Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9845
SECOND DIVISION Docket No. 10040
2-EW-CR-'84

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 Employes:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) has unjustly dismissed Groundman D. C. Harrick from service effective December 7, 1981.

2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Groundman D. C. Harrick 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 Groundman's 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 employe or employes involved in this dispute are respectively carrier and employes 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, D. C. Harrick, entered the service of the Carrier on August 24, 1978. By notice dated October 28, 1981, the Claimant was advised to attend a hearing on November 3, 1981, in connection with the following charge:

"Failure to cover your assignment from October 5, 1981, to October 28, 1981, which constitutes excessive, unauthorized absence."

The hearing was postponed and rescheduled for November 27, 1981. Although the Claimant had been properly notified of the original hearing date and the date for which it was rescheduled, he did not appear at the hearing. Consequently, the hearing was held in absentia. Following the hearing on November 27, 1981, by notice dated December 7, 1981, the Claimant was dismissed from service.

The Organization's position is that Claimant was dismissed from service without a fair and impartial trial 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 the 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 also contends that the Carrier failed to meet its burden of proof in demonstrating Claimant's guilt of the offense upon which his disciplinary penalty is based. Consequently, the Organization argues that the disciplinary action in this case is unjust, lacking in good faith, arbitrary and capricious, without basis, unreasonable, and excessive.

The Carrier's position is that the labeling of the proceeding as a "hearing" rather than a "trial" is not a denial of Claimant's due process as the terms "trial", "hearing", and "investigation" are synonymous in the railroad industry. The Carrier contends that Claimant's terminology argument is highly technical and, therefore, Claimant bears the burden of proving, first, that the technical defect existed and, second, that the defect was prejudicial to Claimant's rights. The Carrier argues that the Claimant was not so 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 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's 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 Organization admits that the Claimant was properly notified of the proceeding by the Carrier. Notice was sent by certified mail. Carrier had not received a receipt from the certified letter by date of hearing; therefore, the proceeding was postponed and rescheduled for November 27, 1981. Prior to this date, both certified letters were returned "unclaimed".

The Board finds that the Carrier met all of its requirements regarding notification to the Claimant. It has long been held that a Carrier is not the insurer that a notice is received by the employee. In support of this principle, Public Law Board No. 2067, Award No. 392, states:

> "The Board finds that Carrier's burden under Rule 6-A-4(c) is not th prove that Claimant received the notice, but rather its burden is to show that it sent the notice. This it did. If the burden were the former, all an intended recipient thereof need ever do is to refuse to accept certified mail and, thus, according to such specious conclusion, Carrier could never prove that it had properly served notice to attend a trial. The use of certified mail is a means of proof that a communication was sent, not that it is received. It is also proof of receipt."

The Board finds that the Claimant did not appear at the hearing and requested postponement thereof. The hearing was properly held in absentia. An employee's failure to appear for a hearing is at his own peril and he must live with the consequences. This principle is supported by Second Division Award No. 7844, which states:

> "Although notified, Claimant failed to attend the hearing. We find that Carrier properly conducted the hearing in the case and that Claimant's failure to attend his own hearing was done at his own peril."

In addition, 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."

Thus, the hearing was properly held in absentia.

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, the labeling of the proceeding as a "hearing" 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...In the context of the circumstances of this case, the Board finds that the term 'hearing' is synonymous with the term 'trial'. Thus, the labeling of the proceeding as a 'hearing' in the notification to Claimant 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, assistant engineer Charles Johansen, who is in charge of compiling the attendance records of certain employees, including the Claimant's, testified that his records indicated that the Claimant was absent, with no call to the Carrier, on the following dates: October 5 to October 9, 1981; October 12 to October 16, 1981; and October 19 to October 23, 1981. Mr. F. Koval, Claimant's Foreman, testified that Claimant did not perform services from October 5 to October 28, 1981.

Mr. Edward Sinkevicz, who takes absentee calls, testified that on September 11, 1981, Claimant called and said he was off on personal business and would be in the next day. Mr.Sinkevicz further testified that Claimant never called again.

Thus, the Board finds that the evidence shows that the Claimant was guilty of excessive and unauthorized absence from October 5, 1981, to October 28, 1981.

The Board also finds that the discipline assessed by the Carrier was proper. Carrier need not tolerate Claimant's poor attendance habits. Aside from Claimant's unauthorized, excessive absence from October 5 through October 28, 1981, Claimant's attendance record, which is contained in the record, shows that he had been absent or left early on a total of 122 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..."

Additonally, Second Division 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 state:

> "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 have 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