

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Southern Railway Company

Dispute: Claim of Employees:

1. That the Southern Railway Company was wrong and unjust, when they dismissed from service Machinist H. R. Scott, Atlanta, GA effective July 7, 1982.

2. That accordingly, the Southern Railway Company be ordered to reinstate Machinist H. R. Scott, with pay for all lost time wages, with all rights under the Agreement unimpaired and his record cleared of the charge.

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 was discharged from service on July 7, 1982 at conclusion of the preliminary investigation for failure to protect his job assignment due to excessive absenteeism in that he did not report to his assignment and had not been excused from his assignment during the preceding thirty-day period.

Notice of the preliminary investigation was sent to Claimant by certified mail and signed for by a Miss Shea Scott. The preliminary investigation was postponed to June 30, 1982 at the Local Chairman's request. The investigation was subsequently rescheduled to July 7, 1982, again at the request of the Local Chairman and was held in the absence of Claimant. A formal investigation was requested and scheduled for July 13, 1982 which was rescheduled to July 20, 1982 due to the Local Chairman being unable to contact Claimant. The July 20, 1982 date was postponed again to August 10, 1982 at the Local Chairman's request as no contact with Claimant had been made.

At the August 10, 1982 formal investigation the evidence indicated Claimant had last worked his job assignment on May 17, 1982. Pursuant to a phone call by a woman identifying herself as the wife of Claimant and stating that he was out of town, Claimant was allowed his two (2) weeks vacation and was due back to his assignment June 3, 1982. Claimant did not report back to his assignment. Evidence was submitted at the August 10, 1982 investigation indicating that Claimant was also known as

William Moore, and that Mr. Moore was being held at the New York State Correctional Facility at Ossining, New York on a charge of parole violation. At the request of the Organization, the formal investigation which began on August 10, 1982 was recessed and reconvened on September 1, 1982. Claimant was not present at the reconvened formal investigation. As a result of the formal investigation, the prior disciplinary action of dismissal from the service of the Carrier was affirmed.

It is the position of the Organization that the Claimant was denied a fair and impartial hearing resulting in a wrong and unjust dismissal because of his absences. It is Carrier's position that Claimant failed to protect his assignment due to excessive absenteeism, that he was provided with all contractual rights to which he was entitled, and that the discipline resulting in dismissal was reasonable and justified.

The first issue before this board is whether the conduct of the preliminary and formal investigations in Claimant's absence denied him a full and fair hearing.

Rule 34 of the Agreement governing discipline provides in part:

- "(a) An employee will not be removed from service or disciplined (including discharge) except for just and sufficient cause after a preliminary hearing... .
- (b) During the preliminary investigation (the discussion of events leading to any disciplinary action), the right of an employee to be accompanied by his duly accredited representative (local chairman or committeeman) should he so desire, and provided he is readily available, is recognized.... .

- (d) Formal investigation, if requested under Section (c) above, shall be held within five (5) days from the date request therefore is made and it shall be conducted by a carrier officer superior in rank to the officer assessing the discipline to determine the propriety thereof. At such investigation the employee(s) involved shall be entitled to assistance of his duly accredited representative(s)... ."

At all stages of the proceedings Claimant's duly accredited representative was present. The Organization diligently sought and was graciously granted postponements of the preliminary and formal investigations. The record is devoid of any evidence that Carrier precluded Claimant's presence. Rule 34 while providing Claimant with the right to have a representative present and to appeal the disciplinary action, does not permit the Claimant to forestall proper disciplinary action by his avoidance for any reason, intentional or otherwise, at the proceedings. To allow an employee to remove himself from facing a charge of excessive absenteeism by circumstances created by his own conduct would be not only outside the Agreement, but a disservice to those Claimants who without delay exercise their procedural due process rights at hearings concerning their employment.

As stated in Third Division Award 20294:

"We have no difficulty in issuing a denial award under this record because Claimant himself, by his own misconduct in perpetrating a number of severe crimes of violence, affected his contractual right to be present at the investigation. There is absolutely no evidence of record to suggest that Carrier was a motivating factor in precluding Claimant's attendance."

The record reveals Claimant's knowledge of the disciplinary proceedings and hearings. Letters supporting Claimant's character, and providing details of his incarceration in New York, were provided to the General Foreman and introduced at the August 10, 1982 hearing. The argument that Claimant was not given sufficient notice of the charges against him or proper opportunity to attend the hearing are unsubstantiated by the record. "The Claimant's inability to attend the investigation was due to his own actions and the Carrier was justified in imposing discipline." Second Division Award 8192.

The second issue before this Board is whether Claimant's absence from work on account of his apparent incarceration in New York State is such "other good cause" within Rule 30 of the Agreement as to constitute unavoidable absence from work.

The record reveals Claimant did not report to work during the 30-day period preceding the preliminary investigation on July 7, 1982 apparently due to his incarceration in New York during part or all of this time. This Board has previously held that incarceration does not constitute unavoidable absence for good cause:

"Claimant has placed himself in a position of being absent from service, but not unavoidably. He should be cognizant of and is liable for the consequences of violating the law. His conscious violation of the law does not constitute an unavoidable absence for good cause; violations of the law are presumed avoidable."

(Second Division Award 6606; See also, P.L.B. No. 2335, Awd. 2 at 9.)

Claimant was absent from June 3, 1982 without a demonstration of "good cause" to miss work and clearly failed to protect his assignment. Based upon the entire record, this Board concludes that the discipline of dismissal in the present case was neither arbitrary, capricious, nor excessive.

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 11th day of July, 1984