

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

Parties to Dispute: { International Association of Machinists and
 { Aerospace Workers
 { Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

That under the terms of the Agreement, Machinist Helper S. D. Neblett was unjustly dismissed from service January 5, 1979, as a result of an investigation held on December 8, 1978.

That accordingly, Machinist Helper S. D. Neblett be restored to service with pay for all time lost, seniority rights, vacation, insurance and all other rights unimpaired, beginning with his unjust dismissal from service January 5, 1979 and continuing until this matter is settled.

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.

Claimant, S. D. Neblett, with service date of June 12, 1974, was employed as a Machinist Helper by the Carrier at the time he was charged by letter dated November 7, 1978, "with being absent from your assigned duties without permission from proper authority since September 8, 1978, until the present date. You are further charged with excessive absenteeism since January 1, 1978, as listed below (there followed specified dates, with amount of time absent for each date, and the reason therefor stated as "excused", "unexcused", or "sickness")." The latter setting forth the charges and a time for an investigation of the charges to be held on November 16, 1978, was sent to Claimant by C. S. Ray, Manager of Motive Power Shops.

By letter dated November 9, 1978, Local Chairman D. R. Schildknecht requested postponement of the scheduled investigation hearing. The request for postponement of the hearing was granted by Mr. Ray by letter dated November 13, 1978, in which the hearing was rescheduled for December 8, 1978.

By letter dated December 4, 1978, Local Chairman Schildknecht advised Mr. Ray that he viewed the charges as very vague and improper. The Local Chairman contended that the Carrier was making two charges from one year's absentee record, and protested the fact that Claimant was being charged with absences as far back as eleven months. The Local Chairman considered this part of the charges a violation of Rule 34 of the parties' Agreement calling for a prompt hearing. Because Schildknecht considered a hearing on eleven-month-old absences to be untimely, he requested that part of the charges against Claimant be dropped.

Mr. Ray advised the Local Chairman by letter dated December 5, 1978, that he believed the charges against Claimant were in accordance with Rule 34 of the controlling Agreement, and he declined to dismiss the charges.

By letter of December 6, 1978, Schildknecht advised Ray that he was proceeding to hearing under protest. Further Schildknecht requested a copy of Claimant's absentee file and work record to gain more knowledge of the precise reasons for Claimant's absences, and also requested Claimant's Company medical records to determine any connection between Claimant's absenteeism and medical condition. The Carrier was also notified that Claimant was willing to sign a release authorizing the Local Chairman to have and use the aforementioned records in representing Claimant in the matter.

Mr. Ray declined to provide the requested records to Schildknecht. He advised by letter that he believed the charges against Claimant were in accordance with Rule 34, that the list of days absent and tardy with reasons given might be refuted by Claimant at the hearing, and that Claimant's medical records should be sought by having Claimant supply the Local Chairman with a release for the information which could, in turn, be given to Claimant's attending physician.

The investigation was conducted on December 8, 1978, by R. H. Hayes, Assistant Manager, Motive Power Shops. Thereafter, Mr. Ray notified Claimant by letter dated January 5, 1979, that the investigation proved him guilty as charged and that authority had been granted to dismiss Claimant from the service of the Carrier effective that date.

By letter dated February 27, 1979, the Local Chairman requested Mr. Ray to reinstate Claimant with all rights, privileges, benefits and pay denied by virtue of the dismissal action. In support of his claim that the dismissal was improper, the Local Chairman referenced pages of the transcript to show that the list of absences was in error based on the testimony of Carrier witness Parrish; that the Conducting Officer of the investigation referred to Claimant's absence as a "leave" (as the Local Chairman had contended during the investigation even though the Local Chairman had never been notified of any type of leave as required in Rule 21 or Rule 22 of the Working Agreement and Claimant was without notice of the LOA or sick leave instructions or dates); and that the Conducting Officer improperly injected himself into the investigation and acted with conflict of interest so that Claimant was not given a fair and impartial investigation.

In due time, the claim was declined and properly progressed to each appropriate step of appeal and conference, with ultimate submission to this Board.

Rule 34, DISCIPLINE, provides:

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his local chairman will be apprised to the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensation for the wage loss, if any, resulting from said suspension or dismissal."

It is the position of the Carrier that Claimant had a fair and impartial investigation in strict accord with Rule 34; that the record made at the investigation contained substantial and convincing evidence proving him guilty as charged; that the seriousness of his offense fully justified Claimant's dismissal from the service; and that the claim before this Board should be denied in its entirety. The Carrier emphasizes that no contention was made at the investigation that the proceedings were not handled in accordance with the Agreement or that the hearing was not entirely fair and impartial.

Further, the Carrier stresses that Claimant was given verbal and written warnings concerning his failure to protect his job on a regular basis, and that although Claimant promised to improve his record, and was given time off as requested, he was guilty of being absent from his assigned duties without permission from proper authority from September 8, 1978 to the date of the charge letter of November 7, 1978. The employment contract requires that the Carrier afford each regularly assigned employe five days of work each week, subject to certain exceptions as contained in the Agreement, and likewise places an obligation on the employe to protect the Carrier's service on the days he is assigned to work. Claimant's excessive absenteeism constituted failure of his contractual obligations and justified his dismissal from the service.

The Board does not find that Claimant was denied a prompt hearing under Rule 34. As has been stated in earlier awards involving excessive absenteeism (see, e.g., Awards 8431, Second Division (LaRocco) and 8546, Second Division (Brown)) excessive absenteeism necessarily occurs over a somewhat extended period of time. If the Organization's position were sustained, excessive absenteeism could never be the subject of an investigation, - a result obviously never intended by the parties. From the very nature of the offense each day of unauthorized absence is a new straw on the camel's back until the breaking point is reached.

The Board views the charges set forth against Claimant as neither vague nor improper. The charge set forth the specific dates when Claimant was absent, with explanation at the investigatory hearing that an unexcused absence indicated

that Claimant gave no reason for his absence, which might be for all or part of a scheduled shift.

In January and February, 1978 Claimant had eight unexcused absences. He was given a verbal warning on March 8, 1978, and he assured management at that time that his attendance record would improve. However, from the time of the verbal warning through July 25, 1978, Claimant accumulated 17 additional sporadic unexcused absences. On July 27, 1978 Claimant was given a written warning for his excessive absences, and again he promised to improve in his attendance.

The very next day after receiving the written warning concerning his poor attendance record, Claimant was absent again for a full unexcused day, and on August 2, 1978 he had an unexcused absence for part of the day.

On or about August 3, 1978, Claimant went to the office of Mr. Ray, the Manager, Motive Power Shops, to indicate that he needed time away from work to seek professional help to get himself together. Mr. Ray was not on the property, but Mr. Hayes, the Acting Manager, and N. D. Parrish, Supervisor, Motive Power Maintenance Personnel, were in the office. Additionally, Claimant had brought Mr. Dorsey to the office with him.

The Organization's claim that the testimony of Mr. Parrish conflicted with the Carrier's documentary evidence concerning Claimant's absence on August 4, 1978, is not well-founded. Mr. Parrish testified, "I believe it (the meeting in Mr. Ray's office) was on August 4, ..." Obviously, Parrish did not know the exact date of the meeting. Claimant placed the meeting on August 3 without equivocation.

Mr. Hayes was receptive to Claimant's desire for time off for professional help. He contacted Mr. Sullivan, the Carrier's employee in charge of employee rehabilitation, to assist Claimant in the matter. Claimant spoke on the telephone directly to Sullivan, who asked the former if he wanted to be admitted to a given hospital. Claimant refused that offer of assistance because, as he stated, "I had had this trouble once before, and since I had been in Norton's Hospital once before I recommended that I go to somewhere that I had been before." At that, Claimant was given opportunity to be off for 30 days excused absence.

The Organization's contention that this oral 30-day leave of absence violated Rule 21 or Rule 22 is rejected by the Board. In pertinent part, Rule 21 provides:

"(a) When the requirements of the service will permit, employees on request will be granted leave of absence for a limited time, with the privilege of renewal. When employees are given written leave of absence for more than thirty days, bulletin will be posted within three days in the department affected showing the name of the employee, his classification, and the duration of the leave. Copy of leave will be given to local chairman."

This contract language imposes a duty on the Carrier to provide the Local Chairman with a copy of a written leave of absence, but there is no express or

implied requirement that a leave of absence be reduced to writing except when the leave of absence is for more than thirty days. Additionally, Rule 22 makes no reference to the mode of granting leave of absence.

The assertion that Claimant was without notice of any leave or instructions or dates pertaining thereto is not supported in the record of this case. Claimant admitted at the investigatory hearing that he was told verbally that he had a leave of absence. When he was asked, "Mr. Neblett, were you given any direct number of days that you could be excused from work?" he answered, "I was told thirty days". Further, he stated that the thirty day leave would expire thirty days from the 3rd of August (1978).

The record further reveals that Claimant provided a written statement, dated August 8, 1978, from Jerry Neff, M.D. of the Norton Psychiatric Clinic, addressed to Mr. Parrish that read:

"This letter is to confirm that Mr. Steve Neblett is currently under my care. Mr. Neblett is being treated on an outpatient basis for an emotional problem. It is anticipated that he will be able to return to work after a few weeks of treatment. If additional information is required, please contact Norton's Psychiatric Clinic in writing. Thank you for your attention."

Claimant did not return to work at the end of thirty days, and made no contact with the Company to secure an extension of his leave.

In October, 1978, Mr. Parrish wrote to Dr. Neff indicating that Claimant would need to validate his status for an extension to his leave or for return to his assigned duties. He asked Dr. Neff to furnish the date of beginning treatments and release date, if Claimant had been released. Dr. Neff responded by letter dated October 30, 1978 that Claimant was last seen at the Norton Psychiatric Clinic on August 16, 1978. Soon after receipt of that letter the Carrier charged Claimant with being absent without permission from proper authority from September 8, 1978 and with excessive absenteeism from January 1, 1978. The investigation hearing was held on December 8, 1978.

It is claimed in the position of the Employees that Claimant was not given a fair hearing as called for in Rule 34 of the Agreement inasmuch as Mr. Hayes, the Conducting Officer of the investigation, was personally involved in the situation from the beginning and injected testimony into the record under the guise of attempting to clarify the record.

The question of whether there has been serious procedural impropriety sufficient to constitute reversible error must be tested by careful examination of the record as a whole to determine whether, on balance, the hearing was in fact fairly or unfairly conducted in full recognition of Claimant's rights of due process. See Award 7034, Second Division (Norris).

Careful review of the transcript of the investigation and analysis of the record testimony satisfies this Board that the hearing was conducted in a fair and impartial manner as required by Rule 34. Claimant was vigorously represented by the Organization Representative. There was full opportunity to cross-examine the Carrier's witness, and Claimant was afforded full scope of expression to state his version of the facts. The effort of the Conducting Officer to clarify testimony was just that. No inference of prejudice can be drawn therefrom. The Conducting Officer's inquiry of Claimant was proper and pertinent to the charges. The conduct of the hearing officer is found not to have impaired the fairness of the hearing.

The assertion that the Carrier improperly withheld information vital to Claimant's position in this case is also rejected by the Board. The Carrier detailed each and every unexcused absence upon which it relied in support of the charges against Claimant. Because Claimant had given no reason for those absences, the Carrier could give no additional reasons therefor. Claimant did not deny that the record of unexcused absences was substantially correct. He did not deny that he had been given both oral and written warnings concerning his unexcused absences. He offered no explanation for his failure to return from his thirty day leave or for discontinuing the professional treatment at the Norton Psychiatric Clinic (which was his reason for seeking leave) long before the end of the thirty day leave period.

It is an employee's responsibility to be in reasonably regular attendance at work and where, as here, an employee's absences are excessive and unexplained to management, there is cause for dismissal and no reasonable objection can be made to the fact that the Carrier did not give full explanation to the Organization as to why Claimant was absent over such a protracted period.

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 9th day of February, 1983.