

The Second Division consisted of the regular members and in addition Referee George V. Boyle when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen and Oilers  
{ Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That, in violation of the current agreement, Laborer Allen D. Smith was unjustly dismissed from service of the Carrier following trial held on June 1, 1979.
2. That, accordingly, the Carrier be ordered to make the aforementioned Allen D. Smith whole by restoring him to Carrier's service, with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been 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.

The claimant, Allen D. Smith, was employed as a laborer by the carrier at the Avon Diesel Terminal, Avon, Indiana.

Upon notification on May 22, 1979 and after investigation and trial the claimant was dismissed from carrier service on June 1, 1979, on a charge of "unauthorized absenteeism".

The employees claim that such dismissal was arbitrary, capricious, unjust and an abuse of managerial discretion. Their claim is based upon the following allegations:

1. Since the claimant was not present at his trial where he could present evidence and question witnesses on his own behalf therefore he was not afforded a fair and impartial trial.

2. The claimant's detainment in jail was a valid reason for the absences with which he was charged and for his failure to attend his trial.

3. The carrier failed to sustain the burden of proof that the claimant had violated the rules by absenting himself without proper cause and without authorization.

With respect to the claim that the employee was denied a fair and impartial trial by denial of his right to attend his own trial, the Board finds to the contrary. In the record of the hearing the following exchange takes place:

R. Rothrock (Mechanical Inspector-Conducting) to John C. Osgatharp (Mechanical Inspector)

"Q. - Mr. Osgatharp, did Mr. Smith indicate that he wished to postpone this trial or give any reason for his absence, or did he request a representative to appear in his behalf?

A. - He requested a representative, Paul Kern or Todd Taylor."

This latter point is confirmed by copy of a letter to Mr. E. K. Sargent, General Foreman, Avon Diesel Terminal, which was signed by Allen D. Smith, May 29, 1979.

Also Paul Kern, Local Chairman, of the claimant's union is questioned by R. Rothrock:

"Q. - Mr. Kern, did Mr. Smith contact you or notify you, to represent him at these proceedings.

A. - No, he did not."

Thus, it is clear that the claimant did not request a postponement, did not claim at the time of his trial that he was unfairly denied the right to be present and, in fact, did request and receive proper and adequate representation of his own choosing. Although he requested representation by Paul Kern or Todd Taylor he did nothing by way of contacting them for his defense.

Dealing with the employees' allegation that the claimant's incarceration in the county jail was proper cause for his absence or at least a mitigating circumstance, their position is equally invalid. It is a well established point, understood and recognized by the parties, repeatedly reinforced by the Board that absence due to arrest and/or incarceration, in and of itself, does not constitute absence for good cause. (Second Division Awards No. 1508, 7578, 7242, 7842, 7777 and 7262) Moreover, even if it would be held that the reason for such absences made them not punishable, the claimant's failure to notify the carrier and seek permission makes him similarly culpable.

As to the burden of proof, the record is clear. Apart from a technical correction regarding one day charged, the employees did not controvert nor even

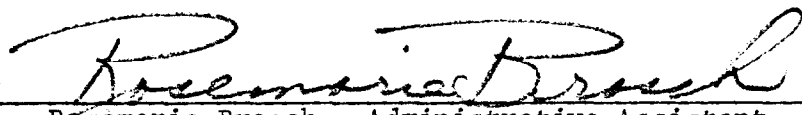
challenge the twenty-five unauthorized absences. He was repeatedly absent; such absences were excessive and unauthorized. The only question to be decided was whether the absence was for good cause. As noted above, they were not and therefore the claim is without merit.

A W A R D

Claim denied.

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 22nd day of July, 1982.