

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(Metro-North Commuter Railroad Company
(Consolidated Rail Corporation)

Dispute: Claim of Employees:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician V. Mastrullo from service effective November 5, 1982.
2. That accordingly, the Metro-North Commuter Railroad Company be ordered to restore Electrician V. Mastrullo 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 Electrician'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 or 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 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 was employed at Carrier's Harmon, New York Shop when noticed on October 19, 1982 of the following charge:

1. Being absent on September 20, 1982 and October 7, 1982, which in light of your previous attendance record constitutes excessive absenteeism.
2. Your failure to mark off properly on October 7, 1982.

Claimant was not present at the five (5) minute trial had on these charges on November 2, 1982. The only relevant evidence at that hearing consisted of the following testimony by the General Foreman in response to questions by the Hearing Officer:

Q. Mr. Conklin, do you have any evidence to present in regards to the charges on the G-250?

A. I have the General Foreman's Attendance Book, a mimeograph copy of it.

Q. Mr. Conklin, what does your record show for September 20, 1982?

A. Sick, mark off sick.

Q. What does your record show for October 7, 1982?

A. AW.

Q. Mr. Conklin, on October 7, 1982, did Mr. Mastrullo mark off properly?

A. No, he didn't.

On November 5, 1982 Claimant was dismissed from Carrier's service.

The Organization's first contention is that the Carrier failed to comply with Rule 6-A-3(a). This Rule mandates that the trial of an employee accused of an offense shall be scheduled within thirty (30) calendar days from the date that the employee's General Foreman or equivalent officer had knowledge of the employee's involvement. This contention is without merit. The charge is unambiguous in that it is inclusive of both September 20, 1982 and October 7, 1982. The trial was held well within the thirty (30) days required by Rule 6-A-3(a). For this Board to hold otherwise would only result in the creation of an endless series of trials in order for the Carrier to preserve the right to discipline its employees for absenteeism whenever the absences comprising the charge fall thirty (30) or more days apart. Such an interpretation would be unwarranted, and serve no useful purpose in furtherance of the clear intent of the Rule to preserve the quantity and quality of evidence in the investigation, proof and defense to a charge. In addition, the very essence of a charge of "excessive absenteeism" requires that the present violation be viewed in the context of the charged employee's record of absences.

The Organization's contention that "excessive absenteeism" is an imprecise charge is also without merit. Rather, it is the application of a charge of excessive absenteeism under the facts and circumstances of each case which may be subject to abuse.

This Board in numerous Awards has emphasized the responsibility of employees to not absent themselves from their duties. However, this obligation does not shift the burden of proof to the employee so charged - it remains with the Carrier at the investigation or trial on the property.

In the instant appeal, the Carrier has failed to adduce sufficient credible evidence that Claimant was guilty of excessive absenteeism. While the Organization does not contest Claimant's absence on the dates charged, that such absences are excessive was not established.

The Carrier's statements during appeal on the property that Claimant was absent at least thirty-two days in 1982 and at least forty-seven in 1981 are unsupported by the record. While Claimant received prior discipline in 1981 and 1982 for absenteeism, Carrier's own record reveals a maximum of 8 days absent in 1981, and 4 days absent in 1982.

Carrier has cited this Board to Award 10214, Second Division, in support of the charge and discipline administered Claimant on the property. Award 10214, Second Division, is readily distinguishable, as that case involved an employee who had been absent fifteen (15) days in one month, and had only worked twenty-eight (28) days during the period January 1 through June 27, 1982. No evidence was presented at the trial by which Claimant's September 20 and October 7, 1982 absences could be construed as "excessive".

A charge of excessive absenteeism requires that Carrier must first prove Claimant had a high rate of absenteeism. This requires some credible evidence of the usual rate of absenteeism on the particular property, and that the employee so charged exceeded that rate. Secondly, the Carrier must show that the employee cannot reasonably be expected to resume work and maintain an acceptable attendance record. An employee's record of prior absences and discipline for the same offense may be used for this purpose. Only where the Board finds upon the record that the number of absences are so copious, abundant, numerous and profuse as to become a serious liability to the Carrier, may the Carrier be relieved of its duty to establish the usual rate of absenteeism as the standard against which the record of the employee so charged is to be judged.

Without such a construction, the charge of excessive absenteeism is meaningless. This Award should not be interpreted as a condonation of the employee who improperly absents himself from his duties. Rather, the Board is of the considered opinion that to hold otherwise would place our imprimatur upon arbitrary and capricious application of the charge of excessive absenteeism.

This Board finds that under the facts and circumstances of this case, the penalty of dismissal was arbitrary, capricious and excessive. Claimant's record indicates, however, that the present charge is the fourth time in two (2) years he has faced a charge of excessive absenteeism. Claimant's absence on the dates charged is uncontested. Claimant was absent from the current investigation without explanation, and with apparent disregard for the fate of his position in Carrier's work force. Therefore, Claimant shall be returned to service with seniority unimpaired, but without back pay or other benefits.

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2-MNCR-EW-'85

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1985.