, does not have

responsibility to ask or cause his representatives to formally request a postponement of the August 29th hearing he's instructed to attend, in such August 24th notice, purportedly because he is too ill to do so. This is certainly not conduct, in the context of one who's been notified that he'll have to defend against a charge of unauthorized absences, which can elicit much sympathy or response from an independent, impartial observer. There is much authority to the effect that a Claimant who acts so cavalierly, respecting attendance at a hearing or requesting a postponement of the latter, is acting very much at his own peril.

For example, Award No. 2925, Second Division, involved a case in which Claimant alleged that the hearing was held precisely at a time when, to Carrier's knowledge, Claimant could not attend. Thus the charge of unfairness by the Carrier was stronger and more sharply defined than in the instant case. Nevertheless, the Board found that the rule comparable to the one cited here by the Organization, requiring a fair hearing for a Claimant, does not make the presence of the Claimant at the hearing itself, mandatory.

Similarly, Award No. 5987, Second Division, stated:

> "When Claimant failed to appear at the hearing ... after having been properly served with notice, he acted at his peril; and Carrier's proceeding with the hearing in his absence was not a denial of due process."

Also, in Award No. 1334, Second Division, the Board commented:

> "... (it) can(not) ... be inferred from the terms 'fair trial' (that)... the actual presence of the respondent (is) mandatory, provided, as here, adequate notice and opportunity for appearance was provided."

Thus, we must conclude that the conduct of the investigative hearing in Claimant's absence, after he had received due notice to attend at the appropriate time and place, without a request by Claimant, prior to the hearing's commencement, for postponement of the hearing did not deprive Claimant of that fair hearing which he is vouchsafed by Rule 34.

As to the merits of whether Claimant was appropriately disciplined for the four days of unauthorized absence with which he was charged, and which was documented by evidence presented at the hearing, again a prior procedural question is raised. The Organization seeks resort to documentory medical evidence which it brought to Carrier's attention, under cover of letter of September 25, 1979, almost a month after the hearing was held, to prove that Claimant was indeed ill on some of those days when he was charged as being "AWOL". Carrier resists reference to such material on the grounds that it is impermissible for this Board to consider any evidence not directly introduced into the record of the investigative hearing itself.

It may be that this latter position, in these premises, smacks too much of a vicious circle type formalism in that it involves Carrier in asserting

that Claimant received a fair hearing at which he was not present to defend himself, because of his irresponsibility in not being there or making provisions for having it postponed, and that Claimant is also denied, later, the right to present material relevant to the merits of the case respecting which he was irresponsible for not taking care of at the hearing. Such an approach results in Claimant losing an opportunity to address the merits at the hearing and also, thence forward, being shut off from introducing evidence which tends to defend against those charges which went undefended by Claimant at the hearing. It may be thought to endorse form too staunchly over substance.

However, in this case, the Board need not decide the propriety of such a procedural posture. This is so because relying only on evidence introduced at the hearing the Board finds that Claimant was guilty of some of the offense charged, but not guilty of the total charge. At no point, either at the hearing, or subsequent thereto, has reference been made to any evidence which would tend to suggest that, regarding his absences, from his assignment, on July 18th or August 20th, Claimant complied with the requirements of Rule 19 which dictate that when an employee is unavoidably kept from work he will notify his Foreman as early as possible. However, at the hearing itself a Foreman who testified, admitted that on August 21st, August 24th and August 27th calls were made on Claimant's behalf to advise that he was ill or under a doctor's care and would not be in to work. Indeed, in specific, the Foreman acknowledged that the woman who called on August 24th stated that Claimant had a stomach virus and would be in to work sometime next week.

This pattern of behavior indicates that Claimant felt that a call to say he was ill on Day 1 and was ill in such a manner as to be able to then advise that neither would he be in to work on Day 2, or perhaps, even Day 3 complied with the requirements of Rule 19 as to advising, as early as possible, when an employe knows he will not be able to fulfill his assignment. And, indeed, it is Organization's argument that there is nothing in Rule 19 which specifically requires a call to a Foreman on the day an employee will be unable to work as opposed to a call regarding a day as to which the employe knows he will not be able to work. And this does appear to us a reasonable interpretation of Rule 19. For, surely, common experience makes it clear that there are certain types of reasons which disable an individual from working which s/he knows will so disable him for, at least, several consecutive days. If an employe knows he has a "flu", of a type which he occasionally contracts, and he knows that it has always taken this type of affliction 4 or 5 days to run its course with him, there seems nothing inconsistent with the rationale of Rule 19 when such an employe calls up on a given date and advises that he will not be at work for at least the next two days as well as the day of the call. (S)he might also, then, say that if still not well on the fourth day (s)he'll call again.

This seems to have been the type of pattern Claimant followed as in the August 21st - 27th period, calls on his behalf were made every several days. Thus although there is no "hard" clinching evidence to this effect it might be considered, depending on exactly what was said in that the call of August 21st "covered" the absences of August 22nd and 23rd. There is reason to believe that Claimant felt he was ill with more than something like the one day "blahs" since beginning on August 27th and continuing through August 30th documentary evidence to which it is difficult, Carrier's arguments regarding confinement to the investigative record, notwithstanding, for the Board to be blind, shows that

Claimant underwent a rather extensive battery of diagnostic tests which cost him in the several hundreds of dollars. (It is interesting to note, in view of the phone call on Claimant's behalf which mentioned a stomach virus, that these tests included a "G.I." series.)

Admittedly, this does not unequivocally demonstrate that on August 21st Claimant definitely felt he would not report to work on immediately succeeding days and so had his Foreman advised. On the other hand, there is no clear evidence as to exactly what was said in the August 21st call and certainly no evidence concretely contravening the possibility that the Foreman was then advised that Claimant would not report to his assignment for several days. There is also something mentioned about the person who made the call for Claimant having the name of a Foreman to call other than the one who actually took one of the calls. In any event, Claimant had been employed for approximately one year when he was charged in this matter and there is no indication that he had theretofore been disciplined in any way. Consequently for the reasons given, and in the context outlined, it is felt that Claimant may have failed to comply with the requirements of Rule 19 respecting only two of the four absences relative to the charges against him and that a fifteen day suspension, with the concomitant substantial pay loss it represents to a Claimant such as this one, is too severe a penalty. It would seem that a five day suspension would have been adequate, to get the message across for a first time offender, who had failed to call in to report off on two days, that faithful compliance with the spirit of Rule 19 is required of employes.

A W A R D

Claim sustained, but only to the extent that Carrier compensate Claimant for all those working days in excess of five, on the basis of an eight hour day and an hourly wage rate of $9.33 per hour, during which Claimant was suspended, pursuant to the above mentioned, letter of September 6, 1979 in which Carrier advised Claimant that he was being suspended for fifteen working days. Additionally, there should be allowed toward Claimant's apprenticeship (if such allowance is still relevant) the same number of days in excess of five for which Claimant was, in fact, suspended as a result of such letter.

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 3rd day of March, 1982.