

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Chesapeake and Ohio Railway Company

Dispute: Claim of Employees:

1. That in violation of the current agreement, Laborer B. J. Dillard was unjustly dismissed from the service of the Carrier on February 8, 1979.
2. That accordingly the Carrier be ordered to make the aforementioned B. J. Dillard whole by restoring him to Carrier's service with seniority rights unimpaired, vacation rights, and all other benefits that are a condition of employment unimpaired. Also, that he be fully compensated for all lost wages plus ten percent (10%) annual interest and reimbursed for all losses because of loss of coverage under health and welfare and life insurance agreements during the time he was held out of service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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, a laborer with 18 months service at Carrier's Walbridge, Ohio repair facility, was absent from his regular assignment without permission on January 12, 1979. At approximately 7:20 AM on the following day, January 13, 1979, Claimant telephoned his Foreman, R. C. Cochran, and requested that a truck be sent to get him because "... he was having car trouble". This conversation was overheard by General Foreman R. Hutton who, at that point, picked up one of the other phone extensions and instructed Claimant "... to get a taxi cab"; and he then asked Claimant why he did not show up for work on the previous day, to which Claimant allegedly responded that he had "overslept".

As a result of the aforesaid incident, Claimant was "... charged with absenting yourself from duty without permission on January 12, 1979, and in violation of Rule 36" and was directed to attend an investigation of the matter on January 23, 1979. Said investigation was conducted as scheduled, but Claimant was not in attendance; and as a result thereof, Claimant was adjudged guilty as charged and was dismissed from Carrier's service effective February 8, 1979.

Organization's basic contention in this dispute is two-fold. First, Organization argues that Carrier's actions herein are procedurally defective in that: (1) Claimant's Notice of Investigation was improperly addressed and Claimant, therefore, was not notified of the hearing which caused him not to attend or not to request a postponement; and (2) General Foreman Hatton served a multiplicity of roles in this matter -- investigating officer, charging officer, hearing officer, and the officer who assessed the discipline -- which was improper (Fourth Division Award No. 2194; Second Division Awards No. 1157, 1158, 4317, 4536 and 7886), and further that "(T)he bias of Mr. Hatton seriously affects the fairness of the handling of this case..." Secondly, Organization further argues that Carrier failed to sustain its burden of proof in proving that Claimant was absent on January 12, 1979, or that he did not call in and requested and received permission to be off.

Carrier's position in this dispute, stated simply, is that the evidence which was introduced at the investigation conclusively proves Claimant's guilt as charged. Accordingly, Carrier argues that Foreman Cochran's testimony was not "hearsay testimony" as Organization alleges, but instead was "... direct testimony presented with regard to a conversation conducted over the telephone in which Mr. Cochran participated".

Regarding Organization's procedural contentions concerning the various roles which were served by General Foreman Hatton in this matter, Carrier contends that, "... such handling is not inconsistent with the term 'fair and impartial' and ... is not therefore in violation of the Agreement rules" (Second Division Awards No. 5360, 5855, 6057, 6229 and 8248). Further along these same lines, Carrier also argues that Organization made no objection to these procedural matters at the time of the investigation and that such a failure prevents Organization from raising such an objection at this time (Second Division Awards No. 3874 and 6188).

As its final series of arguments Carrier maintains that: (1) Claimant has a "relatively brief period of employment with the Carrier" during which period he "had accumulated an unusual number of disciplinary entries, the majority of which involved unauthorized absences"; and (2) "... absence without permission is an offense meriting discipline often as severe as dismissal" (Second Division Awards No. 5182, 6057 and 6240).

The Board, upon a thorough and careful analysis of the complete record in this matter, is of the opinion that Organization's procedural arguments as presented hereinabove are unsupported and thus the resolution of this dispute rests solely upon the merits of the case itself. Regarding Organization's various procedural arguments, suffice it to say that: (1) because of Organization Local Chairman's failure to raise any objection to these procedural matters at the hearing itself but instead clearly gave his endorsement of same, any such protest by Organization at this point is untimely and improper; and, more importantly (2) Organization's mere inference that Claimant did not receive the Investigation Notice because it allegedly was addressed improperly, or that Claimant was denied a fair and impartial investigation or a fair review of same because Mr. Hatton served a multiplicity of roles in this matter, is insufficient proof that such a result did, in fact, occur.

Turning next to the merits portion of this dispute, the Board is compelled to conclude that, over and above the fact that the record itself contains a paucity of evidence regarding several of the more critical aspects of this case, there is a significant absence of substantial evidence which would be needed to establish the propriety of the imposition of the discharge penalty as applied in the instant case. The record, for the most part, merely shows that Claimant was absent from work on January 12 and 13, 1979, as charged, but the record shows very little else. For this reason, therefore, the Board is inclined to rule that Claimant's termination for such an infraction is entirely too severe a penalty to impose under the circumstances and thus is deemed to be unreasonable and improper; and the Board will direct a penalty which is more appropriate and commensurate with Claimant's proven infraction.

A W A R D

The Claim is sustained in part and denied in part. Claimant will be returned to service with all rights and benefits restored, but without back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 19th day of May, 1982.