

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

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

Dispute: Claim of Employees:

1. That the Carrier improperly suspended Machinist Helper J. L. Thomas (Hereinafter referred to as Claimant) from service on August 10, 1981, and subsequently dismissed Claimant on August 26, 1981.
2. That, accordingly, the Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired, with compensation for all wage 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.

Claimant, J. L. Thomas, entered the service of the Carrier on December 9, 1974. He was employed as a machinist helper at Carrier's Sacramento, California, Locomotive Works. His assignment hours were 7 a.m. to 3:30 p.m.

On August 10, 1981, Claimant was cited for a formal hearing to be held on August 14, 1981, wherein Carrier alleged a violation of Rule 810 of its General Rules and Regulations due to Claimant's attendance record during the period of August 3 through 7, 1981. Claimant was held out of service on August 10, 1981, pending a formal hearing. Claimant was later notified on August 26, 1981, that he had been dismissed from Carrier's service for violation of Rule 810.

Rule 810 states:

"Employees must report for duty at the prescribed time and place . . . They must not absent themselves from their employment without proper authority.

Continued failue by employees to protect their employment shall be sufficient cause for dismissal."

The Organization argues that the evidence adduced at the formal hearing does not support the Carrier's allegations and, consequently, the dismissal of Claimant was improper.

Specifically, the Organization points to Rule 25 of the agreement which states:

"An employee detained from work account sickness or for other cause, shall notify his foreman as early as possible. When returning to work, he shall give the foreman in charge sufficient notice (at least eight hours) so that proper arrangements may be made.

(b) If an employee is unavoidably kept from work, he will not be unjustly discriminated against."

The Organization contends that, although Claimant was incarcerated and was unable to call in himself, Claimant had others call his supervisors to report his absence. The Organization argues that Claimant, to the extent possible under the circumstances, complied with the provisions of Rule 25 and, therefore, could not have violated Rule 810.

The Organization further argues that the hearing that was held was not fair and impartial and, therefore, violated Rule 39 of the controlling agreement. The Organization argues that since it was the same person who determined that Claimant be cited for a formal hearing who also served as hearing officer, that "it is obvious" that the hearing officer had already reached a conclusion as to the Claimant's guilt prior to the hearing.

Finally, the Organization argues that the Carrier did not properly administer its five-step counseling program prior to terminating the Claimant. That procedure states:

"FIVE STEP COUNSELING PROCEDURE

1. Verbal counseling between Supervisor (Foreman) and Employee.
 - a. Discuss labor agreement violation (if applicable).
 - b. Ask for employee's explanation.
 - c. Explain expected behavior (suggested remedy).
 - d. Explain consequence of reoccurrences.
 - e. Complete Supervisor's Counseling Form I.

- "2. Group counseling session with Supervisor, Employee, General Foreman and Representative (Committeeman).
 - a. Discuss labor agreement violation (if applicable).
 - b. Discuss S.P.T.C. rule violation.
 - c. Ask for employee's explanation.
 - d. Explain expected behavior (suggested remedy).
 - e. Explain consequences of reoccurrences.
 - f. Complete Supervisor's Counseling Form II.
3. Group counseling session with Department Head (General Foreman), Supervisor, Employee, and Representative.
 - a. Discuss S.P.T.C. rule violation.
 - b. Discuss labor agreement violation.
 - c. Ask for employee's explanation.
 - d. Explain expected behavior (suggested remedy).
 - e. Explain consequences of reoccurrences.
 - f. Complete Department Head's Counseling Form III.
- 3(A). Staff Officer repeats Step 3.
4. Initial Investigation (Formal Hearing)
 - a. Cite for formal hearing (local policy will determine who sends certified letters to employee and representative).
 - b. Supervisor to monitor time limits for notification.
 - c. Supervisor to provide testimony as required.
 - d. Some form of discipline is usually assessed as a result of this hearing.
 - e. Proceedings are automatically documented and a copy sent to the employee's personal record.

"5. Secondary Investigation (occurs after employee has received discipline assessed in Step 4 and there still has been no change in behavior).

a. Thru e. are the same as in Step 4 except the discipline assessed may be dismissal."

The Carrier argues that Claimant was absent from work on August 5, 6, and 7, 1981, and that he did not notify the supervisor on August 4, 1981, that he would be absent those days, nor did he call his supervisor on those dates to request permission to be absent. Carrier contends that the Claimant admits he was absent from employment on August 3, 5, 6, and 7, 1981, and he did not personally contact his supervisor. Moreover, Carrier points out that absence from duty is a serious offense in the railroad industry since the Carrier establishes a work force to meet productivity goals required under its obligations to shippers; and if one employee does not show up for work, its business is hurt in numerous ways.

Carrier also contends that Claimant has had a poor attendance record since May, 1977. Claimant has received seven educational counselings with respect to attendance in that period, and the importance of Rule 810 has been explained to him. Carrier also points out that because of Claimant's attendance, Claimant was dismissed by the Carrier on January 26, 1981, and was only reinstated on a leniency basis, with seniority unimpaired, but without compensation on July 24, 1981.

Carrier states that the hearing officer acted properly and that Claimant was afforded all of his due process rights during the impartial hearing.

Finally, Carrier argues that the five-step disciplinary procedure is merely a voluntary procedure and not mandatory and that Carrier can impose discipline based on the seriousness of an offense, past record of the employee, and employee's years of service; and the Carrier does not have to necessarily take the employee through the entire five steps.

This Board has reviewed the entire record in this case and hereby concludes that the Carrier has not acted properly in dismissing the Claimant.

Although the record is undisputed that Claimant had a terrible absenteeism record and that he was absent from work on August 5, 6, and 7, 1981, because he was incarcerated, a close analysis of this case leads the Board to find that the Carrier acted arbitrarily and capriciously in terminating the Claimant.

The testimony in this case makes it clear that on the 5th and 6th of August, 1981, although Claimant did not call in himself, the Claimant did have someone contact the Carrier and inform his supervisor that he would not be coming to work. His foreman, Mr. Laca, testified at the hearing that on August 5, 1981, although Claimant did not report for duty, at approximately 10:30 a.m., one of Laca's employees reported to him that someone had called in for Claimant and informed him that the Claimant was in jail and would not be coming to work. Laca also admitted that on the 6th of August, 1981, although Claimant did not report, a woman called in for Claimant and informed him that the Claimant was still in jail and could not come to work. Laca testified that on the 7th of August, 1981, the Claimant did not report, nor did he receive a call.

Laca also admitted that although Rule 810 seems to require that employees "ask for permission", that it is not "out of the ordinary" or "uncommon" for an employee to have someone else call in for him and inform the Carrier that the employee will not be at work. Luca also admitted that there is no rule as to the specific time an employee must call in if he is going to be absent. Finally, Luca admitted that it is possible that the Claimant had called in on the 7th of August, 1981, as well.

Consequently, it appears that although Claimant did not ask for permission to be off work on the days in question, he did notify the Carrier that he would not be at work; and that is not an uncommon procedure.

It is also evident from the record that although Carrier has a five-step program for disciplinary purposes, Claimant was not afforded all of the counseling that goes with the five steps and the Carrier just skipped to the fifth step in Claimant's case. It is apparent that although Carrier has a progressive disciplinary procedure in place, it did not allow the Claimant the benefit of it.

This Board does not accept the argument of the Organization that since Claimant was in jail, he was unable to report and, therefore, should not be disciplined for his actions. Various Boards have held that confinement in jail does not constitute unavoidable absence for good cause. (See Second Division Awards 6606, 7762, and 4689; see also Third Division Awards 19568, 20294, and 21947.) The obligation to report remains. However, on at least two of the three days in question, Claimant reported through someone else; and he testified that he did the same thing on the third day.

Similarly, we reject the Organization's argument that the hearing was unfair because the same person who made the decision concerning the discipline of the Claimant was the hearing officer. Even though a review of the transcript shows that the hearing officer was not the most cooperative with respect to the Organization's representative and could have conducted a better hearing, it is judicially proper under the decisional law of this Board for a Carrier official to proffer charges, conduct an investigation, and render a disciplinary decision. (See Second Division Awards 8147, 5972, 3613, and 1795; see also Third Division Awards 13383, 16347, and 16678.)

Carrier has argued that Claimant did not learn his lesson since he had been dismissed on January 26, 1981, for absenteeism problems and was only reinstated on July 24, 1981, barely a week before he "returned to his previous habits of absenteeism." However, this Board views the same facts in a very different light. Claimant was being given a new ray of hope by the Carrier and deserved a complete chance at it. By dispensing with the five-step program only a week after Claimant returned from suspension, and subjecting Claimant to immediate dismissal, Carrier was acting arbitrarily and not in keeping with the principle of giving the employee an opportunity to mend his ways. Obviously, the Carrier reinstated this employee to give him such an opportunity; and to dismiss him immediately because of his incarceration problems, when he made every effort to contact the Carrier, is just not proper.

This Board is usually reluctant to set aside the determination of a Carrier. However, in this instance, it appears that the Claimant was treated unfairly; and, therefore, we must order that Claimant be reinstated to service, with seniority unimpaired, but without compensation for time out of service. The period since his last termination should be treated as a lengthy suspension, putting Claimant on notice that if he does not improve his attendance record, he will face final termination.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of September, 1984.