

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 9857  
Docket No. 9942  
2-SP-MA-'84

The Second Division consisted of the regular members and in addition Referee Hyman Cohen, when award was rendered.

(International Association of Machinists and Aerospace  
Workers, District Lodge No. 19, AFL-CIO  
Parties to Dispute: (  
( Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Carrier improperly suspended Machinists E. L. Hunley (herein- after referred to as Claimant) from service on December 26, 1980, and subsequently dismissed him on February 5, 1981.
2. That he was denied a fair hearing as required by Rule 39 of the current controlling agreement.
3. That the Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired and with compensation for all wage and benefit loss.

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.

Following a formal hearing held on January 16, 1981, Machinist E. L. Hunley, the Claimant, was dismissed from service for the following reasons: he was absent from employment without proper authority on December 26, 1980; his continued failure to protect his employment on December 26, 1980 from approximately 7:30 a.m. until 8:50 a.m.; and for being insubordinate and quarrelsome on December 26, 1980. These actions it was found, constituted a violation of Rules 801 and 810 of the General Rules and Regulations.

The Claimant's seniority date was June 16, 1977. He entered the Carrier's service as a Machinist Apprentice at its Sacramento, California Locomotive Works.

On December 26, the Claimant was serving a jail sentence but was permitted to work for the Carrier which participated in a "Work Furlough Program". The Claimant's suspension or removal from service by the Carrier terminated the Claimant's participation in the Program and caused him to be incarcerated full time. Consequently, in order for the Claimant to attend the formal hearing, it was necessary for a third party, such as a lawyer to obtain a court order to secure the release of the Claimant.

At the request of the Organization the Carrier granted a postponement of the hearing, initially scheduled for December 31, 1980, to January 16, 1981. At the outset of the hearing the Organization sought another postponement because the Claimant was unable to obtain a court release from jail. The Hearing Officer rejected the request and the hearing was held without the presence of the Claimant.

The Organization contends that the Claimant was denied a fair hearing as required by Rule 29 of the controlling Agreement which provides in relevant part:

"No employee shall be disciplined or dismissed without a fair hearing by the proper office of the company. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall in writing, be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented as provided for in Rule 38,\*\*\*"

Consistent with Rule 39, the Claimant was apprised of the precise charges against him a reasonable time before the hearing was held on January 16, 1981. He was represented by the Local Chairman at the hearing and a witness testified on his behalf.

It is significant to point out that Rule 39 does not expressly provide that the Claimant is required to be present at the hearing. However, in light of the due process considerations implicit in a fair hearing, where the Claimant's employment status and livelihood are at stake, it is only in unusual circumstances that a fair hearing may be held without the presence of the Claimant.

The Board has concluded that a fair hearing was held on January 16, 1981. We are unable to conclude that the Carrier, in any way precluded the Claimant's presence at the hearing. The Local Chairman indicated that the Claimant was unable to obtain a court order to be released from jail to attend the hearing. No explanation was given by the Organization to the Hearing Officer as to the inability of the Claimant to obtain a court order for his release to attend the hearing. Thus, the Board is compelled to infer that the Claimant's inability to attend the hearing was due to his own actions. See for example, Second Division Award 8192. The Carrier's removal of the Claimant from service on December 26, 1980 resulted in his incarceration but only because he had been convicted of a prior criminal offense; it cannot reasonably be urged, that by its decision, the

Carrier intended or sought to have the Claimant incarcerated. Moreover, under Rule 39, "suspension in proper cases pending a hearing", or removal pending a hearing, "shall not be deemed a violation" of the Rule. It is enough to say at this juncture that this is a proper case of the removal from service of the Claimant pending a hearing.

It should be underscored that the Carrier was not required to participate in the Work Furlough Program. However, by doing so, the Carrier was in no way limited in imposing discipline against the Claimant; nor was the Claimant exempt from discipline by reason of his involvement in the Program.

Furthermore, the Hearing Officer's refusal to grant another postponement at the hearing cannot be considered unreasonable in light of the following: the hearing had been postponed on December 31, 1980; there was no indication by the Organization when the Claimant would be able to obtain a court order to enable him to attend the hearing and, last, the Claimant's inability to attend the January 16, 1981 hearing was due to his own actions. In sum, the Board has concluded that the Claimant as provided a fair hearing under Rule 39.

When the Claimant reported to work at approximately 7:30 a.m. on December 26, 1980 he let his immediate Supervisor, Machinist Foreman R. N. Ahrendt know that he was on the work site. Foreman Ahrendt was then called to the "engine line" to address a problem but upon returning to his office at approximately 7:40 a.m. he could not locate the Claimant. Foreman Ahrendt looked for the Claimant in several areas, and it was not until 8:50 a.m. that the Claimant "reappeared".

The Board has concluded that when Foreman Ahrendt inquired as to his whereabouts, in the presence of the Organization's Representative, R.A. Mills the Claimant was abrasive and argumentative. The evidence does not support the Claimant's explanation that he was "in the area" between 7:30 a.m. and 8:50 a.m. and that he "went to the head". The Claimant continued his belligerent conduct with two (2) additional Supervisors who, at the request of Foreman Ahrendt, interviewed the Claimant. With extraordinary patience and forbearance, Foreman Ahrendt believed that the matter would best be resolved by R. K. Robinson, the General Foreman. Thus the Claimant and Mills went with Foreman Ahrendt to the General Foreman's office when Foreman Robinson read Rule 810 and a portion of Rule 801 to the Claimant. He then instructed the Claimant to report to his assigned work. While walking towards the engine line, the Claimant told Foreman Ahrendt in a loud voice "You are pretty fucking sharp. You haven't told me shit all morning." Indicating that he "was not going to put up with it anymore", Foreman Ahrendt and the Claimant returned to the office of the General Foreman Robinson who after being told what occurred, removed the Claimant from service.

The last statement by the Claimant cannot be isolated from his absence from the work area between 7:30 a.m. and 8:50 a.m. and his relentless abusive and belligerent attitude by the Claimant towards Foreman Ahrendt, since the time that he reappeared in the work area at approximately 8:50 a.m. In light of the Claimant's persistent hostile and abrasive attitude, his last statement to Foreman Ahrendt cannot be dismissed as mere "shop talk".

In light of these facts, it is our judgment that there is substantial evidence in the record to conclude that by being absent from work between 7:30 a.m. and 8:50 a.m., without proper authority the Claimant violated Rule 810. In addition, the Claimant's persistent belligerent and hostile attitude towards Foreman Ahrendt came within the scope of Rule 801 which provides in relevant part:

"Employees will not be retained in the service who are insubordinate ...quarrelsome, or who conduct themselves in a manner which would subject the railroad to criticism."

Accordingly, there is substantial evidence in the record to warrant the dismissal of the Claimant.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 11th day of April, 1984