

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(System Council No. 7
(Consolidated Rail Corporation (Conrail)

Dispute: Claim of Employees:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) has unjustly dismissed Third Railman A. C. Forbes from service effective November 30, 1981.

2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Third Railman A. C. Forbes to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Third Railman rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and to expunge his record.

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 employees 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. C. Forbes, entered the service of the Carrier on September 26, 1970. Claimant was charged with excessive unauthorized absence for failure to cover his assignment from October 5, 1981, to October 28, 1981. Claimant received a notice dated October 28, 1981, advising him to attend a hearing on November 3, 1981, in connection with the above stated charge. Claimant did not attend the hearing nor did he attempt to have the hearing continued to a different date. The hearing was held in absentia. Claimant was dismissed from service effective November 30, 1981, following the hearing.

The Organization's position is that Claimant was dismissed from service without a fair and impartial hearing in violation of Rule No. 6. Rule No. 6 provides in pertinent part:

"6-A-1(a)--Except as provided in Rule 6-A-5, employees shall not be suspended nor dismissed from service without a fair and impartial trial..."

The Organization contends that the Carrier's "misidentification" of the proceeding as a hearing rather than a trial constitutes a fatal defect in procedure. Additionally, the Organization contends that the Claimant was further deprived of a fair and impartial trial when the hearing was conducted in Claimant's absence. The Organization further contends that the Carrier failed to meet its burden of proof in demonstrating Claimant's guilt of the offenses upon which his disciplinary penalty was based.

The Carrier's position is that the labeling of the proceeding as a "hearing" rather than a "trial" is not a denial of the Claimant's due process as the terms "trial", "hearing", and "investigation" are synonymous in the railroad industry. Carrier contends that since the Claimant's argument is highly technical, Claimant bears the burden of proving, first, that the technical defects existed and, second, that the defects prejudiced the Claimant's rights. Carrier argues further that the Claimant was not prejudiced by the use of the term "hearing", and that he was afforded every right due him under the provisions of the controlling agreement.

The Carrier further asserts that the evidence adduced at the trial proves the Claimant guilty of failing to cover his assignment from October 5, 1981, to October 28, 1981. Consequently, the Carrier argues that the discipline assessed was commensurate and fully warranted.

The Board finds no merit in Organization contention that because the hearing was held in absentia, Claimant was dismissed from service without a fair and impartial trial in violation of Rule No. 6. The Carrier may conduct the hearing in absentia when proper notice has been given to the Claimant. To this end, Second Division Award No. 8225 states:

"...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 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 addition, Second Division Award No. 7844 states:

"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 Organization admits that the Claimant was properly notified of the proceeding by the Carrier. Claimant chose not to appear and he made no attempt to seek a continuance. In accordance with the above-cited principles, the proceeding constituted a fair and impartial hearing and Claimant must live with the consequences of his failure to appear.

The Board finds that the labeling of the proceeding as a "hearing" rather than as a "trial" is not a denial of due process. Furthermore, such labeling did not prejudice the Claimant.

Numerous awards have recognized that the terms "trial", "hearing", and "investigation" are synonymous in the railroad industry. For example, First Division Award No. 13354 states:

"...Likewise upon railroads the term 'investigation' seems to be used interchangeably with the term 'hearing'..."

Moreover, Second Division Award No. 4348 states:

"...The Organization is taking the position that the inquiry held on October 5 was not a 'hearing' because the Carrier denominated it an 'investigation'...In the context here used, the words 'investigation' and 'hearing' are synonymous..."

Thus, it is clear that the labeling of the proceeding as a "hearing" was not a denial of due process nor a violation of Rule No. 6.

The Board further finds that the evidence adduced at the trial proves the Claimant guilty as charged. At the hearing, Mr. Charles Johansen, who is in charge of compiling the attendance records of certain employees, including Claimant, testified that for the weeks of October 5 through October 9, 1981; October 12 through October 16, 1981; October 19 through October 23, 1981; and October 26 through October 28, 1981 Claimant failed to cover his assignment for no known reason and without notice to the Carrier. Foreman Ed Sinkevicz testified that on August 21, 1981, Claimant called him and said he was going to the Bahamas on personal business and that he would be off until further notice. Sinkevicz further testified that he did not give Claimant any authorization to be absent from work. Claimant's Foreman, Mr. Koval, also testified that he knew of no reason for Claimant's absence. Thus, the evidence clearly shows the Claimant is guilty of excessive, unauthorized absence from October 5 to October 28, 1981.

The Board finds that the discipline assessed by the Carrier was proper. Carrier need not tolerate Claimant's poor attendance habits. Aside from Claimant's unauthorized absence from October 5 through October 28, 1981, Claimant's attendance record, which is contained in the record, shows that the Claimant was absent or left early on a total of 85 times in 1981. As stated in Second Division Award No. 5049:

"Nothing in the agreement obligates the Carrier to attempt to operate its railroad with employees repeatedly unable or unwilling to work the regular and ordinarily accepted shifts, whatever reason or excuse exists for each absence..."

Additionally, Second Divison Award No. 7348 states:

"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.

Finally, in Public Law Board No. 1324, Award No. 46, Referee Moore stated:

"...This industry is a bit different than other industries in that employees must be available to perform service in order for the Carrier to operate the trains in an economical manner.

This is one of the painful requirements of the employees of this industry, but it is recognized by many thousands of employees who have performed this service and been available for such service diligently over the years. If an employee cannot meet this requirement, he is in the wrong industry."

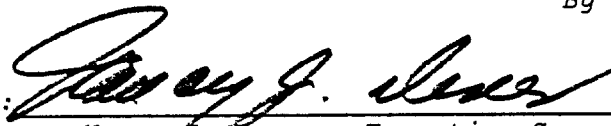
On the record in this case, it must be concluded that Claimant stands guilty as charged and that the discipline assessed was warranted and proper.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD.
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 4th day of April, 1984