

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(Metro North Commuter Authority

Dispute: Claim of Employees:

1. That under the current Agreement the Consolidated Rail Corporation (Conrail) unjustly disciplined Electrician George Patrick III, Harmon, N.Y., when it assessed him a 10 days' suspension on May 22, 1981, causing him to be held from service 40 days.

2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Electrician George Patrick III 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 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 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.

The Claimant entered the service of the Carrier on July 21, 1978. On April 5, 1981 he was employed as an Electrical Worker at the Carrier's Harmon Shop, New York. On April 29, 1981 the Claimant was notified to attend a hearing in connection with the following charge:

"Being absent on April 5, 6 and 19, 1981, which in lieu of your previous attendance record constitutes excessive absenteeism."

Following the hearing, the Claimant was assessed 10 days suspension for excessive absenteeism.

The Organization contends that the Carrier carries the burden of proving the alleged offense based upon the exact terms of the charge. Thus, since "in lieu of" means "in place of" or "instead of", the Organization argues that the Carrier must prove that the Claimant's absences on April 5, 6 and 19, 1981 "constitutes excessive absenteeism".

As a matter of fundamental justice, a charge should properly inform the employee of the offense he is alleged to have committed so that he can adequately defend against it. The Board believes that the charge in this case contained a typographical error which could be reasonably understood by the Claimant. The literal reading of the charge would indicate that "Being absent on April 5, 6 and 19, 1981 which in place of or instead of your previous attendance record constitutes excessive absenteeism". Thus, in place of his previous attendance record, the Claimant's absence on April 5, 6 and 19, 1981 constitutes excessive absenteeism. If the Claimant was to be charged with excessive absenteeism, for being absent only on April 5, 6 and 19, 1981 the words "which in lieu of your previous attendance record" is superfluous and a gratuitous phrase that has no sensible purpose in the charge. The Board has therefore concluded that the Claimant should have reasonably understood the charge to mean that his absence on the three (3) April, 1981 days, "in view of", or in light of "his previous attendance record" constitutes excessive absenteeism. Claimant was not misled nor can it be reasonably urged that due to the exact terms of the charge he was unable to prepare a defense to meet the reasonable and common sense meaning derived from it.

Turning to a different matter, the Carrier used the Claimant's attendance record prior to April, 1981 in an effort to prove its charge that such absences along with his absences on April 5, 6 and 19, 1981 were excessive.

Rule 6-A-3(a) states:

"The trial shall be scheduled to begin within 30 calendar days from the date the employee's General Foreman or equivalent officer had knowledge of the employee's involvement."

Even though the Claimant's absences prior to the April, 1981 absences exceeded 30 calendar days prior to the date of the charge the Carrier did not violate Rule 6-A-3(a). To prove the charge that an employee's absences constitute excessive absenteeism, it is necessary to refer to a record of the employee's absences over a period of time. To sustain the Organization's argument would preclude the Carrier from disciplining an employee for the well established industrial offense of excessive absenteeism. Accordingly, the Carrier can utilize the Claimant's absenteeism record prior to April to prove its charge of excessive absenteeism.

The final inquiry that must be addressed is whether the disciplinary suspension of the Claimant for 10 days is unjust, arbitrary or capricious. In this connection, the Board relies on the record of the hearing. Asked whether he had "been spoken to before, about his absenteeism record", the Claimant responded "****I don't recall anyone talking with me formally about it." There is nothing else in the record that discloses that the Carrier informed the Claimant that it considered his absences prior to April 1981 as a matter of concern. No warning was given to the Claimant prior to April, 1981 about his absenteeism record. Moreover, there was no formal notification to the Claimant of the consequences of further absences and consultation or progressive discipline, or both to remedy the situation short of the 10 day disciplinary suspension issued in this case. Prior to the issuance of discipline by the Carrier, there is nothing in the record to indicate that the Claimant was aware that his sporadic absences in April, 1981, along with his prior absenteeism from January 1981 constituted a violation of any Rule of the Carrier. Accordingly, the Board concludes that the Carrier's disciplinary suspension of 10 days was unjust, arbitrary and capricious.

Finally, it should be noted that the Claimant's absenteeism subsequent to April 19, 1981 is of no weight since it is outside the scope of the record. Accordingly, the claim is sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1985.